ISSN : 1875-4120
Issue : (Provisional)
Published : December 2016

Transnational Dispute Management
www.transnational-dispute-management.com

Value-Adding Predictability: A Way Forward for Non-Legal Arbitrators & Letter of Credit Disputes by M.J. Brown

This paper will be part of the TDM Special Issue on ***"Non-Legal Adjudicators in National and International Disputes"*** *- more information: www.transnational-dispute-management.com/news.asp?key=1626*

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Value-Adding Predictability: A Way Forward for Non-Legal Arbitrators & Letter of Credit Disputes

by Matthew J. Brown[*]

Executive Summary

Letters of credit ('L/Cs') are a tool to increase commercial predictability, allowing for enhanced risk allocation and minimization, thereby lowering transaction costs. However, L/Cs developed through practice and the law merchant, making them often seem counter-intuitive to the lawyers and judges tasked with resolving L/C disputes. With inexperienced decision-makers applying an unfamiliar legal standard—one specifically deferring to L/C practice rather than a known quantity like contract law—come results inconsistent with party expectations, and it chips away at predictive value. This phenomenon is even more pronounced in jurisdictions lacking modern comprehensive L/C legislation.

It should seem obvious then that international commercial arbitration offers an attractive alternative to the use of judges and courts. That, however, has not been the case, partly due to the traditional resistance of large commercial banks to submit to arbitration. Yet, the staggering amounts of outstanding L/C obligations coupled with the major banks' role highlight a potential market deserving of consideration from the arbitration community.

To tackle these problems, it is recommended that a set of modern, specialized institutional arbitration rules be drafted, focused on party autonomy and the appointment of (often non-legal) industry-expert arbitrators. Specific care must be taken to address the issues inherent in a system inviting not just arbitration outsiders but non-legal adjudicators as well. Likewise, potential problems unique to L/Cs must be addressed if the goals of improved L/C integrity and its value-added predictability are to be achieved, taking particular lessons from prior attempts at L/C-specific ADR mechanisms.

[*] Matthew Brown is a foreign lawyer (New York) in the international arbitration group at Houthoff Buruma, Rotterdam; previously he served as Associate Counsel at the Institute of International Banking Law & Practice. This article is based on the Adv LLM Thesis the author submitted in fulfillment of the requirements of the Master of Laws: Advanced Studies Programme in International Civil and Commercial Law degree, Leiden Law School (Leiden University). The author is indebted to fruitful discussions with James Byrne, Max van Leyenhorst, and Marielle Koppenol-Laforce. All views expressed are strictly personal.

"What is wanted in the letter of credit and bank guarantee is essentially a hard and firm promise to pay which is closer to currency than to an accessory guarantee or suretyship undertaking. Its implications include a promise which can only be excused in extreme instances, the type of undertaking which is regularly engaged in by financial intermediaries and expected by traders, a legal regime which encourages widespread and decent business practices, and one which is sensitive to the speedy and inexpensive resolution of problems."[1]

1. Introduction

According to at least one judge, "[u]ncertainty [. . .] is the bane of commercial laws, whose primary purpose is to promote certainty in commercial transactions."[2] A better translation of 'certainty' in commercial transactions would be 'predictability', which allows commercial parties to simplify their risk management by better measuring, allocating, and accounting for the risks inherent in commercial practice, which in turn allows deal structuring to achieve lowered risks.[3] This kind of risk allocation and risk mitigation incentivizes the healthy amount of risk-taking necessary to drive economic growth. Lack of predictability, on the other hand, increases risks by forestalling adequate measurement and allocation, driving up transaction costs and jeopardizing economic growth.

One instrument that has traditionally facilitated international commercial transactions by providing a measure of predictability is at a crossroads. Use of the commercial letter of credit (hereinafter 'L/C' or 'L/Cs'), the origins of which date back to at least the twelfth century,[4] today continues to decline. One such estimate concluded a possible forty percent decline in commercial L/C use.[5] Even with the severe decline in commercial L/C use, in the United States alone the top 600 U.S. banks reported USD 17.8 billion in outstanding commercial L/C obligations at the end of third quarter 2015 while at the same time the 159 non-U.S. banks with U.S. offices doing L/C business reported an additional USD 11.5 billion outstanding.[6]

Unless specified otherwise, the term 'L/C' will be used hereafter as shorthand for 'L/C-type instruments', because "the family of letters of credit (commercial or so-called 'documentary' letters of credit, standby letters of credit, demand guarantees, confirmations, pre-advices, and reimbursement undertakings)",[7] and, as will be explained later, relay at a basic level on the

---

[1] J.E. Byrne, *Fundamental Issues in the Unification & Harmonization of Letter of Credit Law*, 37 LOY. L. REV. 1, 11 (1991).

[2] In re My Type, Inc., 407 B.R. 329, 337 (Bankr. C.D. Ill. 2009) (Perkins, C.J.) (USA).

[3] Under the rubric of certainty can be placed a host of other subheadings which commercial law aspires to promote, including "certainty of liability, finality, predictability, uniformity, and efficiency". Rodrigue v. Olin Employees Credit Union, 406 F.3d 434, 446 (7th Cir. 2005) (USA).

[4] C. Leon, *Letters of Credit: A Primer*, 45 MD. L. REV. 432, 433 (1986) (citing R.J. Trimble, *The Law Merchant and the Letter of Credit*, 61 HARV. L. REV. 981 (1948)).

[5] J.K. Levit, *Bottom-Up Lawmaking Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit*, 57 EMORY L.J. 1147, 1211 (2008) ("estimating a forty percent decline in [. . .] L/C use" while the use of open-account transactions has become "ubiquitously vogue").

[6] C.S. Byrnes & J.E. Byrne, *Overview of International Banking Law & Practice in 2015*, *in* 2016 ANNUAL REVIEW OF INTERNATIONAL BANKING LAW & PRACTICE 3 (J.E. Byrne, et al., Eds. 2016).

[7] J.E. BYRNE, INTERNATIONAL LETTER OF CREDIT LAW AND PRACTICE § 1:1 (2016 ed.) [hereinafter INTERNATIONAL L/C LAW & PRACTICE]. As will be explained later, these instruments are also referred to as 'independent' undertakings because the obligation that they embody does not depend on the underlying transaction. For now it is important to recognize that the term 'L/C' encompasses a category of different instruments that all operate in a fundamentally similar manner.

same guiding independence principle.[8] Demand guarantees may also be commonly known as 'first demand', 'independent demand', 'simple demand', or 'bank guarantees'.[9]

Over the same period in which commercial L/C use was declining, the use of standby L/Cs—a cousin of the commercial L/C that performs a different function but whose basic mechanics remain the same—has skyrocketed. For the same reporting cycle in 2015, the top 600 U.S. banks reporting L/C activity had USD 392.9 billion in outstanding standby obligations with an additional USD 166.6 billion reported outstanding from the 159 non-U.S. banks.[10] It is within this context that the need for an efficient and cost effective dispute resolution mechanism becomes apparent, certainly with regard to the staggering amounts outstanding in L/C obligations, but also with an eye to potentially stemming further erosion of commercial L/C use, an issue which may be of interest to L/C practitioners.

Because of its historical development through commercial practice and the *lex mercatoria* (hereinafter 'law merchant'), the L/C occupies a unique position in commercial law. Codification and legal development has often lagged far behind L/C practice, which has been driven by international banking practice. This has led to an ongoing effort by legal practitioners active in the field to keep the *law* a reflection of *banking practice*, if not at least avoiding conflict. In an effort to harmonize the two, the law frequently defers to "international standard banking practice".[11] Thus, the legal standard itself is to defer to 'L/C practice', requiring lawyers and judges to react to the constantly evolving commercial practices of leading L/C banks and bankers.[12]

Exacerbating this issue is the fact that the entire commercial utility of an L/C depends on its reliability and predictability in accordance with L/C practice.[13] Parties to an L/C transaction ought to be entitled to two layers of predictability when it comes to L/Cs. First, they should be entitled to expect that the instrument will work in a predictable manner, that is, in accordance with international standard banking practice. Second, in the event that something goes wrong or there is a disagreement, parties to an L/C transaction should be entitled to expect that 'justice' will likewise be doled out in a predictable manner. If a dispute should land in court the second expectation goes unrealized, then the function of the L/C is diminished because the parties' transaction structure depended on the first expectation.[14] If those expectations are undercut, then the L/C has lost its value as a tool for commercial predictability.

---

[8] See *infra* notes 39-41 and accompanying text.

[9] A. Davidson, *Fraud and the UN Convention on Independent Guarantees and Standby Letters of Credit*, 1 GEO. MASON J. INT'L COM. L. 25, 27 (2010).

[10] Byrnes & Byrne, *supra* note 6. That number astonishingly represents a 7.4% decline year-on-year.

[11] Voest-Alpine Trading USA Corp. v. Bank of China, 288 F.3d 262, 267 (5th Cir. 2002) (USA) (examining the adequacy of a bank's notice of refusal in the context of international standard banking practice); *cf.* U.N. Convention on Independent Guarantees and Stand-by Letters of Credit art. 13(2), 11 Dec. 1995, 2169 U.N.T.S. 163 [hereinafter U.N. L/C Convention]; U.C.C. §§ 5-108(e), 5-116 (1995).

[12] J.G. BARNES, J.E. BYRNE & A.H. BOSS, THE ABCS OF THE UCC: ARTICLE 5: LETTERS OF CREDIT 1 (1998) [hereinafter ABCS OF THE UCC]; *see also* C.T. Song, *Sectoral Dispute Resolution in International Banking (Documentary Credit Dispute Expertise: DOCDEX)*, 30 ARIZ. J. INT'L & COMP. L. 529, 534 (2013) ("The courts do not review the letter of credit case from a purely legal standpoint, but instead base their decision on a review of banks' international standard practice regarding letters of credit.").

[13] Byrne, *supra* note 1, at 11; Leon, *supra* note 4, at 432 n.1.

[14] *See* Levit, *supra* note 5, at 1169 ("From the vantage point of L/C end-users (exporters and importers), L/Cs become attractive risk mitigation and financing tools only if L/C practices are perceived as predictable and consistent.").

Consequently, and for reasons to be discussed below in greater detail, lawyers and judges unfamiliar with L/Cs often find themselves ill-equipped to either argue or decide nuanced issues that depend on an in depth knowledge of L/C practice. The phenomenon is of particular concern in jurisdictions with neither legislation nor developed case law on the subject. Arbitration can serve as a powerful antidote against such a novice decision-making apparatus. In particular, the exercise of party autonomy to appoint expert-arbitrators—one of the fundamental tenets of arbitral practice—can reduce the obstacle of problematic and unpredictable judicial analyses and serve a two-fold purpose: (1) preserving the integrity of the L/C instrument; and (2) enhancing its value as a risk minimization tool. Ultimately, the goal of increasing the predictability of the L/C system is to improve the overall efficiency of commercial practices.

Although the concept of an arbitration system designed specifically for L/Cs is not a novel idea per se,[15] the present alternative dispute resolution ('ADR') and arbitration mechanisms designed for L/C disputes have proven deficient at tackling the previously identified problem in any meaningful way.[16] There is unfortunately not much overlap in the L/C and arbitration communities. Thus, this Article hopes to bridge that gap, appealing to both L/C users and arbitration practitioners that a sea-change in the way L/C disputes are resolved is both necessary and possible. Updating existing L/C arbitration rules and injecting legitimacy from an established arbitral institution will make arbitration of L/C disputes more useful and attractive. Serendipitously, these recommendations may be arriving just as banks' chilliness to arbitrating their disputes appears to melt.[17]

This Article will proceed in three main parts. Chapter two explains L/Cs and the development of L/C practice to provide the background necessary to understand why unpredictable judicial reasoning in L/C disputes poses such a major problem for L/C users. The chapter then describes how party autonomy represents one of arbitration's basic foundations. It then examines how arbitration has traditionally been anathema to banks despite its apparent usefulness. Chapter three explores potential drawbacks of existing arbitration and ADR mechanisms for the resolution of L/C disputes as a possible explanation for their overall inadequacy. Lastly, chapter four offers a solution to this problem by offering recommendations for the revision of existing L/C arbitration rules of the International Center for Letter of Credit Arbitration ('ICLOCA'), to be offered as an alternative set of rules by P.R.I.M.E. Finance (hereinafter 'P.R.I.M.E.'), a specialized arbitration institution for financial disputes whose reputation seems to be gaining favor among banks and financial firms, with a

[15] *See* L.W. NEWMAN & M. BURROWS, *Alternatives for the Resolution of Letter of Credit Disputes*, *in* THE PRACTICE OF INTERNATIONAL LITIGATION, at V-144 (2d ed. 1996) ("It may, therefore, be appropriate for letter of credit disputes to be resolved in a process that draws on the expertise that exists in the world of issuers and frequent users of letters of credit. Arbitration, especially where the arbitration panel is composed of letter of credit specialists, is an approach that can draw on such expertise.").

