



## 2 The impact of the Covid-19 pandemic on international trade, with specific reference to the role of trade documentation

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### Abstract

In this contribution, the author explains the importance of the documents used in international trade and how they feature in payment transactions in this context. The role of different rules of the International Chamber of Commerce (ICC)—especially the Uniform Customs and Practice for Documentary Credits (UCP) and the Uniform Rules for Collections (URC)—are explained, as well as the development of companion rules by the ICC to facilitate trade digitisation—especially the electronic supplement to the UCP (the eUCP), the Uniform Rules for Bank Payment Obligations (URBPO) and the Uniform Rules for Digital Trade Transactions—are analysed. The point is made that the trade digitisation envisaged by these rules has not really taken place to a significant extent. The author then points towards two disasters that have occurred during the past two decades, namely the eruption of Eyjafjallajökull in Iceland in 2010 and the COVID-19 pandemic in 2020, as potential catalysts to speed up trade digitisation. The conclusion is that the volcanic eruption (which halted air traffic in Europe for a week causing massive delivery problems for couriers of documents with major knock-on effects for international trade) may have been a timely wake-up call, but the world soon fell

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asleep again. He concludes that the COVID-19 pandemic should not lead to the same lack of action, and that all role players should come together urgently to enable worldwide trade digitisation. He argues that this initiative should be driven by the International Chamber of Commerce.

### 1 Introduction: Documentary sales

Documents play an important role in international sales. Transacting over national boundaries, and often over oceans, implies remote parties—the buyer and seller—are not negotiating across a counter and payment and delivery are not immediately reciprocal. This means that the risks involved are significantly higher than in a normal domestic sale.<sup>1</sup> It is against this background that the documents become very important, as well as the method of payment chosen.

There are many different documents that may be important in an international sale, but four constitute the kernel. The first is the commercial invoice.<sup>2</sup> Its role is to reflect, accurately, both the goods sold and the price to be paid. In fact, a pro forma invoice often constitutes the offer leading to the eventual conclusion of the contract.<sup>3</sup> The second is the transport document, for example, a marine bill of lading or combined transport document (multimodal-transport document).<sup>4</sup> These transport documents can fulfil various purposes: they are proof of receipt of the goods; they reflect the contract of carriage; and they

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1 Hugo “Payment in and financing of international sale transactions” in Sharrock (ed) *The Law of Banking and Payment in South Africa* (2016) 394–395.

2 Adodo *Letters of Credit: The Law and Practice of Compliance* (2014) 184–187; Murray, Holloway and Timson–Hunt *Schmitthoff The Law and Practice of International Trade* (2012) 88, 208–209 par 11–014; ICC Services *ICC Guide to Export/Import Global Business Standards and Strategies* (2018) par 2.3.7 fig 2.11, par 11.6.3; Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) 276.

3 ICC Services (n 2) par 2.2.2 fig 2.5.

4 For a comprehensive overview of transport documents see Murray, Holloway and Timson–Hunt (n 2) 307–338. On the development and potential future of bills of lading as part of the dynamic *lex mercatoria* see Naidoo “From the book of lading to blockchain bills of lading: Dynamic merchant tradition and private ordering” in Hutchison and Myburgh (eds) *Research Handbook on International Commercial Contracts* (2020) 223–243. See ICC Services (n 2) par 2.2.3 fig 2.8, par 11.6.2, par 15.7. See further Adodo (n 2) 187–211; Van Niekerk and Schulze (n 2) 146–164; Gutteridge and Megrah *The Law of Bankers’ Commercial Credits* (1984) 126.

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are documents of title.<sup>5</sup> Especially important is that, typically, the buyer will not be able to acquire the goods shipped from where-ever they have been delivered or warehoused, without tendering the transport document.<sup>6</sup> The third is the insurance document (in the event that the seller was responsible to insure the goods),<sup>7</sup> which serves to prove that the risks that needed to be insured were so insured. Finally, there can be any of several certificates, such as a certificate of quality (certifying that the goods are of the quality contracted for);<sup>8</sup> a certificate of origin (establishing that the goods originate from a particular country or region);<sup>9</sup> and a certificate of inspection (certifying that the goods have been inspected in some or other specific manner to ensure that they are fit for purpose).<sup>10</sup>

The documents are intended to come into possession of the buyer who needs them to satisfy itself<sup>11</sup> that the goods are in order and to obtain delivery of the goods; they also enable the buyer (who, in an international sale contract, is often not the end user or consumer of the goods) to start trading with them by selling (transferring) the documents to another buyer (although the goods may at that time still be on board of a container ship in mid-ocean).<sup>12</sup> This will, of course,

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5 Du Toit “Aspects of the bill of lading as a document of title in the eras of the third and fourth industrial revolution” in Vrancken and Hugo (ed) *African Perspectives on Selected Marine, Maritime and International Trade Law Topics* (2020) 135 passim; Gutteridge and Megrah (n 4) 126; Van Niekerk and Schulze (n 2) 148–156.

6 ICC Services (n 2) par 15.7.1; Van Niekerk and Schulze (n 2) 151–156.

7 Murray, Holloway and Timson-Hunt (n 2) 209 par 11–015; Van Niekerk and Schulze (n 2) 277. For an example see ICC Services (n 2) par 2.3.4 fig 2.9.

8 Murray, Holloway and Timson-Hunt (n 2) 89 par 4–013.

9 Murray, Holloway and Timson-Hunt (n 2) 88 par 4–012; Van Niekerk and Schulze (n 2) 278; ICC Services (n 2) par 2.3.7 fig 2.12 (for an example).

10 Murray, Holloway and Timson-Hunt (n 2) 89–90 par 4–013; Van Niekerk and Schulze (n 2) 278; ICC Services (n 2) par 2.3.7 fig 2.13 (for an example).

11 In the type of transaction one typically encounters in this context, buyers and sellers are more likely to be companies than individuals—hence I prefer “it” and “itself” to “he, him or himself” and “she, her and herself”.

12 This has been the position since early times as is evident from the recognition of the delivery of a bill of lading being one of the symbolic forms of delivery. See Du Toit (n 5) 158–9 who questions the accuracy of this description and refers with approval to Carey Miller “Transfer of ownership” in Zimmermann and Visser (eds) *Southern Cross—Civil Law and Common Law in South Africa* (1996) 727–741 who regards it as “not so much symbolic delivery as the only appropriate means of dealing with the goods in transit”. To be transferable bills of lading need to be “negotiable” bills of lading.

only be possible if the documents themselves are in order. It stands to reason that a claused bill of lading (mentioning, for example, some strange seepage from a container)<sup>13</sup> or a quality certificate raising concerns about the quality of the goods, or an insurance document showing that the goods have not been insured against some or other critical peril, could make it practically impossible for the buyer to trade with the goods by transferring the documents (even through the goods themselves may actually be in perfect condition).

