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Trade usages in the law of international sale of goods

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Abstract: This paper examines the application of trade usages, one of the most important sources of autonomous international sales law (so-called *lex mercatoria*) that traders create according to their needs. To understand the application of trade usages, it is necessary to determine their position in source-of-law-hierarchy. As a separate issue, the paper analyses the subjective and objective basis for the application of trade usage, which are possible ways to regulate that issue in legal texts. It is pointed out that trade usages have normative and interpretive role in the contract for the international sale of goods. Their application would not be possible if the law did not allow it. The paper presents how this issue is regulated in characteristic legal systems, both national and international. It is concluded that trade usages have an important role in the law of the international sale of goods. That is confirmed by the fact that it is enough for trade usage to exist to be applied. That solution is justified considering that traders are expected to know not only the rules of the profession but also customs and to harmonize their actions with trade usages rather than with legal rules.
Key words: usages; trade usages; application of trade usages; international trade law; lex mercatoria; national sources of law for trade usages; Vienna Convention on Contracts for the International Sale of Goods.
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Торговые обычаи в праве международной купли-продажи товаров

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Аннотация: В данной статье рассматривается применение торговых обычаев, одного из наиболее важных источников автономного права международной купли-продажи (так называемого lex mercatoria), которое трейдеры создают в соответствии со своими потребностями. Чтобы понять особенности применения торговых обычаев, необходимо определить их положение в иерархии источников права. В качестве отдельного вопроса в статье анализируются субъективные и объективные основания применения торговых обычаев, каковы возможные способы регулирования данного вопроса в правовых текстах. Указано, что торговые обычаи имеют нормативную и интерпретационную роль в договоре международной купли-продажи товаров. Их применение было бы невозможно, если бы закон не позволял этого. В статье показано, как этот вопрос регулируется в характерных правовых системах, как национальных, так и международных. Делается вывод о важной роли торговых обычаев в праве международной купли-продажи товаров. Это подтверждается тем, что для осуществления торговой

практики достаточно торгового обычая. Это решение оправдано, учитывая, что от торговцев ожидается знание не только профессиональных правил, но и обычаев и согласование своих действий с торговыми обычаями, а не с правовыми нормами.
Ключевые слова: обычаи; торговые обычаи; применение торговых обычаев; международное торговое право; лекс меркаториа; национальные источники права для торговых обычаев; Венская конвенция о договорах международной купли-продажи товаров
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1. Introduction

The emergence of trade usages is spontaneous and gradual. In the beginning, it is usually all about the behaviour of one reputable businessman, which develops into a trade practice in a particular area of commerce. That practice then develops into a trade usage. As a rule, it takes a long time to establish such behaviour and develop a consciousness of its obligatory nature. However, that is not so strict in the area of trade generally and for contracts for the international sale of goods because of their very dynamic natures. Therefore, it is not strange for a trade usage to be formed even before a long time has passed during which specific behaviour has been practiced. The legal theory is, also, of the opinion that it is enough to determine that usage exists, that it is applied and widely known among those who practice the relevant trade profession, regardless of whether it has been applied for a long period [1, pp. 20–21]. In that sense we agree with professor Fouchards when he defines usages as "legal rules resulting from repeated practice that apply unless the parties agree otherwise" [2, p. 80].

When the rules of trade usage are not in conflict with the rules of valid legal regulations then both can be applied in situations where usages govern an issue that is not specifically regulated by law. However, when one usage resolves a situation in a way that differs from what the law provides, then its application depends on whether it is contrary to dispositive legal norms or imperative ones. In the first case, as a rule, the usage will be applied rather than the dispositive legal norm because it is assumed that traders respect the usages of the profession and want their contractual relationship to be regulated in accordance with them [3, p. 366]. In the second case, a usage contrary to imperative regulations is not valid and cannot be applied.

2. Legal basis for application of trade usages

The key question for the application of trade usages is whether they bound only when contracting parties know of its existence. In relation to this question, there are two theories in law: subjective and objective. According to the older, subjective theory, the application of usages is conditioned by agreement of contracting parties. Contrary to this opinion, the objective theory assumes that usages always apply when they are not contrary to the imperative norms of the applicable law and under the condition that contracting parties have not excluded their application. This theory is based on the understanding that usages have a normative role and that they are binding regardless of the will of the contracting parties [4, p. 109].