[16] *See infra* Chapter 0.

[17] *See* J. Ross, *The Case for P.R.I.M.E. Finance*, 7 CAP. MARKETS L.J. 221, 226 (2012) (discussing the emergence of a global financial marketplace and banks participation in it, "enforceability of foreign judgments in a range of jurisdictions remains difficult if not impossible. Anecdotal evidence suggests that increased arbitration of financial disputes is inevitable, as banks and financial institutions increasingly discover these enforcement difficulties.") (footnote omitted); *see also infra* notes 106-111 and accompanying text.

particular emphasis on the rights and duties attendant to a specialized set of rules geared toward the use of non-legal arbitrators.[18]

2. The contextual background of letters of credit, international commercial arbitration, & banks

This chapter first provides a contextual background for L/Cs and L/C-type instruments,[19] focusing on their unique nature and a brief introduction to the difficulties that courts have had grasping that nature and the corresponding impact on the integrity and commercial viability of L/Cs. The chapter then provides a brief background of arbitration and the valuable alternative that it provides to traditional litigation. Finally, the chapter concludes by examining the significance that banks—and bank skepticism toward arbitration—have in making an ADR procedure viable for L/C disputes.

2.1. Letters of credit explained

2.1.1. L/Cs are sui generis undertakings

L/Cs come in two basic forms: 'commercial' and 'standby'.[20] L/Cs furnish commercial transactions with predictability by providing an added assurance of payment. Assurance comes from the substitution of the credit of a third party, usually a bank (known as the 'issuer') though not necessarily one, on behalf of the buyer (known as the 'applicant').[21] In a rudimentary commercial or so-called 'documentary' L/C transaction, the seller (known as the 'beneficiary') must timely present specified documents to the issuer as detailed in the L/C's terms and conditions.[22] If the presentation conforms, then the issuer must honor the beneficiary's drawing.[23] If it does not, then the issuer must provide the beneficiary a notice of refusal within a limited period of time that states the reasons why the drawing was not honored, or be 'precluded' from dishonoring the drawing.[24] Commercial L/Cs may thus be

[18] P.R.I.M.E. Finance stands for the 'Panel of Recognized International Market Experts in Finance'. *About Us*, P.R.I.M.E. FINANCE, http://primefinancedisputes.org/about-us/ (last visited 18 June 2016) [hereinafter *About Us*].

[19] *Supra* notes 7-9 and accompanying text. A discussion of independent instruments would be incomplete without at least mentioning bankers' acceptances; however, they are generally considered outside of the family of L/C-like independent undertakings. BYRNE, INTERNATIONAL L/C LAW & PRACTICE, *supra* note 7, at § 1:1.

[20] B. WUNNICKE, D. WUNNICKE, & P.S. TURNER, STANDBY & COMMERCIAL LETTERS OF CREDIT § 2.01 (3d ed. 2016); B. Kozolchyk, *Bank Guarantees & Letters of Credit: Time for a Return to the Fold*, 11 U. PA. J. INT'L BUS. L. 1, 7-11 (1989). *See also* J.E. BYRNE, STANDBY & DEMAND GUARANTEE PRACTICE: UNDERSTANDING UCP600, ISP98 & URDG 758, at 3-4 (S.R. Nelson, P. Traisak, Eds. 2014) [hereinafter STANDBY & DEMAND GUARANTEE PRACTICE]; ABCS OF THE UCC, *supra* note 12, at 1-10; H.D. Gabriel, *Standby Letters of Credit: Does the Risk Outweigh the Benefits?*, 1988 COLUM. BUS. L. REV. 705, 706-08 (1988). Although there are significant differences in practice between standby L/Cs and independent guarantees, due to their overlap in use and legal interchangeability, 'standby' is used broadly here to include both independent guarantees and standby L/Cs. *See infra* notes 30-33 and accompanying text. Confirmations, pre-advices, and reimbursement undertakings—mentioned previously—are ancillary undertakings that may attend the issuance of a commercial or standby L/C and enhance the L/C's usefulness and adaptability to different commercial scenarios and requirements. *See* BYRNE, STANDBY & DEMAND GUARANTEE PRACTICE, at 4.

[21] Leon, *supra* note 4, at 432-33.

[22] WUNNICKE, WUNNICKE, & TURNER, *supra* note 20, at § 2.01.

[23] *Ibid.* "*Honor* is normally the payment of money, but honor could be some other act, such as the delivery of stock certificates." *Ibid.*

[24] *Ibid.* at § 3.18.

explained as "an undertaking to pay the purchase price against documents evidencing the sale and delivery of goods".[25]

Standby L/Cs on the other hand are more difficult to explain.[26] The way a basic standby works is the same as that of a commercial L/C, in that the credit of the standby issuer is substituted on behalf of an applicant in favor of the beneficiary and payable upon the presentation of complying documents.[27] The utilization of the L/C provides a more useful distinction: standby L/Cs are an undertaking to pay against documents *not* evidencing the current sale and delivery of goods.[28] Often used as assurance for payment or performance, the L/C 'stands by' to be drawn upon in the event of a default according to the L/C's terms and conditions.[29] Standby L/Cs are therefore similar to independent guarantees. In fact, while practice rules designed specifically for standby L/Cs and independent guarantees have significant differences,[30] both independent undertakings are governed by the Convention on Independent Guarantees and Stand-by Letters of Credit ('U.N. Standby Convention') where applicable and virtually indistinguishable under law.[31] The same holds true for U.S. law under U.C.C. Article 5.[32] Thus, for the purposes of this Article, they will be treated as such. In contrast to independent guarantees, however, standby L/Cs are also frequently used as a direct pay device.[33] An example of such use would include a financial standby being used to pay interest and principal as it becomes due.[34]

These descriptions admittedly bear much in common with traditional guarantee or suretyship undertakings in which one party promises to answer for another's debts, and L/Cs could be classified as such "*but for* the fact that they evolved as law merchant separately from contract and suretyship law."[35] L/Cs are best treated as *sui generis*.[36] L/C law traditionally embodied this distinction through a few fundamental principles that reflected the law merchant but with "hardly any positive law and with relatively little decisional law."[37]

---

[25] J.E. BYRNE, V. MAULELLA, C. SOH, & A. ZELENOV, UCP600: AN ANALYTICAL COMMENTARY 9 (1st ed. 2010) [hereinafter ANALYTICAL COMMENTARY].
[26] *Ibid.* at 9.
[27] ABCS OF THE UCC, *supra* note 12, at 7.
[28] *See* ANALYTICAL COMMENTARY, *supra* note 25, at 9 n.10 ("The explanation of a standby as a letter of credit other than a commercial letter of credit requires that 'commercial letter of credit' be defined.").
[29] WUNNICKE, WUNNICKE, & TURNER, *supra* note 20, at § 2.04; Gabriel, *supra* note 20, at 709-10. This usually involves a presentation of documents that "indicate in a relatively perfunctory manner that the applicant has defaulted in its obligations to the beneficiary" by presentation of, for example "a draft or demand for payment and a document certifying that 'the Borrower is in default under the Loan.'" WUNNICKE, WUNNICKE, & TURNER, *supra* note 20, at § 2.04.
[30] M.E. Avidon, *Demand Guarantees under Article 5 of the Uniform Commercial Code*, COMMERCIAL LENDING TODAY, Apr. 2012, *reprinted in* 2013 ANNUAL REVIEW OF INTERNATIONAL BANKING LAW & PRACTICE 28 (J.E. Byrne, et al., Eds. 2013).
[31] *See* U.N. L/C Convention, *supra* note 11, art. 2 (Undertaking).
[32] *See* Avidon, *supra* note 30, at 28.
[33] ANALYTICAL COMMENTARY, *supra* note 25, at 9 n.10. As a point of practice, independent guarantees issued subject to the Uniform Rules for Demand Guarantees ('URDG 758') require the presentation of a supporting statement detailing "in what respect the applicant is in breach" and thus unless the parties have expressly excluded this provision, such demand guarantees are generally inapt for direct pay use. INT'L CHAMBER COM., PUBL'N NO. 758, UNIFORM RULES FOR DEMAND GUARANTEES, art. 15 (2010), *reprinted in* INSTITUTE OF INT'L BANKING L. & PRACTICE, LC RULES & LAWS: CRITICAL TEXTS FOR INDEPENDENT UNDERTAKINGS (J.E. Byrne Ed., 6th ed. 2014) [hereinafter URDG 758].
[34] ANALYTICAL COMMENTARY, *supra* note 25, at 9 n.10.
[35] ABCS OF THE UCC, *supra* note 12, at 10 (emphasis added).
[36] *Ibid.*
[37] J.E. Byrne, *Foreword*, *in* Kozolchyk, *supra* note 20, at 4.

While suretyship undertakings may provide a degree of certainty of payment, it depends on the quality of the surety. That degree of certainty may be muted due to a number of factors, including the timing of when precisely a surety's obligation is triggered due to the principal obligor's failure to perform.[38] L/Cs add an additional layer of predictability to this certainty because they are 'independent' of the underlying transaction. The issuer's obligation becomes due when it receives a complying demand. So long as the presentation conforms to the terms and conditions of the L/C in timing, form, and content, the beneficiary will receive payment regardless of whether or to what extent its performance as a seller or other obligor meets the requirements set out in the underlying contract with the applicant.[39] Where an instrument is independent,

> *"what is examined in determining compliance with the conditions of a letter of credit is the documents presented which are examined on their face and not the things represented in the documents. On the other hand, if the undertaking is dependent, it is necessary to determine whether or not the conditions are actually performed."*[40]

The independence principle, as it is commonly known,[41] thus allows commercial parties potentially a world apart to overcome the inherent problem of *when* payment is to be made, either to the benefit of the seller in advance of shipment (increasing risk to the buyer) or to the benefit of the buyer upon delivery (increasing risk to the seller).[42] Absent the use of an L/C, the decision on when payment is made will depend largely on the relative negotiating strength of the parties.[43] Instead, the buyer has assurance that payment will not be made unless the required documents state on their face that the shipment conforms to the terms of the L/C, and the seller has commensurate assurance from the issuer's creditworthiness and the predictability that a drawing which complies on its face will be honored.