In an open-account payment, the seller simply sends (typically by courier) the documents to the buyer and trusts that the buyer will pay on the agreed date. Banks play no role apart from processing payment.<sup>14</sup> The seller is accordingly exposed to the risk of losing the goods and also not being paid. Hence, this form of payment implies strong trust mostly derived from a long-standing trade relationship between the buyer and the seller.<sup>15</sup>

The risk faced by the seller in an open-account payment is addressed in two other important payment methods, in which the documents play a central role, namely, documentary collections and documentary credits (letters of credit). In the case of a documentary collection, the documents move from the seller to its bank (the remitting bank), and from the remitting bank to the collecting bank (in the buyer's country) in accordance with a series of mandates. The collecting bank informs the buyer that it can come and collect the documents from it (and thereby gain access to the goods) but only against payment (in a documents-against-payment (DP) collection)<sup>16</sup> or against acceptance of a trade bill drawn by the seller on the buyer (in a documents-against-acceptance (DA) collection).<sup>17</sup> The seller, therefore, has the security that the buyer will not be able to acquire the documents (and, therefore, also the goods) without paying or accepting the trade bill. In the case of a collection, the physical documents are delivered from the seller to the remitting bank and from the remitting

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13 Adodo (n 2) 199–202.

14 On open account payment see Hugo (n 1) 396–399; ICC Services (n 2) par 11.1, 11.4.1. On the role of the bank in open account payment see SWIFT Presentation “Bank Payment Obligation A new payment method” (July 2016) 6 file:///C:/Users/chugo/Downloads/swift\_corporates\_presentations\_bankpaymentobligation.pdf (24-09-2021).

15 Hugo (n 1) 396.

16 Murray, Holloway and Timson-Hunt (n 2) 185 par 10–002; ICC Services (n 2) par 11.4.4; Hugo (n 1) 399–400.

17 Murray, Holloway and Timson-Hunt (n 2) 185 par 10–002; Hugo (n 1) 400–403; ICC Services (n 2) par 11.4.4.

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bank to the collecting bank. The inter-bank delivery will mostly be done by international couriers using commercial airlines.

In the case of a letter of credit, the buyer requests its bank to issue a letter of credit in favour of the seller. The bank, if it accepts this mandate, issues the letter of credit—which, in essence, is a payment undertaking by the bank to pay the seller. It is, however, conditional upon the seller delivering the documents (commercial invoice, insurance document, transport document, certificates and so on) to the bank.<sup>18</sup> Typically, however, the issuing bank will nominate a bank in the seller's country that will examine the documents, and if they are in conformity with the requirements of the letter of credit, will take delivery of them and pay the seller as mandatary of the issuing bank.<sup>19</sup> One of the foundations of the law of letters of credit is the so-called doctrine of strict compliance in terms of which the seller is required to deliver documents that are in strict conformity with the letter of credit;<sup>20</sup> “[t]here is no room for documents which are almost the same, or which will do just as well” said Viscount Sumner, speaking for the House of Lords, almost a century ago, in the locus classicus, *Equitable Trust Co of New York v Dawson Partners*.<sup>21</sup> The seller has the security of a payment promise by a bank conditioned only upon the ability of the seller to deliver the required documents. The bank's promise, moreover, is independent of the underlying contract of sale—hence the bank cannot resist payment, or be interdicted from paying, on the basis of a dispute between the buyer and seller as to the performance by the seller of its obligations under the contract of sale.<sup>22</sup>

The documents will accordingly be delivered by the seller to the nominated bank, and by the nominated bank to the issuing bank. The inter-bank delivery, again, is mostly done by international couriers using commercial airlines.<sup>23</sup>

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18 Hugo (n 1) 403–404; ICC Services (n 2) par 11.4.5; Van Niekerk and Schulze (n 2) 257–260.

19 Hugo (n 1) 405.

20 *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 3 SA 688 (SCA) 697–698; Hugo (n 1) 414–422; ICC Publishing (n 2) par 12.5.2; Van Niekerk and Schulze (n 2) 285–286.

21 [1926] 27 Ll L Reports 49 (HL) 52.

22 *Philips v Standard Bank of South Africa Ltd* 1985 3 SA 301 (W) 304; *Loomcraft Fabrics CC v Nedbank Ltd* 1996 1 SA 812 (A); Hugo (n 1) 422–430; ICC Services (n 2) par 12.5.1.

23 Nesarul Hoque “COVID-19 pandemic and the delay in delivery of documents” May 2020 *Documentary Credit World* 23 states in this regard that “[t]he speed and widespread reliance on courier companies has

### 2 International rules governing documentary collections and letters of credit

The Banking Commission of the International Chamber of Commerce has drafted rules pertaining to collections (the Uniform Rules for Collections (URC 522)) and to letters of credit (the Uniform Customs and Practice for Documentary Credits (UCP 600)). These rules are almost invariably contractually incorporated by the parties involved in the collection or the letter of credit. To ensure that the transaction proceeds at a reasonable pace, these rules, especially the UCP,<sup>24</sup> impose various time limits that must be met. Article 14(b) provides that “[a] nominated bank acting on its nomination ... and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying”. Moreover, article 14(c) provides that “[a] presentation including one or more original transport documents ... must be made by or on behalf of the beneficiary not later than 21 calendar days after the date of shipment ... but in any event not later than the expiry date of the [letter of] credit”.

In the event of the documents being non-conforming and the nominated bank or the issuing bank deciding to refuse to honour the letter of credit, article 16(c) requires the bank concerned to give a single notice to that effect to the presenter of the documents (in other words, if it is the nominated bank, to the seller, and if it is the issuing bank, to the nominated bank). Article 16(d) reads as follows: “The notice required in sub-article 16(c) must be given by telecommunication or, if that is not possible, by other expeditious means, no later than the close of the fifth banking day following the day of presentation.”

This is followed in article 16(f) by the rather scary preclusion rule in terms of which an issuing bank that has not complied with the aforementioned provisions “shall be precluded from claiming that the documents do not constitute a complying presentation”.

Other relevant provisions of the URC 522 and the UCP 600 relate to *force majeure*. In this respect, article 36 of the UCP 600 reads as follows:

“A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by

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brought so much confidence to the delivery process that banks have largely taken the courier system’s efficiency for granted”.

<sup>24</sup> Article 5(b) of the URC 522 requires that the collection instruction should state the exact period of time within which the documents must be taken up or for any other action of the buyer.

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Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control.

A bank will not, upon resumption of its business, honour or negotiate under a credit that expired during such interruption of its business.”

Article 15 of the URC 522 is almost identical to the first paragraph of the UCP provision quoted above.