Comparing starting points of the mentioned theories in the light of commercial law, it seems that there are stronger arguments for accepting the objective view. Namely, having in mind that traders conclude contracts between themselves (B2B contracts) i.e., that both are professionals and know the rules of the profession, it is reasonable to assume that they are also familiar with the trade usages in that commercial area and that they coordinate their activities with them. On the contrary, if the contract is concluded between trader and consumer (B2C contracts), it would be more appropriate to apply the subjective theory which takes into account the fact that the parties knew or that they should have been aware that such custom rule existed.

3. Application and the role of trade usages in contracts on the international sale of goods

3.1. National legislation

The contract on the sale of goods is practiced and regulated in all legal systems, and one would assume that there can be no moot issues. However, differences exist regarding not only the legal effects of the sale but also the conclusion of a sale contract and its execution. That is particularly significant for the international sale of goods contracts because of foreign elements they contain. In that case, one dispute may be resolved by applying different sources of law, depending on whether the dispute is resolved before a state court or arbitration. In the first case, the state court shall apply the rules of national regulations or international conventions to which refer the conflicting norms *lex fori*. When the dispute is resolved in an arbitration proceeding, then arbitrators can decide about applicable law in the same manner as judges of the state courts. Additionally, they can also apply *lex mercatoria*, which consist of several sources of law such as trade usages, general principles of law, uniform laws, the rules of international organizations, standard form contracts and reported arbitral awards [5, p.748; 6, p. 114].

National legal rules for trade usages and their application in contracts for the international sale of goods are found, as a rule, within the framework of general regulations governing obligation relations. Thus, for

example, in French contract law, the application of usage is regulated in Art. 1135 of the Civil Code, which provides that agreements bind not only as to what is therein expressed, but also as to all the consequences that equity, usage, or law impose upon the obligation according to its nature.

Based on this, it is concluded that usages may be used for filling the legal gaps in contracts, meaning that they have a normative role in French law. Moreover, usages also have an interpretative role because they help interpret the contract when needed.[1] In German law, there is a distinction between common usages (*Verkehrssitte*), which apply to all contracts, and trade usages (*Handelsbräuche*), which apply specifically in commercial transactions. The application of the former is regulated by the German Civil Code (BGB) according to which common usages are taken into account for interpreting the contract, as well as when executing it (§157 BGB states: Contracts are to be interpreted as required by good faith, taking customary practice into consideration). In contrast, the Commercial Code (HGB) stipulates that the meaning and effect of the actions and omissions of the contracting parties are interpreted considering trade usages and trade practices in commercial transactions (§ 346 HGB states: Merchants are to give consideration, in the light of the significance and effect of actions and omissions, to prevailing commercial customs and usages). In other words, trade usages bind contracting parties in commercial contracts (B2B) on the mere fact that they exist, regardless of whether they knew of their existence and wanted their application. Consequently, the role of usage is normative and interpretative only for commercial contracts.

Trade usages (*trade customs*) are very important in regulating commercial contracts in English law. From the moment when the existence of a trade usage (*trade custom*) has been proven in court, it becomes part of the common law.[2] When obligation or liability arises from a contract of sale, the application of trade usages may be excluded or changed by express agreement of the contracting parties or established practice between the contracting parties, or by a trade custom that binds both contracting parties (Article 55 of the Sale of Goods Act, 1979).[3]

Scandinavian states' legislation in the field of sales law was introduced in the early 1900s, namely in the Sale of Goods Act of Denmark (1906), Norway (1907) and Sweden (1905). In the early 1900s, Finland was within the Russian sphere of influence and consequently, a cooperation with the other Scandinavian states was deferred until the 1960s (Jan Ramberg, The Vanishing Scandinavian Sales Law, p. 258). Those Acts were amended at the end of the eighties of the 20th century to conform to the Vienna Convention on Contracts for the International Sale of Goods (CISG). Only Denmark did not harmonize its sales law with the CISG.