Flowing from the independence principle, L/C law and practice embody an approach of "pay now, argue later"[44] because the independence principle also governs the applicant's reimbursement obligation to the issuer.[45] Because the reimbursement obligation is independent of both the underlying contract and the L/C undertaking itself, the issuer should worry far less about being reimbursed when it honors a complying drawing than it otherwise might—so long as it has examined the presentation with the appropriate amount of care and the applicant has not become insolvent in the interim.[46]

---

[38] *See* RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 1(2)(b)(ii) (1996).
[39] WUNNIKE, WUNNICKE, & TURNER, *supra* note 20, at § 2.06.
[40] ANALYTICAL COMMENTARY, *supra* note 25, at 649-50.
[41] L/C independence may also be referred to as 'abstraction' or 'autonomy' but all refer to the same basic principle. *See, e.g.*, H.N. Bennett, *Performance bonds and the principle of autonomy*, J. BUS. L., Nov 1994, at 574, 574 ("The principle of autonomy is fundamental to the law of both documentary credits and performance bonds. The payment obligation assumed under the credit or bond is insulated from disputes arising on the underlying contract.").
[42] Levit, *supra* note 5, at 1166-69; Gabriel, *supra* note 20, at 708; *cf.* M.S. Blodgett & D.O. Mayer, *International Letters of Credit: Arbitral Alternatives to Litigating Fraud*, 35 AM. BUS. L.J. 443, 445-47 (1998).
[43] Admittedly, the choice of *whether* to use an L/C may also depend in some measure on the parties' relative bargaining power.
[44] J.G. Barnes & J.E. Byrne, *Letters of Credit*, 66 BUS. LAW. 1135, 1139 (2011).
[45] BYRNE, INTERNATIONAL L/C LAW & PRACTICE, *supra* note 7, at § 1:9.
[46] WUNNIKE, WUNNICKE, & TURNER, *supra* note 20, at § 2.06. The independence principle in this case also facilitates bargaining between issuer and applicant to come to terms on a reimbursement agreement, which has

Another principle derived directly from the independence principle protects banks involved in L/C transactions, namely the doctrine that "condition[s] to payment, contained in the credit, the performance of which must be ascertained by reference to factual matters rather than by review of a tendered document" are to be disregarded in the examination of presented documents.[47] These so-called 'non-documentary conditions' represent perhaps the primary distinction between independent and dependent undertakings, because the determination of whether an undertaking is independent depends on whether "the conditions on which the obligation turns (or the non-performance of which excuse the performance of the obligation) are not to be determined by an examination of the performances themselves but only of documentary representations of that performance."[48] The instrument thus keeps document examiners (most often bank employees) from having to make a factual investigation into whether the contracting parties have properly performed or, as is frequently the case with standby L/Cs and demand guarantees, whether the required failure or default has occurred—a troublesome and risk-inducing proposition for banks.[49] Because the independence principle benefits all parties to the L/C transaction in some measure, its strict observance is critical to the utility of the L/C and, consequently, its viability as a commercial instrument.[50]

Practice rather than law came to dominate this arena, eventually leading to a recommendation made to the International Chamber of Commerce (ICC) in 1926 "that the International Chamber of Commerce could render a practical service to international trade by seeking to obtain international uniformity . . . and eliminate many difficulties between bankers and business men by adopting uniform regulations for export commercial [L/Cs]."[51] This recommendation eventually culminated in 1933 with the first publication of the Uniform Customs and Practices for Commercial Documentary Credits.[52] The 'UCP' as it became known, has been revised approximately every ten years after its first revision in 1951,[53] eventually dropping the term 'commercial' from its title and becoming applicable to standby

---

the effect of lowering L/C costs through agreements to limit liability and indemnify. J.G. Barnes & J.E. Byrne, *Revision of U.C.C. Article 5*, 50 BUS. LAW. 1449, 1454 (1995).

[47] J.P. Soshuk, *The Consequences of Nondocumentary Conditions*, 56 BROOK. L. REV. 33, 33 (1990).

[48] ANALYTICAL COMMENTARY, *supra* note 25, at 649.

[49] *See* Kozolchyk, *supra* note 20, at 12 ("[T]he issuer of a [contractual guarantee subject to the ICC's Uniform Rules for Contractual Guarantees] was required to ascertain whether the event of default had taken place, as a condition for payment of the guarantee. Predictably, prudent bankers stayed away from such undertakings.").

[50] Modern L/C transactions may involve a number of parties in addition to the applicant, issuer, and beneficiary (e.g., advising banks, confirming banks, nominated negotiating banks, presenting banks, counter guarantors, etc.). The independence principle also protects these other potential parties. *See* BYRNE, INTERNATIONAL L/C LAW & PRACTICE, *supra* note 7, at § 1:9; *see also* U.C.C. § 5-103(d) ("Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.").

[51] ANALYTICAL COMMENTARY, *supra* note 25, at iii.

[52] *Ibid.* INT'L CHAMBER COM., PUBL'N NO. 82, UNIFORM CUSTOMS & PRACTICES FOR COMMERCIAL DOCUMENTARY CREDITS (1933) (known as 'UCP82').

[53] *See ibid* at 424-26; INT'L CHAMBER COM., PUBL'N NO. 151, UNIFORM CUSTOMS & PRACTICES FOR COMMERCIAL DOCUMENTARY CREDITS (1951) (known as 'UCP151'); INT'L CHAMBER COM., PUBL'N NO. 222, UNIFORM CUSTOMS & PRACTICES FOR DOCUMENTARY CREDITS (1962) (known as 'UCP222'); INT'L CHAMBER COM., PUBL'N NO. 290, UNIFORM CUSTOMS & PRACTICES FOR DOCUMENTARY CREDITS (1974) (known as 'UCP290'); INT'L CHAMBER COM., PUBL'N NO. 400, UNIFORM CUSTOMS & PRACTICES FOR DOCUMENTARY CREDITS (1983) (known as 'UCP400'); INT'L CHAMBER COM., PUBL'N NO. 500, UNIFORM CUSTOMS & PRACTICES FOR DOCUMENTARY CREDITS (1993) (hereinafter "UCP500"); INT'L CHAMBER COM., PUBL'N NO. 600, UNIFORM CUSTOMS & PRACTICES FOR DOCUMENTARY CREDITS (2007), *reprinted in* INSTITUTE OF INT'L BANKING L. & PRACTICE, LC RULES & LAWS, *supra* note 34 [hereinafter UCP600].

L/Cs and independent guarantees as well.[54] Adopted in 2007 by the ICC's Commission on Banking Technique and Practice ('ICC Banking Commission'), 'UCP600' represents the latest revision.[55] The UCP has enjoyed "unparalleled success [. . .] in ordering letter of credit practice".[56] In contrast, few countries have enacted comprehensive L/C statutes—including civil law jurisdictions—that recognize L/Cs *sui generis* under the law.[57] Instead, "judicial decisions have tended to defer to [the UCP] in the formulation of letter of credit law, reflecting the willingness of modern commercial law to give effect to the choices of parties who issue and perform under credits subject to it or to enforce rules that reflect standard international letter of credit practice."[58]

Counterintuitively, the U.S. defies its common law status with a comprehensive statutory code that is considered the most advanced national L/C statutory scheme.[59] Originally enacted in 1957,[60] Uniform Commercial Code (U.C.C.) Article 5 was revised in 1995 with heavy input and influence from the L/C community.[61] At the same time that the revision of U.C.C. Article 5 was underway, the U.N. Commission on International Trade Law ("UNCITRAL") drafted the U.N. L/C Convention.[62] Both of these statutory schemes expressly recognize the independence principle[63] and defer to L/C rules of practice.[64] Although the recent, encouraging signals that the United States might soon ratify the U.N. L/C Convention will hopefully lead to its more widespread adoption,[65] experience warns that an extensive statutory scheme by itself—particularly in the short term—could prove insufficient to overcome lawyers' and courts' inexperience handling these disputes.[66]

---

[54] ANALYTICAL COMMENTARY, *supra* note 25, at 8.
[55] UCP600, *supra* note 53.
[56] Byrne, *Foreword*, *supra* note 37.
[57] J.E. Byrne, *Contracting Out of Revised UCC Article 5 (Letters of Credit)*, 40 LOY. L.A.L. REV. 289, 320 (2006) [hereinafter *Contracting Out*]; *see also ibid.* at 315-16 ("Although some foreign codes make a passing reference to letters of credit, none have implemented a systematic formulation of letter of credit law. Nevertheless, there exist two important formulations that codify letter of credit law, namely the UN LC Convention and the Chinese Letter of Credit Rules.") (internal footnotes omitted).
[58] ANALYTICAL COMMENTARY, *supra* note 25, at 20.
[59] *Ibid.*
[60] Byrne, *Contracting Out*, *supra* note 57, at 299 n.1.
[61] U.C.C. §§ 5-101 *et seq*. *See generally*, J.J. White, *The Influence of International Practice on the Revision of Article 5 of the UCC*, 16 NW. J. INT'L BUS. & L. 189 (1995); J.G. Barnes, *Internationalization of Revised UCC Article 5 (Letters of Credit)*, 16 NW. J. INT'L BUS. & L. 215 (1995).
[62] Barnes, *supra* note 61, at 216-17.
[63] U.C.C. § 5-103(d) (Scope); U.N. L/C Convention, *supra* note 11, art. 3 (Independence of undertaking).
[64] ANALYTICAL COMMENTARY, *supra* note 25, at 20-21. *See* U.C.C. §§ 5-116(c) (Choice of Law & Forum); U.N. L/C Convention, *supra* note 11, arts. 5 (Principles of interpretation), 13(2) (Determination of rights and obligations), 14(1) (Standard of conduct and liability of guarantor/issuer), 16(1) Examination of demand and accompanying documents).
[65] Message from the President to the Senate—The UN Convention on Independent Guarantees and Stand-by Letters of Credit (10 Feb. 2016), *available at* https://www.whitehouse.gov/the-press-office/2016/02/10/message-senate-un-convention-independent-guarantees-and-stand-letters (last visited 15 June 2016). To date only eight countries have ratified the Convention, which went into force on 1 January 2000 with the U.S. as the only outstanding signatory not to have ratified. *Status: United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)*, U.N. COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1995 Convention_guarantees_status.html (last visited 15 June 2016).
[66] *See, e.g.*, Matutrading Co. v. N. Africa Int'l Bank, No. 84922 (Tunis Ct. App. 30 Dec. 2009) (Tunis.) (affirming a judgment which held that the UN L/C Convention, having been adopted by Tunisia, displaced Tunisian law such that it excluded the applicability of the prior version of the URDG despite the Convention deferring to such practice rules in Article 13).

2.1.2. Experience with judicial decisions regarding L/Cs has been "uneven"[67]

The value of L/Cs and L/C-like instruments is derived from the integrity of the undertakings.[68] That is, the value depends on whether the rules particular to L/Cs are observed by the judges or arbitrators tasked with scrutinizing L/C transactions in the event of a dispute. If judges do not respect these rules, then why must the parties to these transactions do so?

As a *sui generis* area of commercial law, the tenets of L/C law and practice can be "counter-intuitive to many lawyers and courts".[69] This tends to be the case because "[o]nly to a considerably lesser extent do the principles of the general law of obligations or commercial law inform [L/C] law. On the whole, the general principles of contract law produce the wrong result for [L/C] transactions because an [L/C] differs considerably from a traditional bilateral contract and is *sui generis*."[70] Aggravating this problem, the principles pervade and must be applied throughout the entire decision-making process. This situation persists because "[t]he presence of a non-documentary condition requires a bifurcated approach, necessitating a determination of whether or not the undertaking is independent, and, if so, what to do with the non-documentary condition."[71] In other words, lawyers and judges otherwise unfamiliar with the area of law must make a determination at the outset whether an undertaking is independent. This initial step frequently does not seem logical to judges whose background does not include a familiarity with L/Cs. However, if a judge does find that an undertaking is independent, then the repercussions of that decision will continue to be felt throughout the remainder of the decision. The outcome of the dispute should therefore flow out of the determination of independence and not the other way around.

