

CONSIDERATIONS ON INTERNATIONAL COMMERCIAL USAGES

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Abstract: International commercial relations have their own dynamics which are individualised by the rapidity of operations. The permanent changes imposed by the requirements of the world market are not always accompanied by the elaboration of some corresponding regulations, a fact that determined the international practice to create certain unwritten rules which, accepted by free will and repeatedly applied, have become norms used in international trade, having an important place in the framework of international economical relations. This paper wants to accomplish a presentation of the international commercial usages and of their importance in international trade.

Key words: international commercial usages, international trade, international trade law, law source

General considerations.

The international commercial relations have their own dynamics which is individualised by the rapidity of operations. The permanent changes imposed by the requirements of the world market are not always accompanied by the elaboration of some corresponding regulations, a fact that determined the international practice to create some unwritten rules that, accepted by free will and repeatedly applied, have become norms used in the international trade [1]. Thus, the requirements of international trade, motivated by the absence of some corresponding or sufficient regulations, have imposed the respect of some unwritten rules born from the partners' behaviour in their economical relations, rules that have an important place in the framework of international economic relations [2]. Considering their role in the world trade, a series of conventional regulations internationally adopted, also contain stipulations referring to the applicability of the international usages, such as: the Convention referring to the uniform law on the formation of the international sales contracts of corporal mobile objects, contracted in Hague, on July 1st, 1964, the United Nations Convention on the international sales contract of merchandises from Vienna from 1980, the European Convention of international commercial arbitrage, contracted in Geneva, on April 21st, 1961, the UNCITRAL Model Law on the international commercial arbitrage from 1985 etc. But we should specify that the international commercial usages may be applied in the framework of the international economical relations in special conditions, having special titles [3].

Definition of international commercial usages.

In the specialized literature, there are different definitions regarding the international commercial usages. Thus, according to professor I. Macovei, the international commercial usages are practices or rules applied in the contractual relations between the participants to international trade. These usages suppose a certain behaviour featured by continuity, constancy and uniformity. Also, they are imposed by duration, repeatability and stability [4]. Professor D. Al. Sitaru appreciates that the international commercial usages are social practices (attitudes, behaviours) which, by their nature, are unwritten, having a certain degree of seniority, repeatability and stability, applied by an undefined number of commercial partners, usually in a certain geographical area or in a field of commercial activity and which, depending on their nature, may have or not the feature of a law source [5]. The authors I. Filipescu and A. Filipescu appreciates that the commercial usages means a certain behaviour of the parties which is not born from an isolated economical operation or act, but it is the result of an expressly or tacitly expressed attitude, having a general feature or only in a certain activity sector or in a certain place, harbour or area [6]. According to Professor D. Mazilu, the international commercial usages are those practices, attitudes, behaviours that the parties contract and develop, facilitating the commercial exchanges between the participants to the juridical reports of international trade [7].

Features of the international commercial usages. The analysis of these definitions allows the identification of the following features specific to the international commercial usages:

- *The international commercial usages contain an objective element*, namely they constitute a social practice representing an ensemble of juridical documents and material facts that have gained this feature due to their repeated application by the participants to international trade, in a certain lapse of time [8]. If, in the past, when the volume of international trade was much more reduced than the current one, the creation of a commercial usages needed a longer practice [9], consisting of repeated, uniform acts, nowadays, when the rhythm of the international relations evolution has been accelerated and the needs of the juridical regulation often become urgent, the element of time has diminished its importance in the process of forming a usage. There is no need of long lapses of time, but short ones, sometimes a few years, are enough for a repeated and

uniform behaviour of the participants to the international trade activity to lead to the emergence of some customary norms [10]. The appreciation of an international commercial usage is made depending on the case, and the rule invoked by the doctrine is the one according to which the usage is that practice that had been used for a lapse of time long enough to accomplish all the other requirements of the commercial usages, namely: repeatability, continuity and stability [11].

- *The international commercial usages have a collective feature*, namely they apply between an undefined number of commercial partners.
- *The feature of the international commercial usages of being or not law sources is appreciated depending on their classification in normative usages or conventional ones* [12].

Classification of the international commercial usages.

The commercial usages may be classified depending on several criteria. Thus, according to the extension of their application in space, the commercial usages are intern and international. The intern ones are used on the territory of a certain state, and the international ones are used in international trade. According to their application sphere, the commercial usages may be local, special and general. The local usages are applied in a certain town, harbour [13] or determined region. The special usages are configured by commercial activity branch, the contract object or the parties' profession (for example, usages in the trade with citrus, cereals, wood, usages in international sales, usages of brokers etc.). The general usages apply to the ensemble of international commercial relations (for example, the usages regarding the merchandise quality). According to their juridical force, the usages are classified in normative usages and conventional ones. The normative usages have the value of a juridical norm and they are also called legal or law usages, while the conventional usages have the value of contractual clauses [14]. According to the typing degree, there are typed commercial usages such as typed clause, and non-typed commercial usages. The Chamber of International Trade from Paris had a special role for determining some standardized uniform commercial usages known as the International Rules for the Interpretation of Trade Usages–INCOTERMS which were created in 1936[15]. Also, a remarkable contribution to the promotion of the standardized commercial usages in international trade was brought by the adoption of the Revised American Foreign Trade Definitions – RAFTD in 1941.