Attention should finally be drawn to the following disclaimer in article 35 of the UCP 600:

“A bank assumes no liability or responsibility for the consequences arising out of delay ... in the transmission of any message or delivery of letters or documents, when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit, or when the bank may have taken the initiative in the choice of the delivery service in the absence of such instructions in the credit.”

Article 14(a) of the URC 522 contains a similar disclaimer.

### 3 Electronic trade documents (or data)

The quest to establish electronic trade documents has been present for several decades, but, to date, without a convincing breakthrough. The most troublesome has been the transport document. A journal article published in 2016 has the frustrated title “Electronic bills of lading: A never-ending story”.<sup>25</sup> The different attempts, from the emergence of the Cargo Key Receipt in 1971 to the latest attempts linked to block-chain technology, have recently been traced competently by Du Toit<sup>26</sup> with reference to, inter alia, the South African Electronic Communications and Transactions Act<sup>27</sup> and the Sea Transport Documents Act,<sup>28</sup> as well as the UNCITRAL Model Law on Electronic Transferable Records (Model Law).<sup>29</sup> These developments fall beyond

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25 Bury 2016 *Tulane Maritime Law Journal* 197.

26 See (n 5) 135–161. See also Naidoo (n 4) *passim*.

27 25 of 2002 (reviewed briefly in this context by Du Toit (n 5) 153–154).

28 65 of 2000 (reviewed briefly in this context by Du Toit (n 5) 154–155).

29 adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 13 July 2017.

the scope of this contribution. I abide by quoting his final conclusion, which reflects a carefully positive view:

“It is submitted that, in the case of blockchain bills of lading, a sensible interpretation of current legislation, together with the flexibility of the common law, would be able to provide the necessary legal framework for such bills of lading. It is nevertheless suggested that the Model Law will bring further legal certainty and harmonisation with other jurisdictions, for the benefit of global maritime trade.”

In the payment area, there have been similar moves aimed at facilitating electronic documents. The UCP 600 came into operation in 2007. The previous two revisions were the UCP 400 (which came into operation in 1984) and the UCP 500 (which came into operation in 1994). At the 12<sup>th</sup> ICC Banking Conference held in Paris in 1989, a panel of experts took the view that it was time to revise the UCP 400 “taking into account the need to establish rules for an ‘EDI credit’”.<sup>30</sup> Independent rules for EDI credits were ruled out as premature by the ICC Banking Commission in 1990. Instead, it was decided to investigate whether the UCP could not be adapted to both paper and EDI as a first step. With this in mind, a special EDI working party was set up.<sup>31</sup> However, in the revision process of the UCP 400, it was eventually decided in 1991, that there would be no reference to EDI in the new revision (the UCP 500).<sup>32</sup>

Very little happened further in this regard until May 2000 when a task force on the future of the ICC Banking Commission identified as an important goal for the Commission “a greater focus on electronic trade”.<sup>33</sup> Further discussion identified a need to develop a bridge between the UCP 500 and the processing of the electronic equivalent of paper-based documents. The view taken was that the market was looking towards the ICC to provide guidance for the evolution from paper to electronic credits.<sup>34</sup>

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30 Katz “ICC in Action: More on Incoterms 1990: Major EDI, Guarantee Discussions” December 1989 *Letter of Credit Update* 7 8.

31 Katz “ICC in Action: Progress on UCP Revision, Guarantee Rules, New Incoterms Guide” December 1990 *Letter of Credit Update* 9 10.

32 Katz “ICC in Action: UCP Revision; Guarantee Rules; EDI Details; Credit Case Study Excerpts” September 1991 *Letter of Credit Update* 11.

33 ICC Publishing SA *UCP 500 + eUCP ICC (2002) Introduction* 53.

34 *Ibid.* See also “eUCP text takes final form” [dcpro-DCWN\\_12October20011063.XML](#).

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The Banking Commission, accordingly, appointed a working group in 2000 co-chaired by Dan Taylor (of the US) and Rene Mueller (of Switzerland). Its efforts were approved by the Banking Commission at its meeting in November 2001 on a weighted vote of 63–3. Thirty-four national delegations voted for and two against it. South Africa was not represented. In fact, Africa was not represented. The only countries that opposed it were Austria and Ireland. Amongst the delegations that voted in favour of it were the US, the UK, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Norway, Portugal, Singapore, Spain, Sweden, and Switzerland. The matter was brought to fruition in little more than a year. In January 2002, the Supplement to UCP 500 for Electronic Presentation (eUCP) was published and became operative on 1 April 2002.<sup>35</sup> It was not a new revision of the UCP. The ICC, in its introduction to the eUCP explains its status as follows:

“The eUCP is not a revision of the UCP. The UCP will continue to provide the industry with rules for paper letters of credit for many years. The eUCP is a supplement to the UCP that, when used in conjunction with the UCP, will provide the necessary rules for the presentation of the electronic equivalents of paper documents under letters of credit.”<sup>36</sup>

Maria Livanos Cattai, the then Secretary General of the ICC, described the eUCP as “an update rather than a full revision” of the UCP, and as “a bridge between the current UCP and the processing of the electronic equivalent of paper-based credits”. It was, therefore, to be used “in tandem with, not as a replacement for UCP 500”.<sup>37</sup> The eUCP has been revised twice since 2002. As was to be expected, it was revised in 2007, to align it with the UCP 600, under the title *Supplement to the UCP600*

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35 The information in this paragraph is contained in periodic reports published in the electronic database of the ICC related to documentary credits *dcprofocus*. Most were also published in the quarterly newspaper *DC Insight* (an electronic version of which is also available on *dcprofocus*). See, inter alia, “eUCP Final version approved” Vol 8 No 1 Jan–March 2002 *DC Insight*; “Electronic supplement to the UCP advances; URGETS rules in suspension” 28 November 2000 *dcpro-DCWN\_EUCP\_ANS\_URGETS.XML*; “eUCP text takes final form” *dcpro-DCWN\_12October20011063.XML*.

36 ICC Publishing (n 33) Introduction 53.

37 ICC Publishing (n 33) Foreword 3. See also Introduction 53.

for *Electronic Presentation (eUCP)*.<sup>38</sup> It was again revised in 2019 under the shortened title *eUCP Version 2.0* which became operative on 1 July 2019.<sup>39</sup> On the same date, the ICC also released the *eURC Version 1.0* (for documentary collections).<sup>40</sup>

The ICC Banking Commission, by word of David Meynell, states that the purpose of the eUCP and eURC is to address “e-compatibility” of the ICC Rules and to ensure that “they are ‘e-compliant’ i.e. enabling banks to accept data vs. documents” which was identified as a requirement “in order to accommodate evolving practices and technologies”.<sup>41</sup> As supplements or updates to the UCP and URC, the legal nature of the eUCP and eURC is the same as that of their mother documents: they constitute rules, which, for them to apply, must be contractually incorporated.<sup>42</sup> Incorporation of the eUCP or the eURC automatically incorporates the UCP 600 or the URC 522,<sup>43</sup> but the converse is not true. A discussion of the particular rules themselves falls well outside the scope of this article.<sup>44</sup> Regarding their purpose and benefits, however, Meynell, writing for *Trade Finance Global*, states as follows:

“Existing ICC rules, such as UCP 600 and URC 522, whilst being invaluable in a paper world, provide limited protection when applied to electronic transactions. As such, it is inevitable that traditional trade instruments will, over time, inexorably move towards a mixed ecosystem of paper and digital, and, ultimately, to electronic documents alone. In this respect, the eRules provide numerous benefits, some of which are listed below:

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38 For a helpful background see the “Editor’s overview” in Byrne (ed) *LC Rules & Laws: Critical Texts for Independent Undertakings* (2018) 23.