The corpus of L/C case law is rife with instances of judges and courts revealing their unfamiliarity with L/C practice. It has been stated that "[r]arely in the United States but regularly outside the United States, parties and courts struggle with so-called demand guarantees that might or might not deserve to be treated as independent of the underlying transaction."[72] In places where there is comprehensive L/C legislation, like the U.S., this problem is resolved by answering the question of "whether the undertaking is a 'letter of credit' as defined in U.C.C. Article 5 [§ 5-102(a)(10)]".[73] Where this is not the case, particularly in places that have no comprehensive L/C code, the problem is a vicious circle. Courts may be unsure whether an undertaking is independent due to ambiguous drafting, which then forces drafters to cover the possibility that an undertaking will be treated (unpredictably) as either dependent or independent and the cycle repeats itself anew.[74]

A 2004 article by Georges Affaki entitled "Is it a demand guarantee?", describes the situation in France, including over 300 decisions by French courts solely on the issue of whether to characterize an undertaking as dependent (suretyship) or independent (demand guarantee).[75] The author goes on to "describe[] this type of litigation as a European 'sport' inducing drafters

---

[67] STANDBY & DEMAND GUARANTEE PRACTICE, *supra* note 20, at 25.
[68] *Supra* notes 13-14 and accompanying text.
[69] NEWMAN & BURROWS, *supra* note 15, at V-144.
[70] STANDBY & DEMAND GUARANTEE PRACTICE, *supra* note 20, at 22-23.
[71] ANALYTICAL COMMENTARY, *supra* note 25, at 649.
[72] J.G. Barnes & J.E. Byrne, *Letters of Credit*, 68 BUS. LAW. 1227, 1232 (2013).
[73] *Ibid.*
[74] *Ibid.*
[75] J.G. Barnes, *ISP98 Standby Forms & Achieving "Independence"*, DCINSIGHT, Jan.-Mar. 2013, *reprinted in* 2014 ANNUAL REVIEW OF INTERNATIONAL BANKING LAW & PRACTICE 36 (J.E. Byrne, et al., Eds. 2014).

of guarantee texts to burden and lengthen them with meticulous details as to their character."[76]

Other examples range from a court confusing rules about when a draft is issued with the issuance date of a document required in a presentation;[77] to a court confusing the amount of an underlying obligation with the amount available under an L/C for a beneficiary to non-fraudulently draw;[78] to a court confusing factors relevant to whether the time was reasonable in which an examination of documents was made with factors relevant to whether the bank may take the full seven days available to it under UCP500 Article 13(b) after examining and determining that a presentation is discrepant (e.g., whether to approach the applicant and seek a waiver);[79] to a court confusing the L/C doctrine of preclusion with the common law doctrine of waiver.[80] The nature of the UCP itself does not aid the situation. Rather being a fully self-contained set of practice rules, it relies heavily on interpretations of its provisions by the ICC Banking Commission which may be of "varying value and sophistication".[81]

Although these examples range from more severe to relatively benign with regard to their individual impacts, they are far from isolated incidents of court decisions affecting L/Cs and commercial practice generally. One need not look further than the survey of U.S. L/C cases published annually by the same two authors in the *Business Lawyer* since 1993.[82] These surveys, representing the opinions of two leading minds in L/C legal practice, constantly criticize not just case outcomes but the reasoning employed to reach those outcomes as well. For the process of building legal doctrine through case law, the reasoning is almost uniformly more important than the fact-specific outcome of a particular case. The fact that such harsh criticism abounds is telling, particularly since the focus of these surveys is U.S. case law under a modern and comprehensive L/C statutory scheme.

2.2. Expert-arbitrators & party autonomy: two basics of international commercial arbitration

Arbitration evolved at the same time as L/Cs as the preferred mechanism to resolve proto-commercial disputes under the developing law merchant.[83] In the modern context, arbitration is at its core a private method of binding, non-judicial dispute resolution where parties agree—either before or after a dispute arises—to be bound by the decision of a neutral third party called an 'award'.[84] In terms of a basic contractual bargain, parties to an arbitration receive the possibilities of a speedier, more efficient, more cost-effective, and more flexible proceeding conducted according to their agreement with increased confidentiality capabilities and mechanisms for international enforcement superior to that of traditional public

[76] *Ibid.*
[77] Griffin Energy Pty Limited v. ICICI Bank Limited, [2015] NSWSC 87 (Austl.).
[78] WHRJ, L.L.C. v. City of Taylor, Case No. 295299, 2011 WL 1141142 (Mich. Ct. App. 29 Mar. 2011) (USA).
[79] DBJJJ, Inc. v. Nat'l City Bank, 19 Cal. Rptr. 3d 904 (Cal. Ct. App. 2004) (USA).
[80] Philadelphia Gear Corp. v. Central Bank, 717 F.2d 230 (5th Cir. 1983) (USA).
[81] ANALYTICAL COMMENTARY, *supra* note 25, at 6.
[82] J.G. Barnes & J.E. Byrne, *Letters of Credit*, 70 BUS. LAW. 1219, 1219 (2015).
[83] R.C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 NEV. L.J. 271, 279 (2007) ("Arbitration became formalized in the commercial context with the rise of the craftsmen's gilds and Court Merchant fairs of the twelfth and thirteenth centuries.").
[84] W. Mattli & T. Dietz, *Mapping & Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction, in* INTERNATIONAL ARBITRATION & GLOBAL GOVERNANCE: CONTENDING THEORIES & EVIDENCE 1 (W. Mattli & T. Dietz, Eds., 2014).

adjudication.[85] Speed and efficiency are able to play such critical roles in the arbitral bargain because 'binding' in the context of arbitration includes the finality that an award "generally cannot be appealed to a higher level court", instead it may be challenged only in limited circumstances for defects in the process.[86]

Furthermore, arbitrators and tribunals are not bound, strictly speaking, to apply a particular national law or laws in the same manner as public courts.[87] Rather, arbitral authority is derived from the parties' agreement, a foundational principle of both arbitration and modern liberal contract law theory known as 'party autonomy'.[88] Party autonomy dictates not just the procedure that the arbitration will follow, but also the substantive law or 'rules of law' to which the parties wish to have their contract and resulting dispute subjected.[89] Therefore parties may agree to have their dispute judged according to, e.g., technical specifications, trade custom, industry practice, the law merchant,[90] or even a *lex specialis* crafted by the parties for their specific agreement, so long as the standard does not violate fundamental norms of public policy.[91]

In the case of decisions based on industry practice, it makes intuitive sense that the parties nominate a specialists in the given field to be their arbitrators. This leads to another critical difference between arbitration and public adjudication, namely that the decision-makers need not be judges, lawyers, or even legally trained.[92] It may be observed that commercial disputes today are generally decided by commercial lawyers serving as arbitrators.[93] However, common practice from the construction industry provides a perfect illustration of non-lawyers, in that case frequently engineers, who through years of experience in the field have qualified as industry experts capable of arbitrating disputes despite having received little to no formal legal education.[94] On the other hand, judges are quite often generalists.[95] Unless they have prior experience in a particular legal field, either as a practitioner or from prior cases, advocates must spend an unfortunate amount of time explaining or 'educating' judges on the technical aspects of law or practice.[96] For L/C disputes in particular, this time could be

[85] M.L. MOSES, THE PRINCIPLES & PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 3-4 (2d ed. 2012); Y. DEZALAY & B.G. GART, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION & THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 5 (1996). For further discussion, see *infra* note 153 and accompanying text.
[86] *Ibid.* at 2.
[87] Mattli & Dietz, *supra* note 84.
[88] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 44-46 (E. Gaillard & J. Savage, Eds., 1999).
[89] *Ibid.* at ¶¶ 47-52; *see* MOSES, *supra* note 85, at 64 ("Why shouldn't party autonomy mean that parties can choose to have their substantive rights governed by customary commercial law or general principles of law, or transnational rules of law?").
[90] Although national laws and international conventions have attempted to codify all or parts of the law merchant, there is no single authoritative version and attempts to harmonize the law merchant remain ongoing in, for example, the U.S. Uniform Commercial Code or the U.N. Convention on Contracts for the International Sale of Goods. *See* MOSES, *supra* note 85, at 65 (discussing another modern example of the law merchant, the UNIDROIT Principles of International Commercial Contracts).
[91] *See* MOSES, *supra* note 85, at 82; Mattli & Dietz, *supra* note 84, at 1-2.
[92] *See* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 88, at ¶¶ 759, 769, 957. This characterization is qualified by the admission that it depends on the arbitration law to which the procedure is subject.
[93] *See* Y. DEZALAY & B.G. GART, *supra* note 85, at 18-29.
[94] D.A. STEPHENSON, ARBITRATION PRACTICE IN CONSTRUCTION CONTRACTS 6, 42 (5th ed. 2001).
[95] Song, *supra* note 12, at 536; *see* MOSES, *supra* note 85, at 123.
[96] MOSES, *supra* note 85, at 123; *see* STEPHENSON, *supra* note 94, at 7.

better spent and clients spared the unnecessary cost by simply engaging a decision-maker familiar with L/C law and practice.

It is within this context that arbitration would seem a perfect marriage of form and substance for the resolution of complex commercial disputes governed by a unique, technical, and often counterintuitive set of commercial rules. However, in this respect, arbitration has fallen short. It has not been widely or successfully adopted as a primary means to resolve disputes across a majority of L/C users.[97] One major reason for this is that despite having evolved into some of the largest players in the commercial field, banks have historically declined to avail themselves of arbitration, preferring to opt for public court proceedings instead.

2.3. Historic bank skepticism of arbitration

As has been discussed, banks play a frequent and key role in commercial transactions generally, and L/C transactions in particular. Resulting from this status, banks often have a role to play when disputes arise either as a disputant or interested bystander. Banks also provide a common thread through individual and discrete L/C transactions as repeat players. Thus, when considering the potential that arbitration possesses for the efficient resolution of L/C disputes, bank attitudes toward arbitration must be considered. In spite of their stature as key players in the commercial field, commercial banks traditionally have resisted submitting their disputes to arbitration.[98] This reluctance extends to both disputes between banks and disputes with others.[99]

Bank antipathy to arbitration has been explained as developing out of the particular type of dispute in which banks and lenders traditionally found themselves, namely some form of debtor's default which most often "results from simple inability or unwillingness to pay, rather than any honest divergence in the interpretation of complex or ambiguous contract terms."[100] In which case, factors such as security interests in the debtor's property, summary disposition, and a perceived willingness of arbitrators to compromise and 'split the baby' under principles of fairness and equity all militated in favor of traditional litigation over arbitration.[101] Herd mentality, conservatism, and a preference for courts in highly developed, key financial centers such as New York, London, Frankfurt, and Hong Kong may also provide explanations for why banks have not sought to innovate, particularly where it was thought that litigation worked 'well enough'.[102]

Feelings seem to be reciprocal. It has been said that "[a]rbitration practitioners think that bankers do not show sufficient appreciation to the many benefits that arbitration provides;

---

[97] Y. Zhang, *Exploration of Alternatives for Litigating International Documentary Letter of Credit Fraud Disputes*, 17 VINDOBONA J. INT'L COM. L. & ARB. 133, 137 (2013) (*citing* J.E. Byrne, et al., *Disputes Involving Letters of Credit*, 7 WORLD ARB. & MED. REP. 185, 190 (1996)).

[98] Zhang, *supra* note 97, at 136 ("According to the statistics provided by ICC Court of Arbitration Secretariat on 29 January, 2003 only nine cases involved banks as parties, and no banker had been appointed as arbitrator, in the 1135 pending cases before the ICC Court at the time.").

[99] Song, *supra* note 12, at 530; W.W. Park, *Arbitration in Banking & Finance*, 17 ANN. REV. BANKING L. 213, 215-16 (1998).

[100] *Ibid.*

[101] *Ibid.* at 216; *see* MOSES, *supra* note 85, at 82; Int'l Chamber Com., Publ'n No. 877-0, ICC Commission Report on Financial Institutions and International Arbitration ¶¶ 58-65 (2016), *available for download at* http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2016/Financial-Institutions-and-International-Arbitration-ICC-Arbitration-ADR-Commission-Report/ [hereinafter ICC Report].

[102] Park, *supra* note 99, at 216; ICC Report, *supra* note 101, at ¶ 4.

whereas bankers criticise arbitrators for not fully understanding the basics of the banking business."[103] These attitudes have carried over into the L/C field as well, where arbitration has not been widely used to resolve L/C disputes.[104] In disputes between banks over more technical aspects of L/C practice, the use of non-expert arbitrators stymied some of the benefits of arbitration, since these arbitrators required the same amount of education and explanation as did courts.[105] There are signs that this chilliness is beginning to thaw,[106] however, including the formation of a task force by the Arbitration & ADR Policy Commission of the ICC, which "recognised the need to study financial institutions' perceptions and experience of international arbitration."[107] The task force was entitled the 'Task Force on Financial Institutions and International Arbitration' ('Task Force'), which prepared a report ('ICC Report') "identify[ing] and propos[ing] recommendations to increase the attractiveness of international arbitration to financial institutions."[108] According to the ICC Report:

> *"The Task Force found that the banking and financial sector's use of and expectations about international arbitration are unique in many respects – and evolving. Financial institutions use arbitration in a broad array of banking and financial transactions, although not on a consistent basis or on a large scale. There is an overall lack of awareness of the potential benefits of international commercial arbitration and investment arbitration in banking and financial matters and there are some common misperceptions about the process."*[109]

Of note, the paragraph on arbitration of trade finance disputes, which includes L/Cs, states that any clear preference for traditional litigation over arbitration has ceased.[110] However, any statistical evidence of this shift in perception or use has not as of yet clearly emerged. Adding L/C bankers and practitioners to rosters of arbitrators (and subsequently using them) could also help ease the discomfort of unfamiliarity and bridge the experience gap that undoubtedly contributes to the disuse of arbitration by L/C banks and trade finance players.