Normative and conventional usages. The normative usages, usually called traditions or legal usages [16] in the doctrine of international public and private law, having the value of a juridical norm, constitute a law source. In the normative commercial usages structure, there are also two elements, namely:

- The factual/material element (*consuetudo*) – incarnated in the participants' practice to the international trade activity which is repeated and relatively long.
- The psychological element (*opinio juris sive necessitatis*[17]) – manifested by the conviction of the participants to the international trade activity, according to which a certain rule repeatedly respected in their practice has the value of a mandatory juridical norm [18].

But we should say that only the indissoluble synthesis of these two elements may offer to the practice of the participants to the international trade activity the feature of a source of international trade law. Also, it is necessary to accomplish a legal condition, namely for the law system constituting *lex causae* in the cause to acknowledge the normative force of these usages [19]. The normative usages are featured by the fact that they have a mandatory feature, of duration, of generality, of continuity and repeatability [20]. The test of the normative usages benefits from the system accepted by the legal stipulations, meaning that they do not need to be proved by the parties because, due to system identity to the law, it is presumed that the judge or an arbitrator knows the normative commercial usages, as they are forced to invoke these usages *ex officio* [21]. As examples of normative usages, we mention: the general usages regarding the anatocism of bank accounts, the passive solidarity (of the co-debtors) in the commercial operations, the suspensive effect of major force, in order to avoid the immediate resolution of the contract, the defendants' obligation to cooperate in order to limit the losses, the usages of harbours, of merchandise exchange etc. Some of these normative commercial usages have been taken over by the national legislators and they were included in intern normative documents and their immediate consequence was the fact that, in this situation, the usage feature has disappeared and the behaviour rule they contained has become a law [22]. The normative usages role is to replace the law or to complete the law stipulations [23]. The conventional usages, also called usages of fact or interpretative usages [24], as they are the parties' will expression, are not a law source because their juridical force belongs to a contractual clause. But the conventional commercial usages are also continuous and repeatable [25]. This type of usage is applied based on the parties' will which may be expressly or tacitly expressed. The parties' tacit agreement is deduced from certain indications which are intrinsic to the contract (for example, the parties refer, in the contract, to a practice specific to a usage) or extrinsic to it (the reference to a usage in the framework of an additional document of the contract, where we may understand that the parties wanted the application of that usage and of the main contract [26]). The conventional usages should determine the parties' rights and obligations [27]. The test of the conventional usages is made by the part invoking them by any proving means such as: usage collections, jurisprudence, certificates, witnesses, experts etc. The role of the conventional commercial usages is to interpret, complete and specify the contract content [28]. Such as contractual clauses, the usages may derogate only from the suppletive norms, not from the imperative ones [29]. The application of the international commercial usages is accomplished as a consequence of

the contract registration of a reference clause or by formulating a clause integrated in the model contracts or in the general deliverance conditions [30].

Coding the international commercial usages.

The feature of unwritten practice of the international commercial usages offers them a certain degree of imprecision and incertitude which may create them certain testing difficulties by the party invoking them. Certain aspects determined the consideration of the codification of the international commercial usages, considering the fact that it provides clarity, precision and stability to the norms [31] and removes the possible different interpretations of the unwritten rules applied to international trade. Besides, the creation of an adequate juridical system that, by uniformity and harmonization, could overdraw the difficulties and incertitude stopping the commercial relations of exchange, is a *sine qua non* condition for guaranteeing and developing the international trade [32]. An important role in the uniformization activity of the customary law of international trade belongs to the UNO specialized organisms [33], especially the United Nations Commission for International Trade Law (UNCITRAL) [34] and the United Nations Conference for Trade and Development (UNCTAD) [35], the Chamber of Trade and Industry of Paris, the World Trade Organization [36] and the International Institute for the Unification of Private law (UNIDROIT)[37], which elaborated a series of regulations in order to code the international commercial usages.

Conclusions.

The varied and multiple aspects of the international commercial relations and also their dynamics make their national regulations and international conventions not able to cover all the litigations situations emerging between the participants to international trade. As the usages are the most direct expression of the activity of the participants to international trade, they have a greater capacity to adapt to the new conjunctures emerged in different trade fields, and their role is to cover the legislative and contractual lacunas [38]. Besides, the parties often cannot stipulate in the contracts they sign, all the situations emerging during the development of the commercial operations [39]. In the second place, most of the national norms applicable in international trade are not proclaimed in order to especially regulate the juridical reports emerging in this activity field, but they are regulations of common law which are not always adapted to the particularities of international trade, determining the international commercial usages to consecrate certain uniform common solutions at the level of the national law systems [40]. All of these are able to spotlight that the emergence of the international commercial usages was determined by the practical needs of international trade [41] and that, in the conditions of the significant and fast development of international trade, as a consequence of globalization, the international commercial usages will further have an important role. In this context, it must be said that commercial usage uniforms made under the International Chamber of Commerce in Paris – INCOTERMS (ex. Free on Board (FOB), Delivered at Frontier (DAF), Delivered Ex Quay (DEQ), Ex Point of Origin, Free Alongside Ship (FAS), Cost Insurance Freight (CIF)) are widely used in international commercial contracts concluded by Romanian companies with foreign natural or legal persons because it gives those who use them an important legal certainty, these rules being characterized by a complete, explicit and detailed determination of the obligations of the parties in international commercial contract which excludes or reduces uncertainty driven by the diversity of interpretations given the same commercial terms in different countries[42] given the existence of conflicts of cultures [43].

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