39 See “Introduction eUCP Version 2.0” at <https://cdn.iccwbo.org/content/uploads/sites/3/2019/06/icc-uniform-customs-practice-credits-v2-0.pdf> (22-09-2021).

40 <https://iccwbo.org/content/uploads/sites/3/2019/06/icc-uniform-rules-for-collections-v1-0.pdf> (23-09-2021).

41 See his introduction to the eUCP 2. Meynell is the Senior Technical Advisor to the ICC Banking Commission. See also the introduction to the eURC 4.

42 See a e1(b) and (c) of the eUCP and art e2(b) and (c) of the eURC. For a comprehensive discussion see further Hugo “The legal nature of the Uniform Customs and Practice for Documentary Credits: *lex mercatoria*, custom or contracts [sic]” 1994 *SA Merc LJ* 143–168.

43 See a e2a of the eUCP and art e3(a) of the eURC.

44 Despite a strong copyright policy on its instruments the ICC has provided open access to both the eUCP and the eURC together with an article-by-article commentary. See <https://2go.iccwbo.org/users-guide-to-the-eucp.html>.

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- Ensuring relevance in an evolving digital trade world
- Explicitly and unambiguously supporting the usage of electronic documents
- Extending risk mitigation to a digital environment
- Providing conformity when faced with divergent local or regional practices
- A shared understanding of terminologies
- Uniformity and consistency in customs and practice”.<sup>45</sup>

An internet search on statistics relating to the use of these eRules was fruitless. Statistics on non-use are difficult to come by. Anecdotal evidence from the banking community, however, is to the effect that they are seldom used.<sup>46</sup>

The move away from paper to data in payment methods designed for international trade has also been evident during the past decade in other developments apart from the eRules discussed above. The first is the so-called “bank payment obligation” (BPO), an initiative developed in collaboration between the ICC Banking Commission and the Society for Worldwide Interbank Financial Telecommunication (SWIFT). A BPO is essentially an irrevocable undertaking given by one bank to another that payment will be made following a data matching report generated by SWIFT’s Trade Service Utility relating to the international sale. Essentially, data matching takes over the role of document checking in the letter of credit and documentary collection environment. Byrne remarks that the purpose of this initiative was “to reintroduce banks into the supply chain process from which they have been increasingly excluded by open account transactions”.<sup>47</sup> He further points out that the bank payment obligation “is intended to benefit the seller” by providing an “indirect assurance of payment as a result of an electronic matching of data [as opposed to conforming documents] related to the

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45 “Breakdown of the new ICC eRules: eUCP & eURC” in *Trade Finance Global Articles* (28 June 2021) at <https://www.tradefinanceglobal.com/posts/breakdown-of-new-icc-erules-eucp-eurc/> (23-09-2021).

46 Legwaila “Trade digitization: Developments and legal aspects” in Hugo and Du Toit (eds) *Annual Banking Law Update 2017* (2017) 133 138–139 relates that the first issuance of a paperless letter of credit subject to the eUCP was in 2010 between an Australian mining company and a Chinese buyer. The documents in the electroning presentation included the commercial invoice, packing list, certificate of weight, certificate of analysis, the bill of lading and the insurance certificate.

47 See (n 38) 95.

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sale”.<sup>48</sup> In 2013, the ICC Banking Commission adopted and published the Uniform Rules for Bank Payment Obligations (URBPO 750E)<sup>49</sup> and published a guide<sup>50</sup> to these rules. The BPO, however, has not made significant progress to date. Legwaila mentions that the “costs of supporting the software and architecture” is a contributory factor.<sup>51</sup> It may also be that the BPO has been overtaken by the latest initiatives that are focussing on the potential of blockchain in an international-trade context. In this respect, Legwaila refers to “blockchain” as “the end game”:

“What blockchain technologies promise is the instant movement of data (not just the movement of electronic documents ...) from one [party] to the other reducing decision and product processing time and thereby shortening the trade transaction life-cycle. Data visibility, complex analytics and a shift from transaction-based value to information-based value will follow, and the ability to extract, manipulate and benchmark data that would originally have been found only in hardcopy documents will be an important cornerstone of the way business is conducted, risk is mitigated, and commercial transactions will be financed on a cost-effective, global and near-real time basis.”<sup>52</sup>

A sudden move of a documentary-based trade finance system that has developed over centuries to a significantly different system based on blockchain, however, is highly unlikely. As pointed out by Haynes and Yeo, there are many practical, legal, and cost implications that need to be considered and addressed.<sup>53</sup> The enormous potential of blockchain in this context is, however, patently clear.

Finally, the ICC Banking Commission has recently published the Uniform Rules for Digital Trade Transactions (URDTT) Version 1.0.<sup>54</sup>

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48 Ibid.

49 See Byrne (n 38) 95.

50 Hennah *ICC Guide to the Uniform Rules for Bank Payment Obligations* (2013). The ICC also issued a discussion paper Bank Payment Obligation (BPO) Doc 010613 (2018) accessible at [https://library.iccwbo.org/pdf/BPO\\_Frequently\\_asked\\_questions\\_corporates\\_May2018\\_Final.pdf](https://library.iccwbo.org/pdf/BPO_Frequently_asked_questions_corporates_May2018_Final.pdf).

51 See (n 46) 144.

52 Ibid.

53 See “Legal issues arising from the utilisation of blockchain-based products in the 4<sup>th</sup> industrial revolution” in Hugo and Du Toit (eds) *Annual Banking Law Update 2020* (2020) 47 et seq.

54 In 2021. See [https://2go.iccwbo.org/downloadable/download/pdf/product\\_id/951/\(24-02-2022\)](https://2go.iccwbo.org/downloadable/download/pdf/product_id/951/(24-02-2022)).