One prominent member of the Task Force, Patricia Peterson, writing about the growing use of arbitration in swaps and derivatives transactions, stated that "[a]rbitration can offer an attractive alternative, given the potential for the selection of arbitrators with appropriate experience and expertise to decide financial disputes."[111] Given that the same statement could

---

[103] Zhang, *supra* note 97, at 136 (citing G. Affaki, *A Banker's Approach to Arbitration*, *in* KAUFMANN-KOHLER, ARBITRATION IN BANKING AND FINANCIAL MATTERS, ASA SPECIAL SERIES NO. 20 at 63 (2003)).
[104] *Ibid.* at 137.
[105] *See ibid.*
[106] *See* ICC Report, *supra* note 101, at ¶ 105; P. Peterson, *Arbitration and financial institutions: Revisiting dispute resolution options*, INT'L CHAMBER COM. (2 Nov. 2015), http://www.iccwbo.org/News/Articles/2015/Arbitration-and-financial-institutions-Revisiting-dispute-resolution-options/ (last visited 16 June 2016).
[107] *Ibid.* at ¶ 1.
[108] *Task Force on Financial Institutions & International Arbitration*, ICC, http://www.iccwbo.org/About-ICC/Policy-Commissions/Arbitration/Task-forces/Task-Force-on-Financial-Institutions-and-International-Arbitration/ (last visited 16 June 2016).
[109] ICC Report, *supra* note 101, at ¶ 3.
[110] *Ibid.* at ¶ 105 ("In trade finance, there has ceased to be any clear preference for either traditional court litigation or arbitration among market players. Instead, the long-time preference of financial institutions for traditional litigation appears to have been replaced by a recognition that litigation may not be in their best interest in all circumstances.").
[111] Peterson, *supra* note 106.

be made about L/C disputes, there is no reason why such specialized arbitration cannot fulfill the same need for the L/C marketplace.

3. Inadequacy of existing ADR & arbitration mechanisms for L/C disputes

This chapter examines the two primary ADR mechanisms in current operation that were designed specifically for disputes involving L/Cs and L/C-type undertakings. Despite the input and participation of the L/C community in the construction of both, this chapter highlights their weaknesses—whether real or perceived—which could help account for their glaring absence from the development and continuation of sound L/C law and practice.

3.1. International Center for Letter of Credit Arbitration

A 1997 announcement of the establishment of the International Center for Letter of Credit Arbitration stated that 'ICLOCA' "may change the traditional aversion of financial institutions to arbitration."[112] ICLOCA adopted its 'Rules of Arbitration for Letter of Credit Disputes' ('ICLOCA Rules')[113] in September 1996 with the support of the L/C community.[114] As described by ICLOCA itself, "[t]he primary characteristic of this system is that the arbitration is conducted by experts from the relevant fields of international banking operations under procedures which facilitate summary disposition with the assistance of an established administrative center."[115]

Modeled on the original 1976 version of the UNCITRAL Arbitration Rules ('UNCITRAL Rules 1976'),[116] the ICLOCA Rules were thought to represent a paradigm shift away from traditional litigation in favor of a specialist arbitral center,[117] which would administer "expert-based arbitration" in an effort to "become an important—perhaps the accepted—way for letter of credit disputes to be resolved."[118] Many of the revisions ICLOCA made to the UNCITRAL Rules 1976 represent the fundamental distinctions between ICLOCA and UNCITRAL as rules for institutional and ad hoc arbitration, respectively.[119]

The overall emphasis of the ICLOCA Rules is on the speed and efficiency of the proceedings.[120] For example, ICLOCA Articles 5-8, 11, 19, 23, and 25 all include time calculations within which either ICLOCA, the parties, or the tribunal must act. ICLOCA Article 19 (Statement of Defence) introduces a time limitation within which a respondent must submit its statement of defense whereas the corresponding UNCITRAL Rules 1976

---

[112] L. Stevenson, *Insider Briefing: Private International Law*, 91 AM. SOC'Y INT'L L. PROC. 40, 48 (1997).
[113] INT'L CENTER FOR LETTER OF CREDIT ARB. (ICLOCA), ICLOCA RULES OF ARBITRATION (1997), *available at* http://icloca.org/resources/ICLOCA+Rules+of+Arbitration.pdf (last visited 21 June 2016) [hereinafter ICLOCA RULES].
[114] NEWMAN & BURROWS, *supra* note 15, at V-147.
[115] ICLOCA RULES, *supra* note 113, at 4.
[116] *Ibid.*; UNCITRAL Arbitration Rules, G.A. Res. 31/98, U.N. Doc. A/31/98 (28 Apr. 1976), *reprinted in* 15 I.L.M.701 (1976) [hereinafter UNCITRAL Rules 1976].
[117] *See* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAI COMMERCIAL ARBITRATION, *supra* note 88, at ¶¶ 337-39 (distinguishing between generalist and specialist institutional arbitral centers).
[118] *Ibid.* at V-150.
[119] *E.g., compare* UNCITRAL Rules 1976, *supra* note 116, art. 1 (Scope of Application) *with* ICLOCA RULES, *supra* note 113, art. 1 (Scope of Application) (adding subsection (3) which provides "The Center shall act as appointing authority and administer arbitrations conducted under these Rules.").
[120] ICLOCA RULES, *supra* note 113, at 12.

provision,[121] UNCITRAL Article 19 (Statement of Defence), had none.[122] ICLOCA Article 23 (Periods of Time) shortens the amount of time within which parties must conclude the communication of their written statements from forty-five days—as in Article 23 (Periods of Time) of the UNCITRAL Rules 1976[123]—to twenty-one.[124]

As a testament to the broad appeal of the UNCITRAL Rules 1976, relatively few of the articles in the ICLOCA Rules have an L/C-specific focus. ICLOCA Article 1(1) (Scope of Application) provides that the scope of the ICLOCA Rules shall be limited to arbitration agreements contained in "a letter of credit, independent guarantee, collection instruction, reimbursement undertaking, or other agreement or undertaking (whether independent or not) [. . . and] disputes, controversies or claims relating to the undertaking, whether domestic or international, between any two or more persons causing it to be issued, issuing it or acting upon it shall be settled in accordance with these Rules".[125] With its focus on expediency and cost-efficiency, ICLOCA chose to make a sole arbitrator the default rule while allowing for the parties to deviate by agreement.[126]

Likely in order to maintain the integrity of the L/C decisions, ICLOCA retains enhanced control over the credentials of arbitral appointment, though not wholly inconsistent with that of other arbitral institutions.[127] Article 8(2) (Confirmation of Appointment) provides that the appointment of an arbitrator by the parties shall remain subject to confirmation by ICLOCA if the arbitrator is not a member of ICLOCA's List of Accredited Arbitrators.[128] Should the parties fail to agree on a language for their proceedings, the language defaults to that of the undertaking from which the dispute arises.[129] Lastly, with its goals interwoven with attending to and advancing the interests of the L/C community, ICLOCA awards may be published with the consent of the parties in a "sanitized form" and to which the parties are given the opportunity to review and provide comments.[130]

Despite the initial high hopes for the newly-minted ICLOCA, the arbitral institution remains little used.[131] Some indications seem to suggest that attitudes are shifting as banks and financial institutions more readily embrace arbitration.[132] On the other hand, particular claims

---

[121] ICLOCA RULES, *supra* note 113, art. 19 (Statement of Defence).
[122] UNCITRAL Rules 1976, *supra* note 116, art. 19 (Statement of Defence).
[123] UNCITRAL Rules 1976, *supra* note 116, art. 23 (Periods of Time).
[124] ICLOCA RULES, *supra* note 113, art. 23 (Periods of Time).
[125] ICLOCA RULES, *supra* note 113, art. 1(1) (Scope of Application).
[126] ICLOCA RULES, *supra* note 113, art. 5 (Number of Arbitrators).
[127] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAI COMMERCIAL ARBITRATION, *supra* note 88, at ¶ 999 (citing Article 7.1 of the Arbitration Rules of the London Court of International Arbitration ('LCIA') as an example).
[128] ICLOCA RULES, *supra* note 113, art. 8(2) (Confirmation of Appointment); NEWMAN & BURROWS, *supra* note 15, at V-147-48 ("The Center reserves the right to confirm party-appointed arbitrators, apparently in the expectation that there may be some arbitrators appointed who will not have sufficient expertise in practice or arbitration.").
[129] ICLOCA RULES, *supra* note 113, art. 17 (Language).
[130] ICLOCA RULES, *supra* note 113, art. 32(8) (Form & Effect of the Award).
[131] Zhang, *supra* note 97, at 135.
[132] *See, e.g.*, Park, *supra* note 99, at 241 ("To reduce the cost and delay of such documentary credit litigation, parties to letters of credit *sometimes* agree to submit their controversy to arbitration under the rules of an institution that has developed experience in documentary credit disputes.") (emphasis added); S.E. Cirielli, *Arbitration, Financial Markets & Banking Disputes*, 14 AM. REV. INT'L ARB. 243, 263 (2003); ICC Report, *supra* note 101, at ¶ 105. This seems to be more prevalent in independent guarantee practice rather than L/C practice, where issuers of independent guarantees "often find themselves bound by the dispute resolution clause in the principal contract" particularly where "conflict-of-laws doctrine in some countries favors submission of

that L/C disputants are choosing arbitration "administered [. . . by] one of the arbitral institutions particularly experienced in this field"[133] seem to be of dubious origin.[134] Regardless, any such changing attitudes have not managed to trickle down into increased use of ICLOCA's dispute resolution services.[135]

3.2. Documentary Instrument Dispute Resolution Expertise ('DOCDEX')[136]

DOCDEX represents the ICC's venture into designing an ADR procedure for disputes concerning independent undertakings. This section provides a brief introduction to DOCDEX, focusing on both what it is and what it is not. Then the section examines some of its perceived inadequacies, namely that it is inapt for high value and complex disputes not of a technical nature.

3.2.1. DOCDEX is non-binding expert determination—not arbitration

Originally developed by a working group of the ICC Banking Commission—which as mentioned is responsible for drafting, revising, and interpreting UCP600, ISP98, and URDG 758 among other things[137]—the originally entitled 'Rules for Documentary Credit Dispute Resolution Expertise' came into force on 1 October 1997.[138] The newly-devised procedure for dispute resolution was "intended to facilitate the settlement of difficulties that arise between banks when a letter of credit contains irregularities."[139] Revised in 2002 to include application to independent guarantees, the latest revision came into force on 1 May 2015.[140] According to commentary, "[DOCDEX] experts base their decisions on reasonableness and international standard practice, while deciding disputes that arise from letters of credit and bank guarantees."[141]

DOCDEX represents a form of ADR somewhere between 'neutral evaluation' and 'expert determination'.[142] Because the parties have the option to make the decision contractually binding, DOCDEX is probably best described as expert determination rather than neutral

---

suretyships (whereby one person agrees to answer for the debts of another) and other "accessory" agreements to the same law governing the principal obligation." Park, *supra* note 99, at 237-38. Whether this is intentional or even voluntary as it involves a complete disregard of the independence principle is a matter of debate.

[133] Cirielli, *supra* note 132, at 263 (citing N. Horn, *The Development of Arbitration in International Financial Transactions*, 16 ARB. INT'L 279, 286 (2000)). Regrettably, the author does not proved the names of these 'particularly experienced' arbitral institutions.

[134] *See* Zhang, *supra* note 97, at 135 ("We are cautious though about generalising this statement without further investigation."). If L/C disputes were frequently arbitrated, then banks would play a major role. However, that has not been the case to date. *See ibid.* at 136-37; E.P. Ellinger, *Expert evidence in banking law*, 23 J. INT'L BANKING L. & REG. 557, 567 n.99 (2008) ("[A]t the time of writing, arbitration clauses have not become popular in letter of credit documentation.").

[135] This is the personal experience of the author while serving as Associate Counsel for the Institute of International Banking Law & Practice (IIBLP), which directly oversees ICLOCA.

[136] INT'L CHAMBER COM., PUBL'N NO. 872, ICC RULES FOR DOCUMENTARY INSTRUMENTS DISPUTE RESOLUTION EXPERTISE (2015) [hereinafter DOCDEX RULES].

[137] *See supra* note 55 and accompanying text.