3.2. International sources of law

Trade usage as a source of law is also regulated in CISG [9], the most significant international source of law for the said contract. According to article 9(1), trade usages are applied on the basis of the express or tacit agreement of the contracting parties, for example, their reference in the contract to one of the INCOTERMS transport clauses (Article 9(1) states: The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves). However, Convention also accepts the objective theory of the application of trade usages because it foresees that they bind the contracting parties even when they have not expressly referred to them. In that case, the basis for the application of trade usages is the tacit will of the contracting parties. That is possible only if the following two requirements are met: that the trade usage was known or should have been known to the parties, and that the usage is widely known in international trade and regularly respected (Art. 9(2) CISG). The first requirement is subjective, while the second is objective. Professor Garro explains that developing countries had put pressure to incorporate cited rule in the text of the Convention in order to protect their citizens from the application of customs that could not be known to them [10, pp. 476–480]. Both requirements have to be fulfilled simultaneously considering that they are set cumulatively. Trade usages are privileged in the CISG since they have priority in application over its dispositive provisions. In addition to the normative function, trade usages also have an interpretative function, given that Article 8(3) stipulates that they have to be taken into account when determining the intention of one contracting party.

UNIDROIT Principles of International Commercial Contracts in Article 1.9. take over Art. 9 of the CISG almost in its entirety, except for the requirements from Art. 9(2) which stipulate that the trade usage must be known to the contracting parties to be applied. In this way, the normative role of usages is more emphasized, and the contract will be subordinated to any usage that is widely known and respected regularly in international trade. Exceptionally, trade usage will not be applied to the contract if that would be unreasonable in the specific case (On the meaning of the term "unreasonableness" in the context of the application of trade usages in the

[1] In French theory, a distinction was previously made between *coutome* and *usage,* in the sense that the former represent trade customs for which, due to long-term repetition, an awareness of the duty of their application has been formed, while the latter represent trade usages of a local character, related to a particular profession or particular local market, which are applied because there is a belief that it is expedient to behave in the manner provided by them. Until the seventies of the last century, this division had practical significance only before French courts, but not in proceedings before arbitration [7, p. 414].

[2] In the earlier theory of common law, a distinction was made between "Custom" and "Trade usage".– by custom was understood usage that has the force of law, binding all who know or should have known of *it.* Trade usage, however, refers to the use of a trade or local practice as evidence of the parties' probable intent in interpreting the terms of an agreement [8]..

[3] This rule was amended in 2015 since when it is not applied to consumer contracts.

Principles of European Contract Law [11, pp. 126–128]). This exception is introduced with the aim to apply primarily for transactions of an atypical nature or for contracts concluded by persons operating under special conditions [12, p. 26]. The Principles of European Contract Law (hereinafter: PECL) in Article 1:105 take over the rule of Article 9(1) CISG in its entirety (which is identical to Article 1.9(1) of the UNIDROIT Principles), while in second paragraph they stipulate that parties are bound by a usage which would generally be considered applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable. Paragraph 2 differs from the Vienna Convention insofar as it does not require a connection between the will of the parties and the application of usage. In this respect PECL are identical to UNIDROIT Principles. However, unlike the UNIDROIT Principles, PECL do not require that trade usage is widely known in international trade and applied regularly; it is sufficient that persons in the same situation would consider that usage authoritative. This decision enables the application of international, national, and even local customs, provided that other persons who find themselves in the same situation would consider the customs in question as authoritative for their contract.

4. Conclusion

The contract of the international sale of goods is a complex transaction and parties to that contract usually do not regulate every possible problem which may arise during its performance. Trade usages are recognized in national and international sources of law to fill in the gaps in the contract for the international sale of goods and for interpreting the terms of that contract when needed.

Trade usages are perhaps the most important source of autonomous international sales law (so-called *lex mercatoria*) because traders created them according to their own needs, which is why they express their expectations in trade transactions. They enjoy protection before state courts and arbitrations, regardless of whether they are widely known in international trade or recognized as international trade usages. This, paired with the position of trade usages in source- of-law-hierarchy, confirms their paramount importance for the contract on the international sale of goods.

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