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The working group responsible for it expressed its key focus as “helping the trade finance industry realise the many benefits of digitalisation—including transparency, time and cost savings, reduced errors, and reduced compliance and operational risk”.<sup>55</sup> This, in itself, indicates that we are as yet nowhere near the full realisation of doing away with paper documents in favour of electronic documents or data. In their introduction to the URDTT, the drafting group states:

“The URDTT should be regarded as an over-arching set of rules under which other rulebooks may co-exist and the trade transaction may be documented. This recognises the prior existence of industry terms and conditions, proprietary rulebooks pertaining to individual service providers, as well as the existence of rulebooks developed in conjunction with distributed ledger projects. However, the URDTT may in some cases eventually remove the need for duplicate/repetitive clauses in user agreements and/or proprietary rulebooks.”

Hence, it would be fair to conclude that both in relation to transport and payment methods, much has been done over the past two or more decades to facilitate the “inexorable move to electronic documents” referred to confidently by Meynell.<sup>56</sup> Legwaila writes of “the trade ecosystem [being] spoilt for choice when it comes to transformation of the trade environment”.<sup>57</sup> Nevertheless, somehow, it just has not happened as extensively as might have been expected for a drive of already some 5 decades old.

Perhaps a seismic event of significant magnitude is necessary to generate the necessary will amongst all roll players in international trade to bring true impetus to this quest.

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55 <https://iccwbo.org/media-wall/news-speeches/icc-banking-commission-launches-working-group-digitalisation-trade-finance/> (25-09-2021).

It is trite in the modern world that the delivery and processing of digitised documents is less costly than the delivery and processing of paper. It does, however, require some infrastructure which may not be uniformly available—especially in some first-world countries. Against this background the focus of the working group of “helping the trade finance community realise” specifically the potential cost-saving benefits of digitisation is crucially important.

56 see the quote above referenced in footnote 45.

57 See (n 46) 138.

### 4 Eyjafjallajökull

A seismic event of some significant magnitude, however, did in fact occur (unfortunately without the desired results). Volcanic activity that commenced at the end of 2009 on Eyjafjallajökull in Iceland, gradually increased in intensity leading to a small eruption on 20 March 2010.<sup>58</sup> The eruption entered a second phase on 14 April 2010. During this phase, an estimated 250 million cubic metres tephra<sup>59</sup> was ejected and the ash plume rose to the height of 9km. By 21 May 2010, the production of lava and ash had come to an end. On 6 June, a small new crater opened up on the west side of the main crater with the emission of small quantities of ash.<sup>60</sup> On 27 October 2010, Ármann Höskuldsson, a scientist at the University of Iceland Institute of Earth Sciences, stated that the eruption was officially over, although the area was still geothermally active and might erupt again.<sup>61</sup>

Although there was no loss of life resulting from the eruption,<sup>62</sup> the ash cloud spread to Northern Europe which led to the closure of most of the European IFR airspace<sup>63</sup> from 15 to 20 April 2010. Consequently “a very high proportion of flights within, to and from Europe were cancelled creating the highest level of air travel disruption since the Second World War”.<sup>64</sup>

On 21 April 2020, the Banking Commission of the ICC, in a news release, stated that the volcanic eruption had led to delays in the presentation of documents by beneficiaries and banks in international trade “due to the inability of courier companies to deliver packages in accordance with their published schedules” having a serious impact

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58 It had last erupted in 1821. See <https://www.britannica.com/place/Eyjafjallajökull-volcano> (26-09-2021).

59 fragmental material produced by a volcanic eruption regardless of composition, fragment size, or emplacement mechanism. See <https://en.wikipedia.org/wiki/Tephra> (26-09-2021).

60 Ibid.

61 [http://icelandreview.com/icelandreview/daily\\_news/?cat\\_id=16539&ew\\_o\\_a\\_id=369471](http://icelandreview.com/icelandreview/daily_news/?cat_id=16539&ew_o_a_id=369471) (26-09-2021).

62 [https://en.wikipedia.org/wiki/2010\\_eruptions\\_of\\_Eyjafjallajökull](https://en.wikipedia.org/wiki/2010_eruptions_of_Eyjafjallajökull) (26-09-2021).

63 There are two sets of regulations governing all aspects of civil aviation referred to by the acronyms VFR (for visual flight rules) and IFR (for instrument flight rules). See [https://en.wikipedia.org/wiki/Instrument\\_flight\\_rules](https://en.wikipedia.org/wiki/Instrument_flight_rules) (26-09-2021).

64 [https://en.wikipedia.org/wiki/2010\\_eruptions\\_of\\_Eyjafjallajökull](https://en.wikipedia.org/wiki/2010_eruptions_of_Eyjafjallajökull) (26-09-2021).

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on transactions subject to the UCP 600 and the URC 522.<sup>65</sup> The news release, from Paris on 21 April 2010, inter alia, provided the following two opinions (and advice):

- The eruption did not qualify as a *force majeure* event as defined in the UCP 600 and the URC 522 because the banks remained open for business; it was the delivery of the documents to them that was being delayed.
- It is the responsibility of the beneficiary to ensure that the documents are presented to the nominated bank in time. If it is impossible to do so [for example due to volcanic eruptions preventing transport] beneficiaries should consider the appropriateness of seeking an amendment that will allow presentation to be made to another more accessible bank.

It is especially the rather unhelpful, yet clearly correct, opinion provided in the second bullet point that needs to be emphasised: in short, the risk of not being able to present documents to a nominated bank in time, is a risk that the beneficiary must bear, and the fact that volcanic activity has made this impossible is irrelevant. The advice of seeking an amendment when it becomes clear that the beneficiary is not going to be able to deliver in time, is sound—but, of course, requires the consent of the issuing bank<sup>66</sup> who will be guided by the mandate of the applicant (buyer) who may conceivably, in some cases, be disinclined to give the necessary consent.

The stark reality cannot be escaped that the electronic transmission of documents or data would not have been affected by this seismic event. It was perhaps a wake-up call, but one that seems to have gone unheeded. The final question to be considered against this background is whether a deadly virus might accomplish what a volcanic eruption could not do.

## 5 COVID-19

On 31 December 2019, the World Health Organisation (WHO) was informed of cases of pneumonia in Wuhan, China, with no known cause. A week later the Chinese authorities identified the cause as a novel coronavirus, temporally named 2019-nCoV. On 30 January 2020, the WHO declared a “Public Health Emergency of International Concern”.

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<sup>65</sup> <https://iccwbo.org/media-wall/news-speeches/volcanic-eruption-delaying-delivery-of-documents-under-icc-rules/> (26-09-2021).

<sup>66</sup> a 10(a) of the UCP.