[138] INT'L CHAM. COM., PUBL'N NO. 577, RULES FOR DOCUMENTARY CREDIT DISPUTE RESOLUTION EXPERTISE (1997); FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 88, at ¶ 29; Park, *supra* note 99, at 241.

[139] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 88, at ¶ 29.

[140] DOCDEX Rules, *supra* note 136.

[141] Song, *supra* note 12, at 529.

[142] *See* MOSES, *supra* note 85, at 15-16.

evaluation.[143] DOCDEX is not, however, an arbitration procedure.[144] Antipathy toward and inexperience with international arbitration in the banking and finance community were cited as reasons for the type of dispute resolution mechanism eventually chosen by the ICC Banking Commission.[145] In place of an arbitral award, the DOCDEX Rules endeavor to provide disputing parties with an opinion rendered by a panel of experts "within thirty days of the experts' receiving the file."[146] In an effort to increase the speed of resolution, the process takes place entirely via document submission.[147] A new feature of the 2015 revision is that the entire document procedure occurs electronically via standard form documents found on the ICC's website.[148] When an opinion is rendered, it is given to the Technical Advisor of the ICC Banking Commission for approval; however, the Advisor does not have the authority to substantively alter the decision.[149]

Article 2 (Scope) provides a non-exhaustive list of the possible undertakings or instruments which could form the basis of a DOCDEX dispute, for which "a party may refer [a] dispute to the Rules to obtain an independent, impartial and prompt expert decision on the basis of the terms and conditions of the relevant instrument, undertaking or agreement, any applicable ICC Banking Rules and international standard practice in trade finance."[150]

To be discussed in greater detail in the next section, the DOCDEX Rules also permit parties to proceed despite the other party's refusal to participate and utilize 'blind' panels of experts, meaning that the identities of the experts are not disclosed to the disputing parties.[151] Although DOCDEX has received more disputes than ICLOCA, the numbers remain relatively low perhaps due to several potential shortcomings.

3.2.2. The biggest flaw of DOCDEX may be simply that it is not arbitration

The overall efficacy of particular ADR mechanisms ought not be measured solely in the situations where parties voluntarily abide by the outcomes of their chosen ADR procedures, particularly where the parties have not participated directly in the negotiation of the terms of the settlement.[152] Rather, efficacy must be measured on the margins in situations where parties come away unhappy with their ADR, usually regarding either the procedure, the outcome, or both. In this regard, arbitration possesses the greatest upside among ADR processes in that its outcomes (awards) are enforceable with minimal judicial review under 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the

---

[143] *See ibid.*

[144] DOCDEX RULES, *supra* note 136, art. 2(5); FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 88, at ¶ 29. Regrettably, there seems to be some confusion over whether the expert opinion rendered by a DOCDEX panel constitutes an arbitral award and the process an arbitration. *See* Levit, *supra* note 5, at 1175-76.

[145] S.I. Chung, *Developing a Documentary Credit Dispute Resolution System: An ICC Perspective*, 19 FORDHAM INT'L L.J. 1349, 1350 (1996).

[146] DOCDEX RULES, *supra* note 136, at 1.

[147] Song, *supra* note 12, at 539; DOCDEX RULES, *supra* note 136, art. 2(4).

[148] DOCDEX RULES, *supra* note 136, at 1-2.

[149] Song, *supra* note 12, at 539 (citing Levit, *supra* note 5, at 1176).

[150] DOCDEX RULES, *supra* note 136, art. 2(1), (2).

[151] DOCDEX RULES, *supra* note 221, arts. 4(5), 12(3).

[152] Otherwise there would be no need for UNCITRAL's proposed convention for the enforcement of conciliated settlements agreements. *See* E. Vidak-Gojkovic, *The UNCITRAL Convention on Enforcement of Conciliated Settlement Agreements—An Idea Whose Time Has Come?*, KLUWER MEDIATION BLOG (21 Oct. 2015), http://kluwermediationblog.com/2015/10/21/the-uncitral-convention-on-enforcement-of-conciliated-settlement-agreements-an-idea-whose-time-has-come/.

so-called 'New York Convention') and other treaties.[153] Simply put, DOCDEX is inadequate in this regard. At best, DOCDEX opinions can be contractually binding, or, at worst, merely advisory and decided based upon unilaterally presented evidence. This outcome may be adequate to stimulate the resolution of relatively low value disputes of a technical nature; however, it becomes inapt as disputes increase in value and complexity.

First and foremost, DOCDEX opinions are a form of expert determination.[154] They have only the limited 'binding' effect of a contract, and even then only if the parties have agreed prior to the rendering of a decision.[155] While a party might voluntarily comply with an expert opinion if the amount in controversy is inconsequential or there is a commercial purpose for doing so, a lawyer would arguably commit malpractice by advising a client to simply 'agree' to be bound by an expert opinion after the harmful opinion was rendered with no further action or explanation. The net result is that if a party either disputes whether such an agreement was reached or decides it no longer wishes to be bound by the DOCDEX opinion—i.e., breaches the agreement—then the parties are back to square one with a contractual dispute that they will have to either negotiate, mediate, arbitrate, or take to court.[156]

Despite the contentions of at least one commentator,[157] merely putting a DOCDEX clause in a letter of credit would not elevate a DOCDEX opinion above the 'binding' effect of an ordinary contract.[158] Although arbitration is, as has been stated many times before, "a creature of contract",[159] its primary value is not solely the contractual nature of an arbitration agreement. That is not to diminish the hard fought acceptance of pre-dispute arbitration agreements as fully enforceable contracts.[160] However, one of arbitration's primary value-adding propositions as a modern ADR mechanism is its flexibility combined with the superior international enforceability of its awards vis-à-vis traditional litigation judgments. Without enforceability under the New York Convention or other such treaties, arbitration would lose a massive selling point as an alternative to litigation.

---

[153] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter N.Y. Convention]; *see* Park, *supra* note 99, at 244 (citing a case in which, despite having been termed an arbitration, an expert valuation was denied coverage from the N.Y. Convention).

[154] *Supra* notes 142-143 & accompanying text.

[155] DOCDEX RULES, *supra* note 136, art. 2(6).

[156] Exacerbating this problem is that DOCDEX allows parties to proceed unilaterally even in the event that DOCDEX has not been agreed upon by the parties as a means to resolve the dispute. DOCDEX RULES, *supra* note 136, art. 4(5). Thus, one party may present its evidence ex parte to the DOCDEX panel and receive an advisory opinion. Such presentation inherently entails one-sided advocacy which in turn renders suspect any utility that the advisory opinion might have otherwise had.

[157] Song, *supra* note 12, at 533, 551, 555-557.

[158] Regrettably, Mr. Song does not explain what precisely is meant by 'binding', merely stating that putting a DOCDEX clause in a letter of credit "would suffice to make the decision binding on the parties, just as an arbitration clause in contracts does." *Ibid.* at 555. Arbitration's value does not lie solely in the contractual nature of an arbitration agreement, and to argue that it does seemingly misses the point.

[159] Sgouros v. TransUnion Corp., 817 F.3d 1029, 1033 (7th Cir. 2016) (USA); Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC, 450 F.3d 100, 104 (2d Cir. 2006) (USA); G.B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1814 (2d ed. 2014); F.G. De Cossío, *National Report for Mexico (2011), in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 39 n.198 (J. Paulsson & L. Bosman, Eds., supp. 66 2011); V. Korzun, *Arbitrating Antitrust Claims: From Suspicion to Trust*, 48 N.Y.U. J. INT'L L. & POL. 867, 869 (2016); F. Blavi & G. Vial, *The Burden of Proof in International Commercial Arbitration: Are We Allowed to Adjust the Scales?*, 39 HASTINGS INT'L & COMP. L. REV. 41, 51 (2016); S.I. Strong, *Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law- Civil Law Dichotomy*, 37 MICH. J. INT'L L. 1, 45 (2015).

[160] *See* J. Berger & C. Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745, 746-56 (2009) (describing this battle as it played out in the context of U.S. federal law).

There is no equivalent enforcement mechanism for DOCDEX opinions, regardless of when the parties agree to be 'bound' by the opinion, because such opinions are neither enforceable under their own dedicated enforcement treaty nor the New York Convention. Such opinions do not enjoy enforceability under the New York Convention for two primary reasons. First, the DOCDEX Rules explicitly state as much.[161] Any clause that purported to be an arbitration agreement and referred to the DOCDEX Rules as institutional arbitration would likely be deemed an unenforceable, 'pathological' arbitration agreement.[162]

Second, and just as importantly, DOCDEX proceedings fall short of the necessary minimum due process requirements of the New York Convention. Article V(1)(b) of the New York Convention includes as a ground for refusing the recognition and enforcement of an award the instance in which a "party against whom the award is invoked was not given proper notice of the appointment of the arbitrator".[163] In fact, proceedings rendered under the DOCDEX Rules provide zero notice of the appointment of the decision-makers because DOCDEX panels remain nameless to the parties both prior to, during, and after the rendering of the decision.[164] Without criticizing the theoretical reasons for this procedural rule—some would call it a safeguard—it unfortunately has the secondary effect of a due process violation at least for purposes of the New York Convention. The reason for notice of an arbitrator's appointment is to allow parties that have not participated in the appointment of a particular arbitrator the ability to test and, where necessary, challenge that arbitrator's independence and impartiality.

In sum, DOCDEX is a procedure through which parties to an L/C dispute may have an expert opinion rendered on their behalf. It expressly denies itself to be an arbitration mechanism. To take the experience gained from the enforcement of arbitral awards, there is a direct relationship between the stakes of a dispute and the willingness of a party to submit to an unfavorable decision: the larger the stakes, the more likely a party will challenge an award.[165] Consequently, while DOCDEX may be adequate for low stakes, relatively technical disputes, it is inadequate for larger amounts in dispute because it lacks the enhanced enforceability coupled with limited judicial review (finality) from which arbitration participants benefit.

4. The administration of updated L/C arbitration rules by P.R.I.M.E. Finance

One way to increase the attractiveness of expert-based L/C arbitration would be to reimagine the existing scheme through a two-fold process. First, annexing a set of L/C arbitration rules to P.R.I.M.E. can buttress procedural safeguards and provide the integrity of an arbitral institution necessary to attract attention amongst arbitration practitioners. Second, the ICLOCA Rules ought to be revised, from both the perspective of arbitration and L/C practice to serve as a new set of 'P.R.I.M.E. Finance Rules of L/C Arbitration' which will be referred to hereinafter as the 'P.R.I.M.E. L/C Rules'.

---

[161] DOCDEX RULES, *supra* note 136, art. 2(5).
[162] MOSES, *supra* note 85, at 33 (describing 'pathological' arbitration clauses as "defective" and where the "language of the clause is so vague that the parties' intent cannot be determined.").
[163] N.Y. Convention, *supra* note 153, art. V(1)(b).
[164] DOCDEX RULES, *supra* note 136, art. 12(3).
[165] A.S. Stone & F. Grisel, *The Evolution of International Arbitration: Delegation, Judicialization, Governance, in* INTERNATIONAL ARBITRATION & GLOBAL GOVERNANCE: CONTENDING THEORIES & EVIDENCE 30 (W. Mattli & T. Dietz, Eds., 2014).

4.1. Why P.R.I.M.E. Finance?

This section provides a brief background of P.R.I.M.E. before explaining the potential benefits of a P.R.I.M.E. administered set of L/C arbitration rules. In particular, the addition of knowledge and experience that an institutional arbitration center represents could make L/C arbitration more attractive to practitioners wary of specialized arbitral institutions that lack experience administering arbitration proceedings.

4.1.1. An introduction to P.R.I.M.E. Finance

In *The Case for P.R.I.M.E. Finance*, Jonathan Ross presents an argument that should appear familiar to those who have read the preceding pages of this Article:

> *"P.R.I.M.E. Finance has been established in The Hague against an asserted background of legal uncertainty and conflicting decisions in the world of complex financial transactions (CFTs). The conflicting decisions have been handed down both within and between jurisdictions. Few judges in state and national courts are familiar with CFTs let alone confident in their knowledge and hence resolution of CFTs disputes. In broad terms, the case for P.R.I.M.E. Finance is a case for a specialized court or tribunal."*[166]

In other words, P.R.I.M.E. is a specialized arbitral institution designed specifically for the resolution of complex financial transactions—or 'CFTs'. Merely substitute 'L/Cs' for 'CFTs' and Ross's logic in favor of specialized arbitral institutions could be interchangeable.