## The Impact of Covid-19 on the Future of Law

On 11 February, the virus received its official name “COVID-19”. The number of infections increased rapidly worldwide, and on 11 March 2020, the disease was declared a pandemic by the WHO. By September 2021, there had been more than 200 million confirmed cases and over 4.6 million persons had lost their lives due to the disease. Its sustained spread is ascribed to new variants that continued emerging.<sup>67</sup> In September 2021, it was reported that it had become the deadliest disease in American history surpassing the number of deaths in the 1918 (Spanish) flu.<sup>68</sup>

The first case in South Africa was reported on 5 March 2020. The 38-year-old male was infected on a vacation in Italy.<sup>69</sup> A mere ten days later the president declared a national state of disaster and, on 23 March, announced a national lockdown which began on 27 March 2020. A gradual and phased easing of the lockdown followed from 1 May. From 21 September, the restrictions were lowered to the lowest level (alert level 1). In December, the country experienced a second wave which led to renewed higher restrictions from 29 December 2020. These were again relaxed from 1 March 2021. During May and June 2021, the Delta variant led to a third wave of infections in South Africa causing the imposition of progressively higher restrictions (alert level 2 on 31 May, alert level 3 on 15 June and adjusted level 4 on 28 June). Restrictions were again progressively lowered from 25 July onward.<sup>70</sup>

By 27 September 2021, the official South African death toll ascribed to COVID-19 was just under 90 000. This, however, does not reflect reality. There had been 260 241 excess deaths from natural causes<sup>71</sup> as

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67 All of the above facts in this paragraph were taken from <https://www.news-medical.net/health/History-of-COVID-19.aspx> (28-09-2021).

68 <https://www.smithsonianmag.com/smart-news/the-Covid-19-pandemic-is-considered-the-deadliest-in-american-history-as-death-toll-surpasses-1918-estimates-180978748/> (28-09-2021).

69 <https://www.nicd.ac.za/first-case-of-Covid-19-coronavirus-reported-in-sa/> (28-09-2021).

70 Unless otherwise referenced, the facts in this paragraph were all taken from [https://en.wikipedia.org/wiki/COVID-19\\_pandemic\\_in\\_South\\_Africa](https://en.wikipedia.org/wiki/COVID-19_pandemic_in_South_Africa) (28-09-2021).

71 In relation to excess deaths, Wikipedia states: “Mortality displacement is a phenomenon where a period of excess deaths (i.e., more deaths than expected) is followed by a period of mortality deficit (i.e., fewer deaths than expected). It is also known as “harvesting”. ... It is usually attributable to environmental phenomena such as heat waves, cold spells, epidemics *and pandemics*, especially influenza pandemics, famine or war.” (The italics are mine.) See [https://en.wikipedia.org/wiki/Mortality\\_displacement](https://en.wikipedia.org/wiki/Mortality_displacement) (28-09-2021).

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from 3 May 2020 with 85%–95% being ascribed to COVID-19 and the others to the overwhelming of the health services.<sup>72</sup>

South Africa's response to COVID-19 (lockdowns and varying restrictions as infections spiked and receded) was the typical response throughout the world. The lockdowns and restrictions imposed by governments were primarily aimed at preventing rampant spread of the virus. There were many negative consequences, one of which was the devastating effect on international trade arising, inter alia, from the inability to deliver and/or to process paper documents expeditiously.<sup>73</sup>

### 6 Response from the trading community

The ICC's response was quick. On 9 April 2020, it issued its comprehensive *Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*.<sup>74</sup> The following main general points are made in the paper.

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<sup>72</sup> [https://en.wikipedia.org/wiki/COVID-19\\_pandemic\\_in\\_South\\_Africa](https://en.wikipedia.org/wiki/COVID-19_pandemic_in_South_Africa) (28-09-2021).

<sup>73</sup> Since February 2020, the dominant topic aired in *Documentary Credit World* has been the impact of COVID-19 on international trade. See, amongst many others, Feature "Use of digital signatures due to coronavirus" March 2020 *Documentary Credit World* 17; Baker "For letters of credit, corona crisis magnifies operational problems and considerations" March 2020 *Documentary Credit World* 26; Update "COVID-19 crisis pushing pace of trade digitization" April 2020 *Documentary Credit World* 8; Meynell "Addressing the implications of COVID-19 on transactions subject to ICC Rules" April 2020 *Documentary Credit World* 17; Nizardeen "Will COVID-19 expedite the digitisation of paper-based trade finance document presentation" May 2020 *Documentary Credit World* 20; Nesarul Hoque (n 23); Update "Trade finance and force majeure" June 2020 *Documentary Credit World* 8; Update "A new era for electronic documents" June 2020 *Documentary Credit World* 11; Padinhere "What COVID-19 is showing us about the future of trade" June 2020 *Documentary Credit World* 38; Information Digest "Survey examines impact of COVID-19 on African trade finance" April 2021 *Documentary Credit World* 46; and Sproston "Potential impact on lc parties due to delays in transit" May 2021 *Documentary Credit World* 30.

<sup>74</sup> Accessible at <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-Covid-19-pandemic/> (29-09-2021). See also the shorter description by Meynell (n 72) 17–19. For an analysis of the guidance note see Andrieu "Perspectives on the ICC Guidance Paper on COVID-19's impact on trade finance transactions subject to ICC rules regarding force majeure" January 2021 *Documentary Credit World* 29–35.

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- The authors state that, as in the Icelandic crisis, most banks had generally remained open for business, at least to a degree and in such cases there was no *force majeure* event. In some instances, however, they had to close. Against this background, the ICC took the stance that the determination of whether this was a *force majeure* event was not one for the ICC to make but required a decision from a court or arbitration tribunal with jurisdiction.<sup>75</sup>
- It acknowledges that in the extraordinary circumstances, parties may agree to modify some of the rules. Against this background, it urges parties only to do so on competent professional advice.<sup>76</sup>
- The executive summary concludes with the following placatory remarks:

“It remains the core purpose of the ICC rules—and of industry practice—to facilitate and enable good-faith trade, and it is clear that the continuing flow of trade is critical during the COVID-19 pandemic. Accordingly, all parties are encouraged to continue to interact on this basis and to leverage rules as well as sound commercial practice to find solutions to the current situation.”<sup>77</sup>

This resonates with a joint statement by the ICC and the WHO that “as an immediate priority, businesses should be developing or updating, readying or implementing business continuity plans”.<sup>78</sup>

The remainder of this substantial document deals with specific questions put to the Banking Commission on “many associated issues such as delivery and examination of documents, liaison with applicants and beneficiaries, different places for presentation, document examination period, definition of a banking or business day ... [and] events covered by ‘interruption of business’ under *force majeure* provisions”.<sup>79</sup>

A discussion of the specific answers of the ICC Banking Commission to these specific questions in the guidance paper falls outside the scope of this contribution. It is noteworthy, as a further general observation, however, that the guidelines do outline potential alternative solutions to paper that involve the use of “digitalised

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75 See par 1(i)–(iii).

76 par 1(v).

77 par 1(vi).