While P.R.I.M.E. fulfills three primary roles,[167] only its dispute resolution arm is particularly relevant for purposes of the present discussion. As a specialized arbitral institution, P.R.I.M.E. administers arbitrations under the P.R.I.M.E. Finance Arbitration Rules ('P.R.I.M.E. Rules').[168] The P.R.I.M.E. Rules are based on the 2010 revision of the UNCITRAL Arbitration Rules ('UNCITRAL Rules 2010').[169] To assist in this effort of operating and maintaining a legitimate and respected arbitral institution, P.R.I.M.E. concluded a cooperation agreement with the Permanent Court of Arbitration ('PCA') in The Hague, The Netherlands.[170] The agreement provides that the PCA will administer arbitrations subject to the P.R.I.M.E. Rules,[171] with the stated goal of "add[ing] depth and credibility to

---

[166] Ross, *supra* note 17, at 221-22.

[167] *About Us*, *supra* note 18 (describing P.R.I.M.E.'s three primary roles as "dispute resolution services [. . .]; judicial support and education; and [. . .] the compilation of a central database of international precedents and source materials").

[168] P.R.I.M.E. FINANCE, P.R.I.M.E. FINANCE ARBITRATION RULES (2d ed. 2016), *available at* http://primefinancedisputes.org/wp-content/uploads/2016/02/PRIME-Finance-Arbitration-Rules-January-2016-1.pdf (last visited 18 June 2016) [hereinafter P.R.I.M.E. RULES].

[169] Ross, *supra* note 17, at 228; *see* UNCITRAL Arbitration Rules as revised in 2010, G.A. Res. 65/22, U.N. Doc. A/65/22 (6 Dec. 2010) [hereinafter UNCITRAL Rules 2010].

[170] Press Release, P.R.I.M.E. Finance Foundation & Permanent Court of Arbitration, PCA and P.R.I.M.E. Finance team up to curb risks in the financial markets (15 Dec. 2015), available at http://primefinancedisputes.org/wp-content/uploads/2015/12/PRIME-Finance-Press-Release-7th-December-2015.pdf (last visited 18 June 2016); PERM. CT. ARB., ANNUAL REPORT 2015 (2015), *available at* https://pca-cpa.org/wp-content/uploads/sites/175/2016/02/PCA-annual-report-2015.pdf (last visited 18 June 2016).

[171] PERM. CT. ARB., ANNUAL REPORT 2015, *supra* note 170, at 19; *About Us*, *supra* note 18.

the administrative quality of [. . .] P.R.I.M.E. Finance arbitrations", according to P.R.I.M.E. Chairman Jeffrey Golden.[172]

In addition to this partnership, P.R.I.M.E. was included in the International Swaps and Derivatives Association's ('ISDA') 2013 ISDA Arbitration Guide.[173] The Guide's appendices provide model arbitration clauses to be included in ISDA Master Agreements for six of the top arbitral institutions in the world in addition to P.R.I.M.E.[174] Appendix G to the Guide contemplates three different possible combinations of choice of law and choice of seat for a P.R.I.M.E. administered arbitration: London, New York, or The Hague.[175]

The P.R.I.M.E. Rules place an emphasis on speed and efficiency, including provisions for emergency arbitration if interim measures are needed before the constitution of the arbitral tribunal has occurred.[176] In addition to its arbitration services, P.R.I.M.E. maintains an 'Expert List' which is really made up of two separate lists of finance and dispute resolution experts.[177] Parties are generally expected to choose their arbitrator appointments from this list of dispute resolution experts,[178] though they may deviate in accordance with Article 10(a) of the P.R.I.M.E. Rules.[179] On the other hand, the finance experts may be used to provide "expert opinions, determinations and risk assessment",[180] or they may be added to the proceedings as tribunal-appointed experts following consultation with the parties under Article 29 of the P.R.I.M.E. Rules.[181]

4.1.2. The case for P.R.I.M.E. Finance administering (newly revised) ICLOCA Rules

The legitimacy of arbitral awards rests on the perceived legitimacy of the arbitral process.[182] The legitimacy of the arbitral process is therefore of the utmost concern. Yet, the world of international arbitration has been described as "mysterious" with "a literature produced mainly by insiders with their own particular understandings."[183] Most recently, this type of criticism has been leveled rather vociferously to delegitimize investment arbitration.[184] The

[172] Press Release, *supra* note 170.
[173] INT'L SWAPS & DERIVATIVES ASS'N, 2013 ISDA ARBITRATION GUIDE (2013), *available for download at* http://www2.isda.org/functional-areas/public-policy/financial-law-reform/page/2 (last visited 18 June 2016) [hereinafter 2013 ISDA ARBITRATION GUIDE].
[174] *Ibid.* at 11. The remaining institutions included in the 2013 ISDA ARBITRATION GUIDE, namely the ICC, LCIA, American Arbitration Association – International Centre for Dispute Resolution, Hong Kong International Arbitration Centre, Singapore International Arbitration Centre ('SIAC'), and Swiss Rules of International Arbitration, represent almost all of the top arbitral institutions in the world. *See* G.B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 47-54 (3d ed. 2010).
[175] 2013 ISDA ARBITRATION GUIDE, *supra* note 173, at 11, app. G.
[176] P.R.I.M.E. RULES, *supra* note 168, art. 26a; I. Hanefield, *Arbitration in Banking & Finance*, 9 NYU J. L. & BUS. 917, 931-32 (2013).
[177] *Expert List*, P.R.I.M.E. Finance, http://primefinancedisputes.org/about-us/ (last visited 18 June 2016).
[178] P.R.I.M.E. RULES, *supra* note 168, arts. 8 & 9.
[179] P.R.I.M.E. RULES, *supra* note 168, art. 10(a).
[180] *About Us*, *supra* note 18.
[181] P.R.I.M.E. RULES, *supra* note 168, art. 29; Hanefield, *supra* note 176, at 931.
[182] DEZALAY & GART, *supra* note 85, at 83.
[183] *Ibid.* at 4.
[184] *See generally*, European Federation of Investment L. & Arb. (EFILA), *A response to the criticism against ISDS* (17 May 2015), *available at* http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf (last visited 20 November 2016).

"insular nature of the arbitration community" has had its benefits.[185] But as a result, a specialized institution opening its doors to both disputants and decision-makers that are new to arbitration has the potential for delegitimized proceedings conducted under such auspices.[186] This potential exists because inherent in the use of industry-expert arbitrators familiar with neither the legal foundations nor the practice and procedures of arbitration is, albeit a bit tautological, precisely the fact that the industry-expert arbitrators are familiar with neither the legal foundations nor the practice and procedures of arbitration. It is within this framework that having an established arbitral institution with the backing of a highly respected international body such as the PCA can provide a measure of integrity to L/C arbitral awards necessary to insure against claims of illegitimacy. Thus, parties and the counsel directing those parties can rest assured that proceedings will be appropriately directed from a procedural standpoint, including ensuring Professor Park's four "principal obligations" of arbitrators.[187]

These four arbitral obligations are (1) to render an accurate award; (2) to ensure due process; (3) to strive for efficiency; and (4) to produce an enforceable award.[188] Park defines rendering an accurate award as being faithful to the "context and relevant bargain" in order to "get as near as reasonably possible to an understanding of what actually happened between the two litigants and how pertinent legal norms apply to the controverted events."[189] Experts proficient in the technical language and practice of L/Cs should have no trouble with this first obligation; however, an experienced arbitral institution can help with the faithful execution of the remaining three obligations. In particular, an arbitral institution can assist or standardize the procedure for the appointment of and duties attendant to arbitral secretaries.[190]

One such example of an arbitral institution standardizing tribunal secretaries is the Netherlands Arbitration Instituted ('NAI').[191] Article 39(1) of the 2010 NAI Rules of Arbitration provides that "[a]t the request of the arbitral tribunal, the [NAI] Administrator shall arrange for the presence of a lawyer who acts as the secretary to the arbitral tribunal."[192] The Article goes on to standardize that the tribunal secretary has the same duties of independence, impartiality, and disclosure as do members of the arbitral tribunal and may be

---

[185] A.N. Cole & P. Ortolani, *Diversity in Arbitration in Europe: Insights from a Large Scale Empirical Study*, TRANSNAT'L DISPUTE MGMT., July 2015, at 1, 1.

[186] *See* M. RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW & PRACTICE 321 (2d ed. 2001) (highlighting the difficulties with technical experts serving as arbitrators who although "have the great advantage of being able to go straight to the issue without being hampered by legal arguments" may nonetheless "lack legal training and experience of disputes which, since arbitration is an instrument for dispute settlement, is a very important element and probably one which cannot be waived"); STEPHENSON, *supra* note 94, at 12-13 (decrying the disadvantages that arbitration can pose with the imposition of appointed arbitrators possessing in "inadequate qualifications and experience").

[187] W.W. Park, *The Four Musketeers of Arbitral Duty: Neither One-for-All nor All-for-One*, *in* IS ARBITRATION ONLY AS GOOD AS THE ARBITRATOR? STATUS, POWERS & ROLE OF THE ARBITRATOR 25 (ICC Dossiers, Vol. 8 No. 1, 2011).

[188] *Ibid.*

[189] *Ibid.* at 26.

[190] For a discussion on the present debate regarding the role of the arbitral secretary and the boundaries of acceptable duties, *see* M. Polkinghorne & C.B. Rosenberg, *The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard*, 8 DISP. RESOL. INT'L 107 (2014). The discussion includes, of particular interest, arbitral institutions which have defined the role of the tribunal secretary. *Ibid.* at 110.

[191] NETHERLANDS ARBITRATION INSTITUTE, NAI Arbitration Rules (2010), *available at* http://www.nai-nl.org/en/info.asp?id=910&name=Rules,_Clauses_&_Legislation/Rules (last visited 10 November 2016) [hereinafter NAI RULES 2010].

[192] NAI RULES 2010, *supra* note 191, art. 39(1).

subject to party challenge in the same manner as arbitrators.[193] The NAI's 2015 revision of its Rules carried forward the same rule, providing for its own article.[194]

It is telling that the rules explicitly call for the use of a *lawyer* as a tribunal secretary. A tribunal secretary experienced in arbitration can provide invaluable procedural guidance where necessary (and able, without influencing the outcome of the proceeding) to help ensure due process,[195] to balance the requirements of accuracy with due process in order to achieve maximum efficiency while not sacrificing quality,[196] and to facilitate the rendering of an enforceable award in which "an arbitrator must satisfy norms both at the arbitral seat, where proceedings take place, and at the recognition forum, where the winner goes to attach assets".[197] *A Guide to the NAI Arbitration Rules*, commenting on the NAI Rules 2010, notes:

> *"The need for a secretary may also depend on the field of expertise of the arbitrators involved. As Article 39(1) requires the secretary to the arbitral tribunal to be a lawyer, it may provide for the efficient and proper conduct of the arbitral proceedings if a secretary is appointed when there is a sole arbitrator who is not legally trained, or in the event that there are more arbitrators, none of whom is a legal professional."*[198]

This practice is not without criticism, for example where tribunal secretaries have been accused of influencing (or writing) a decision on the merits.[199] However, the author's recommendation is limited in scope to that of the example expressly authorized in the NAI Rules. The purpose of the tribunal secretary in the form advocated here is to provide legal, *procedural* safeguards that allows the non-legal arbitrators to focus primarily on determining the merits of the dispute in accordance with L/C practice.