78 par 2(i) with reference to [https://iccwbo.org/media-wall/news-speeches/icc-who-Covid19/\(29-09-2021\)](https://iccwbo.org/media-wall/news-speeches/icc-who-Covid19/(29-09-2021)).

79 par 1(v).

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documents” and/or “electronic documents” which include scanned, faxed or emailed images.<sup>80</sup> More to the point is a comment by Meynell writing in his capacity as Senior Technical Advisor of the ICC Banking Commission in a feature article published in *Documentary Credit World* in which he unpacked the guidance paper:

“There is no doubt that the problems that are being faced would have been eased if paper documentation was no longer such a necessary requirement for so many aspects of global trade financing. As such the ICC is taking the opportunity to stress the importance of digitalisation and will continue to promote the broader use of ICC eRules i.e., eUCP Version 2.0, eURC Version 1.0, and URBPO as well as UNCITRAL Model Laws on Electronic Commerce, Electronic Transferable Records, and Electronic Signatures.”

A survey conducted by *Documentary Credit World* during the week of 13–20 March 2020, makes for interesting reading. The following questions, inter alia, were put to banks:

- “Due to situations and circumstances with the coronavirus, is your bank willing to accept letters of credit, issuance and amendments, with digital signatures instead of original signatures on paper documents?”
- “Are you presently (or do you anticipate) working from home and issuing documents with digital signatures and forwarding to the beneficiary and/or beneficiary bank as PDFs or other digital documents?”
- “What modifications to your usual LC business procedures are you taking or have been implemented?”
- “If you agree to receive electronic documents and notices from the beneficiary, would you amend the LC to state as such?”, and if so “would your answer change if your client (applicant) refuses to amend the LC?”

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<sup>80</sup> par 5(i) and (ii). The difference between digital records and electronic documents is explained as follows in par 5(vi): “A digital record is one that exists in digitised form only, whereas an electronic record may also encompass a copy of an original document that is stored in electronic form e.g. a scanned copy.”

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- “As beneficiary, would you accept the use of stamps, digital machine or PDF signatures on LCs by work-at-home LC personnel authorized to authenticate LCs the bank wants to issue?”<sup>81</sup>

It is not clear in what country or countries the targeted banks were, and clearly it was a hurried survey. It is suggested, however, that one fact emerges clearly from it: there is no uniform practice regarding these issues. In a very real sense, therefore, it makes for depressing reading.

I conclude this paragraph with reference to another survey closer to home. The International Academy of Comparative Law (IACL) is conducting research on legal harmonisation through soft law with specific focus on the UCP 600. The IACL put certain questions to the different national rapporteurs. The South African rapporteurs reached out to the South African National Committee of the ICC Banking Commission. Two of the questions are relevant for the purposes of this contribution:

- “To what extent is digitalization present in the banking and finance industry in South Africa?<sup>82</sup> How has digitization affected the practice surrounding letters of credit and similar instruments in your jurisdiction? Is the eUCP<sup>83</sup> currently applied or being considered?”
- “In South Africa, has the COVID-19 pandemic had any impact on the application of the UCP 600 (for e.g. on Article 35).”

An especially detailed response was received from one of the large banks in South Africa. It reports that: (i) electronic documentation via fax and email is used in some instances but then “backed by the necessary indemnities”; (ii) “there are pockets of true digitization where the data contained in documents such as bills of lading are shared through their lifecycle ... and ownership of the information is passed from one party to the next through the use of distributed ledgers although this is not widely adopted as common practice and requires

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81 March 2020, 17–25. Some 62 banks responded. Two interpretations of the survey or responses to it were subsequently published in *Documentary Credit World*. See Verschoren “Quizzical questions lead to varied responses” March 2020 *Documentary Credit World* 30–32; Smith “Interesting responses underscore need for industry to come together” March 2020 *Documentary Credit World* 33.

82 See more information on digitisation and ICC initiatives: <<https://iccwbo.org/global-issues-trends/banking-finance/icc-digitalisation-of-trade-finance/>> and <<https://iccwbo.org/publication/icc-digital-roadmap/>>

83 See <https://cdn.iccwbo.org/content/uploads/sites/3/2019/06/icc-uniform-customs-practice-credits-v2-0.pdf>.

legal clarity and adoption by regulators”; (iii) the endorsement of title documents in digital format remains a challenge; (iv) the eUCP has shown “very limited use” but “is, however, being considered for more formal adoption and general use”; (v) in relation to blockchain “more fintechs [are] coming to the fore” each with its own offering, rules and contracts “but these are being developed in multiple ‘digital islands’ with a small number of ring-fenced participants and critical mass or economics of scale does not make this commercially viable at this stage”; (vi) in relation to the COVID-19 challenge alternative arrangements were negotiated “through open communication between banks and ad-hoc agreements and indemnities”; and, finally, (vii) “[w]ith the return to normal operations of courier services, banks and clients have largely reverted back to standard procedures and handling of original paper-based documents”.<sup>84</sup>

This response shows an appreciation of much of what is happening in relating to electronic documents and digital records in the context of international trade, but the final two remarks referred to seriously question whether significant developments in this regard are likely in the short term.

## 7 Conclusion

There are many role players in international trade, and to succeed in establishing a firm footing for the use of electronic documents or data matching instead of the centuries-old paper documents,<sup>85</sup> there needs to be *serious collaboration*. This appears to be absent. To borrow the words of Don Smith in his response to the *Documentary Credit World* survey referred to above, the COVID-19 pandemic underscores the need for industry to come together.

Although the main players are in the private sector, governments need to ensure that the necessary legislation that gives legal efficacy to electronic documents and digital records is in place. The joint statement of the ICC and WHO referred to above “calls on national

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84 feedback provided by the bank concerned through the National Committee of the ICC Banking Commission to the South Africa rapporteurs of the IACL.

85 which form an integral part of what Bewes quaintly referred to as “the romance of the law merchant” in his celebrated tome *The Romance of the Law Merchant: Being an Introduction to the Study of International and Commercial Law with Some Account of the Commerce and Fairs of the Middle Ages* (1923). (I have my doubts whether anyone will someday write a book on the romance of e-commerce.)

governments to adopt a whole-of-government and whole-of-society approach in responding to the COVID-19 pandemic”.<sup>86</sup> Although this statement was primarily aimed at the medical fight against the virus, it is equally apt for the economic fight towards recovery.