P.R.I.M.E. is a particularly attractive candidate to take on this role because it is beginning to make a name for itself in both the arbitration community and the financial world. Its growing acceptance within these two communities, exemplified by the execution of P.R.I.M.E.'s cooperation agreement with the PCA and the inclusion of P.R.I.M.E. arbitration clauses in the 2013 ISDA Arbitration Guide,[200] places it in a logical and advantageous position to expand its offerings of arbitral administration into disputes beyond swaps, derivatives, and other CFTs and into trade finance, L/Cs, and independent guarantees. P.R.I.M.E. would also be well suited to, much like its geographic neighbor the NAI, provide a pool of trained tribunal secretaries or administer courses for lawyers wishing to act as tribunal secretaries.[201] Additionally, that P.R.I.M.E. is familiar with administering efficient and cost-effective arbitrations under an UNCITRAL-based set of arbitration rules while maintaining a

---

[193] NAI RULES 2010, *supra* note 191, art. 39(1).
[194] NETHERLANDS ARBITRATION INSTITUTE, NAI Arbitration Rules, art. 20 (2015), *available at* http://www.nai-nl.org/en/info.asp?id=910&name=Rules,_Clauses_&_Legislation/Rules (last visited 20 November 2016).
[195] Park defines this obligation as a three-fold requirement: (1) "responsibility to hear both sides"; (2) "respect the contours of arbitral jurisdiction or, to put the duty in the negative, to avoid decisions which constitute an excess of authority [. . .] either under the contract or by reason of some public policy constraint"; and (3) "the general duty of impartiality and independence". Park, *supra* note 187, at 26, 28, 29-36.
[196] *Ibid.* at 27.
[197] *Ibid.*
[198] A GUIDE TO THE NAI ARBITRATION RULES 174 (B. van der Bend, M. Leijten, & M. Ynzonides, Eds., 2009).
[199] *See, e.g.*, A. Ross, *Was the tribunal's assistant the fourth Yukos arbitrator?* GLOBAL ARBITRATION REVIEW (27 Jan. 2015), http://globalarbitrationreview.com/article/1034016/was-the-tribunal%E2%80%99s-assistant-the-fourth-yukos-arbitrator.
[200] *Supra* notes 170-175 and accompanying text.
[201] *See* A GUIDE TO THE NAI ARBITRATION RULES, *supra* note 198, at 174.

prestigious list of experts only serves to drive home the point that L/C arbitration and P.R.I.M.E. are a natural pairing.

4.2. Updating the ICLOCA Rules regarding arbitrator-specific issues

Though some projected the rise of international commercial arbitration as the globally preferred method for the resolution of commercial disputes, few could have predicted the level of transformation and sophistication which the practice has undergone over the past 20 years.[202] With their original drafting having taken place in 1996, 2016 seems a felicitous moment to re-examine and adapt the ICLOCA Rules for adoption as the new P.R.I.M.E. L/C Rules. This section focuses on L/C-specific considerations for arbitrators long on L/C experience but short on legal training. In particular, this section examines two L/C-specific recommendations for revision of the ICLOCA Rules which deserve some consideration, namely a default applicable law and the 'uniquely L/C' problem that independence presents for non-legal arbitrators when it is properly dealt with as a threshold question.

First, L/C expert-arbitrators draw their value from their knowledge and experience with international banking practice. There is no reason why the parties to disputes being decided by these arbitrators should not therefore default their disputes to be decided in accordance with L/C practice and the law merchant. The limited applicability and specialization of the proposed rules thus allow for a wholly unique approach to institutional arbitration: a set of rules providing a default choice of law provision selecting 'international standard banking practice' under the law merchant as the default set of 'rules of law' applicable in the dispute. The parties would be free to derogate from this default of course, but it solves the problem of having to apply, for example, Australian law to a demand guarantee simply because there is no express choice of law and the private international law rules point to the applicability of Australian law and all of its quirks regarding L/C-type instruments.[203]

Second, due to the unique legal framework within which L/Cs operate, with near global unanimity as to their independence from underlying transactions, L/Cs create a unique problem for non-legal adjudicators. As previously described, independence should be a threshold determination from which the remainder of the analysis flows. [204] The difficulty lies in the consequences of such a determination, though not of independence—with which L/C

---

[202] *See generally*, WHITE & CASE LLP & QUEEN MARY UNIV. OF LONDON SCHOOL OF INT'L ARB., 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION (2015), available at http://www.arbitration.qmul.ac.uk/docs/164761.pdf (last visited 18 June 2016).

[203] Australian law presents a particularly noxious brand of judge-made wisdom whereby a third 'exception' has been carved out of the independence principle (in addition to the two recognized under English common law, i.e., the so-called 'fraud' and 'unconscionability' exceptions), which effectively disregards the doctrine altogether depending on the language of the underlying contract. By its very terms this judicial construction undermines the independence principle, requesting an issuer to look beyond the terms of the L/C to determine whether a drawing is permissible according to the underlying contract. Among the latest of this line of cases, the court in *Best Tech & Engineering Ltd v. Samsung C&T Corp.* equates the third 'exception' to an "injunction of negative stipulations in contracts." [2015] WASC 355, ¶ 27 (Austl.). In other words, for an independent undertaking subject to Australian law, the issuer must look to the contract to determine whether a drawing is a breach if the contract contains an agreement not to draw under certain circumstances without regard to whether the breach constitutes fraud.

[204] *Supra* notes 69-71 and accompanying text.

practitioners will be familiar—but of dependence. Dependent undertakings operate not under the *sui generis* practice rules, but as ordinary guarantee or suretyship undertakings.[205]

As the term 'dependent' suggests, the surety (i.e., guarantor) may make use of defenses that 'depend' on the underlying transaction. In other words, because guarantors are said to step into the shoes of the principal obligor, any defenses available to that obligor become available to the guarantor as well with two minor exceptions.[206] Critically, these defenses include those against the formation of the contract from which the principal obligation arises.[207]

Further, a true conflicts of law or private international law analysis may become necessary to ensure the application of the proper substantive contract law in the absence of the default provisions of the P.R.I.M.E. L/C Rules. These issues are highly technical legal questions unsuitable for non-legal arbitrators to decide. Thus, the dilemma presents itself: as counsel, could you ever advise the use of non-legal L/C practitioners (likely bankers) for a case in which there is even a scintilla of a possibility that the undertaking could be determined to be dependent?

The ICLOCA Rules made reference to this problem in Article 1(1) wherein all undertakings made subject to ICLOCA arbitration "whether independent or not" fall within the scope of the Rules.[208] In other words, the ICLOCA Rules do not deal with the issue directly. Perhaps it was assumed that ICLOCA would deal with this issue through its reserved control over the identity of the arbitrator(s) via Article 8.[209] However, under Article 8(2), the choice is only subject to confirmation if the appointment is not made from the pre-approved Arbitrator's List. The problem never surfaced because, as described, ICLOCA remains largely unused.[210]

Conversely, there are several options with which an arbitral institution could choose to deal with this dilemma. The first is for the set of arbitral rules to expressly limit either jurisdiction or admissibility to claims regarding independent undertakings. Such a limitation would mean that, by determining an undertaking to be dependent, a tribunal would cancel its own jurisdiction or exclude the admissibility of the claim. There would be at least two problems with such a regime, however. First tribunals would be incentivized to find independence, perhaps an extreme version of the common refrain that as 'paid judges', tribunals too often find in favor of their own jurisdiction. Second, in the (perhaps) rare instance in which a tribunal did not find independence, the parties would be left either stranded in arbitration limbo with an inadmissible claim or forced to start litigation anew, the exact situation the parties likely sought to avoid with their arbitration agreement in the first place. The specter of

---

[205] *See* F.S.H. Bae & M.E. McGrath, *The Rights of a Surety (or Secondary Obligor) under the Restatement of the Law, Third, Suretyship and Guaranty*, 122 BANKING L.J. 783, 784-86 (2005); N. Cohen, *Striking the Balance: The Evolving Nature of Suretyship Defenses*, 34 WM. & MARY L. REV. 1025, 1026-28 (1993).
[206] RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 34(1); *see, e.g.*, Langeveld v. L.R.Z.H. Corp., 350 A.2d 931, 936 (N.J. 1977) (USA) ("It was then that defendant was entitled to exercise his rights as surety. Had he paid plaintiff the amount then due-57,500, together with interest at the rate of 10% from October 15, 1970-he would have stood in plaintiff's shoes as holder of the note and mortgage."); Bae & McGrath, *supra* note 205, at 797-98.
[207] *See* D.E. Hackett, *Guaranteed Confusion: The Uncertain Validity of Suretyship Defense Waivers in California*, 41 LOY. L.A. L. REV. 1097, 1101 (2008).
[208] ICLOCA RULES, *supra* note 113, art. 1(1) (Scope of Application).
[209] ICLOCA RULES, *supra* note 113, art. 8(2) (Confirmation of Appointment).
[210] *Supra* notes 131-135 and accompanying text.

this kind of uncertainty, in spite of a clear arbitration agreement, would likely have a strong deterrent effect against such an arbitral institution.

A second possibility for the rules is to limit jurisdiction to independent undertakings only for non-legal arbitrators. This 'solution', however, would present a new problem, by creating a disincentive to make non-legal arbitral appointments. When non-legal arbitrators are a perceived strength of an institution, the rules should be loathe to then paradoxically thwart non-legal appointments.

A final possibility, which in the author's opinion presents the least downside for the proposed P.R.I.M.E. L/C Rules, is for the institution itself to perform a prima facie review with the assistance and input of the parties, to determine whether the threshold question is applicable. If the threshold question is applicable, then the institution will exercise approval authority to limit appointments to legally trained arbitrators, or, at a minimum, ensure a mixed tribunal composed of legal and non-legal arbitrators under an authority similar to that in effect under current Article 8 of the ICLOCA Rules.[211] Such an authority should be limited to disputes which meet some threshold for amounts in controversy or the parties have chosen a tribunal rather than a sole arbitrator.[212] Arbitral institutions commonly undertake a prima facie review to determine whether an arbitration agreement exists,[213] making such a practice not wholly out of line with international commercial arbitration practice, if only exercised in a unique manner under the P.R.I.M.E. L/C Rules.

5. Conclusion

Recommendations for L/C arbitration are by no means a panacea; nor are they intended to be. There will always be outlier cases and issues that may not be resolvable through recourse to arbitration, for example, lawsuits by parties that are completely unrelated to the L/C or its underlying transaction. In *Taurus Petroleum Ltd v. State Oil Marketing Company of the Ministry of Oil, Republic of Iraq*,[214] a non-party to the transaction sought to attach the proceeds of an L/C in satisfaction of an unrelated arbitral award.[215] Attachment of this type in an effort to enforce a separate, unrelated arbitral award is simply not an arbitrable issue, and referring the dispute to non-legal arbitrators will not suddenly make it so.

The bulk of issues related to the unpredictability of L/C disputes on the other hand, for instance failing to test an instrument's independence at the outset of a dispute and failing to account for the consequences of such a determination, are potentially solvable simply by substituting decision-makers who will treat L/Cs as unique commercial undertakings outside of general contract, surety, or negotiable instruments law. This proposed regime also adds protection for L/C users by solving the problem of unsophisticated L/C legal schemes through the introduction of a default choice of 'law' provision expressly designating L/C practice under the law merchant, providing an arbitral award, capable of enforcement in some of the most remote jurisdictions of import-export L/C transactions for even the greatest value, highest complexity disputes.

---

[211] ICLOCA RULES, *supra* note 113, art. 8(2) (Confirmation of Appointment).
[212] It must be kept in mind that with a focus on cost and efficiency, a sole arbitrator will likely be the default. *See, e.g.*, ICLOCA RULES, *supra* note 113, art. 5 (Number of Arbitrators).
[213] *See, e.g.*, INT'L CHAMBER COM., PUBL'N NO. 865, Rules of Arbitration of the International Chamber of Commerce, art. 6(4) (2011).
[214] [2015] EWCA 835, *dismissing appeal from* [2013] EWHC 3494 (Comm) (Eng.).
[215] *Ibid.*

After surveying the landscape of courts and court decisions whose premises often violate the fundamental character of L/Cs, potentially deteriorating an otherwise sound commercial instrument whose use in commercial sales transactions is already in decline, the benefits of providing an adequate and cost-effective forum specifically for the resolution of L/C disputes far outstrip its costs. With decision-makers well versed in the details of L/C practice, the odds are greatly increased for maintaining the L/C's integrity as a "hard and firm promise to pay which is closer to currency than to an accessory guarantee or suretyship undertaking",[216] so long as a solution is found for prickly issues such as non-legal adjudicators being forced to decide on contract defenses. The key is to capitalize on the experience gained over the last 20 years since the crafting of the last set of L/C-centered arbitration rules and that by drawing on these lessons could something like the proposed P.R.I.M.E. L/C Rules could provide a meaningful contribution to the continued development of safe and sound L/C law and practice.

[216] Byrne, *supra* note 1.