To achieve a harmonised approach *someone needs to drive it*. It is suggested that the ICC is the proper body. The ICC was born from the ashes of World War One which had had a devastating effect on international business and trade. A group of industrialists, financiers and traders, who became known as “the merchants of peace” led by Clementel (a former French minister of commerce) founded it in 1919.<sup>87</sup> The philosophy underlying its birth is well reflected in the introductory phrase of the preamble to its constitution which reads as follows: “the fundamental objective of the International Chamber of Commerce ... is to further the development of an open world economy with the firm conviction that international commercial exchanges are conducive to both greater global prosperity and peace among nations”.<sup>88</sup>

Our war, a century later, is a very different one, but has left many economies and businesses shattered. The prosperity and peace (and economic recovery) that can flow from international commercial exchanges are currently being held back by paper-based trade. To be true to its constitution, *the ICC should be significantly more proactive and visible in relation to trade facilitation* in the COVID-19 (and, hopefully, post COVID-19) era. Most of the private-sector role players in international trade are represented in the ICC. Moreover, in December 2016, the ICC was granted observer status at the United Nations, which has given it significant influence in relation to policies of national governments as well. As the ICC itself put it when sharing this news with the world: “ICC’s Observer Status provides world business with a direct voice into the UN agenda for the first time: providing an opportunity to shape global policies that work with the private sector to drive sustainable development and extend prosperity for all.”<sup>89</sup>

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86 [https://iccwbo.org/media-wall/news-speeches/icc-who-Covid19/\(29-09-2021\)](https://iccwbo.org/media-wall/news-speeches/icc-who-Covid19/(29-09-2021)).

87 Irujo “Trade finance and the Banking Commission of the ICC” in Hugo (ed) *Annual Banking Law Update 2016: Recent Developments of Special Interest to Banks* (2016) 71 78; Hugo “Letters of credit and demand guarantees: A tale of two sets of rules of the International Chamber of Commerce” 2017 *TSAR* 11–2.

88 <https://iccwbo.org/constitution/#Preamble> (29-09-2021).

89 <https://iccwbo.org/global-issues-trends/global-governance/business-and-the-united-nations/> (29-09-2021).

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The international-trade community needs more than an explanation of ICC Rules in extraordinary circumstances, or a call to negotiate with counterparties in good faith to seek solutions to terrible problems.<sup>90</sup> The ICC needs to draw the private sector together in the quest of facilitating trade in difficult times and needs to lobby extensively to generate sufficient pressure on regulators whose antiquated laws cannot accommodate the electronic and digital era. Against this background, it is encouraging that the ICC has established the ICC Digitalisation of Trade Finance Commercialisation sub-stream to the URDTT initiative “with cross-industry representation from all key trade regions” with the intention of “examining both the ICC eRules and the URDTT” and “evaluating opportunities and ideas to drive use of the rules”.<sup>91</sup> To the best of my knowledge, however, as in February 2022, South Africa is not (formally) involved in this project.

I conclude with a final point to ponder (latching onto Legwaila’s remark quoted above of “the trade ecosystem [being] spoilt for choice”<sup>92</sup>): there are too many products offered by too many role players, requiring too many different rule sets, too many different contracts and too many technological solutions, all of which need to be understood and regulated, and require too much investment of time and money.<sup>93</sup> For a uniform approach and for a breakthrough in this decade-old quest, a *clearer focus* is necessary.

Much of which is said above in this conclusion is strongly supported by a news item published in the September 2021 issue of *Documentary Credit World* dealing with a similar call issued by SWIFT.<sup>94</sup> I quote it in full as a form of peroration:

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90 which was to a large degree what was done in the two ICC guidance notes considered above.

91 “The rationale behind the Uniform Rules for Digital Trade Transactions (URDTT) Version 1.0” September 2021 *Documentary Credit World* 9.

92 See the text at n 56 above.

93 See the paragraph (in the text) preceding footnote 83 above. See also on the collaboration of Fintech companies and regulators Soon “Improving the digital financial services ecosystem through the collaboration of regulators and FinTech companies” in Lui and Ryder (eds) *Fintech, Artificial Intelligence and the Law* (2021) 46–63.

94 “SWIFT issues call for collaboration to digitise trade” 6. SWIFT is a very influential body in international banking context, and its call therefore undoubtedly has clout. As to how it is governed, its website provides as follows: “SWIFT is a cooperative company under Belgian law and is owned and controlled by its shareholders (financial institutions) representing approximately 3,500 firms from across the world. The shareholders elect a Board of 25 independent Directors, representing banks across the world, which governs the Company and oversees the management of the

## The Impact of Covid-19 on the Future of Law

“Observing that the trade industry has long discussed trade digitisation and its many facets, SWIFT makes clear that immediate action is necessary to transform talk into results. In releasing its August 2021 paper, ‘Digitising trade: The time is now’, SWIFT identifies what it believes is needed to successfully facilitate the digitization of global trade.

Technology alone cannot adequately confront the monumental task of integrating numerous stakeholders, rules, and regulations into a functioning digital trade system globally. Rather, SWIFT’s paper contends that three key enablers are vital for truly facilitating effective trade digitisation: Legal Harmonization; Richer Data and Standards; and Interoperability.

After setting this stage, the 15-page paper assesses the impact of the Covid pandemic on trade processes and SWIFT offers its take on the widely-held view of the pandemic as a catalyst of digitisation. SWIFT then briefly examines challenges to digitisation which include legal considerations tied to transferable records, the indispensability of standards, and fragmentation.

In drawing attention to the key enablers of trade finance digitisation, SWIFT emphasizes the need for adoption of UNCITRAL’s Model Law on Electronic Transferable Records (MLETR), added reliance on ISO 20022 data, and advancement of ICC’s Digital Standards Initiative (DSI).

SWIFT also strongly advocates for utilising what’s already available. In commenting on the documentary credit industry and its need to adapt to a digital world, SWIFT bluntly asks: ‘Whilst the

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Company. The Executive Committee is a group of full-time employees headed by the Chief Executive Officer. SWIFT is overseen by the G-10 central banks (Belgium, Canada, France, Germany, Italy, Japan, The Netherlands, United Kingdom, United States, Switzerland, and Sweden), as well as the European Central Bank, with its lead overseer being the National Bank of Belgium. In 2012, this framework was reviewed and the SWIFT Oversight Forum was established, in which the G-10 central banks are joined by other central banks from major economies: Reserve Bank of Australia, People’s Bank of China, Hong Kong Monetary Authority, Reserve Bank of India, Bank of Korea, Bank of Russia, Saudi Arabian Monetary Agency, Monetary Authority of Singapore, South African Reserve Bank and the Central Bank of the Republic of Turkey. The SWIFT Oversight Forum provides a setting for the G-10 central banks to share information on SWIFT oversight activities with a wider group of central banks.” See <https://www.swift.com/about-us/legal/compliance-0/swift-and-sanctions#how-is-swift-governed?> (26-05-2022).

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industry is awash with trade digitisation initiatives, are the existing tools available to us, like eUCP, being leveraged to their full potential?’

The paper underscores SWIFT’s stance that the digitisation of trade can no longer be an ‘if’ but must now be a ‘now and how’.”

