Behind every mask… is another mask – structural considerations on trade usages in international commercial law – dissolving some confusions

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Abstract

It is recognized for millenniums already that outside of the written and codified law, custom can also function as a source of law if certain criteria are fulfilled. Even though modern lawmaking in civil law controls the possible situations when usages can intervene, in case of international commercial law the application of usages is much wider. As international trade was growing in the past century in an unprecedented manner, the number of international transactions grew exponentially. Also, the field of international commercial law consists mostly of soft-law sources due to the fact that states hardly obtain a consensus in regulation. Therefore, the usage created by the general practice of actors of a given field, and also the practice which is not based on contractual provisions between trading partners shall be taken into account. The structure of usage remained mostly the same for centuries, but due to that, this consuetudo might have fallen into desuetude. The problem with these is the fine line that exists between custom and usage, the existence of a usage and a practice which is unable to act as a source of law. We only see the mask – and behind every mask... is another mask.

Keywords: *trade usages, international commercial law, practice, implied terms, INCOTERMS, conflict between usage and practice.*

JEL Classification: K12, K15, K22, K33

1. Introduction

The aim of this article is to introduce a more suitable structure of trade usages[2] in international commercial law dispute resolution and to clarify some confusions regarding trade usages, which can be confronted in different awards of courts and arbitral tribunals, or in the doctrine. If we take a historical perspective, usages were most often defined as social practice with long-term repeatability and continuity (*longa, inveterata, diuturna consuetudo*), and the belief that such social practice has to be respected under the law (*opinio juris sive necessitatis*)[3]. Things

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[2] The terms 'trade usage', 'usage', 'commercial practice' and 'custom' will be used interchangeably. For an analysis which differentiates between the terms 'custom' and 'usage', see Kadens, Emily, The *Myth of the Customary Law Merchant*, Texas Law Review, Vol. 90, 2012, p. 1163 et seq.

[3] Dragoș Alexandru Sitaru. *Dreptul Comerțului Internațional. Tratat. – Partea Generală*. Ed. Universul Juridic. Bucharest, 2017, p. 141. The author distinguishes between 'normative' and

have changed, and consequently it is questionable whether such structures are able to answer the realities and challenges faced by judges and arbitrators rendering decisions in international commercial disputes.

The second section of the article presents a structure more suitable to these realities, as well as a brief review of the situation of usages in trade. The third section mentions a quasi-common misunderstanding in the domain of ICC Incoterms[4], and a possible interpretation to avoid that misunderstanding. The fourth section contains the necessary delimitations between implied terms and usages and considers the conflict of usage and party-practice, while the fifth and final section argues against any understanding of general principles of law and trade as usages.

2. The structure of usages in international commerce – premises of a theory

2.1 National framework

In the framework of international commercial law, as a branch of law, trade usages are widely recognized. Taking into account the formality of international public law towards that phenomenon[5] and the different orientations of states through their national laws or legal traditions, it is unquestionable that usages got the most impactful normative role in international trade[6]. Professor Katz explains this through the fact that substantive interpretation, opposing to a more formalistic approach, has comparative advantages in the setting of international commerce[7].These advantages include things such as (i) a stronger party autonomy[8] which implies the possibility to choose the governing law[9] or the venue of the

'conventional' usages, with *opinio juris*being the defining factor to decide if a usage is normative or conventional. Under Article 9(2) of the CISG, it is ambiguous whether such 'conventional' usages can apply, in lack of any subjective element.

[4] International Commercial Terms, published by the International Chamber of Commerce. For further details about Incoterms rules, see https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/, last accessed at December 3, 2019.

[5] See Anthony a D'Amato, *Wanted: A Comprehensive Theory of Custom in International Law*, Texas International Law Forum, Vol. 4, 1968, pp. 28-41. About international customary law see also Bernstein, Lisa E. and Parisi, Francesco, *Customary Law: An Introduction*, Economics of Customary Law, Edward Elgar, 2013; Minnesota Legal Studies Research Paper, No. 13-22. The document is available online at SSRN: https://ssrn.com/abstract=2377714, last accessed at November 18, 2019.

[6] For some reasons see Hernany Veytia, *Driving Forces Behind Trade Usages in International Trade*, the document is available online at http://www.cisg.law.pace.edu/cisg/biblio/veytia.pdf, last accessed at November 18, 2019.

[7] Katz, Avery Wiener, *The Relative Costs of Incorporating Trade Usage into Domestic versus International Sales Contracts: Comments on Clayton Gillette, Institutional Design and International Usages Under the CISG*, Chicago Journal of International Law: Vol. 5: No. 1, 2004. p. 185.

[8] On the concept of party autonomy, see Alina Oprea, *Observaţii privind principiul autonomiei voinţei în dreptul internaţional privat al contractelor*, Revista română de drept privat, Issue 5, 2012, passim.

[9] See Gary Born, *International Arbitration: Cases and Materials*, Second ed., Wolters Kluwer, 2015. p. 983 et seq.

litigation, (ii) a decreased burden on parties when presenting context evidence which means a lower cost, (iii) different enforcement mechanisms such as letters of credit and (iv) high fixed cost of litigation[10].

Before analyzing the context of international commerce, there is a need to mention some of these statal orientations. On the one hand, we have regulations such as the Uniform Commercial Code in the United States, which defines trade usages (and also practice of the parties, through the course of a performance, or a course of a dealing)[11] and establishes it as an important source of law. As it is stated by Professor Chen, „Section 1-205 eliminates the need to prove *opinio necessitatis*", but the Code „retains the traditional requirement of reasonableness."[12] Trade usage under the UCC shall be regularly observed, but in contrary with the common law tradition, it replaces the criteria of universality with that of „regularity of observance".[13]

In case of the United States, we have to mention the ongoing debate between the plain meaning rule and the incorporation strategy. As it is stated by Professor Gillette, plain meaning is "a highly formal formalistic strategy that considers common understandings (…) independent of [its] context"[14]. The latter, in exchange, "incorporates context and commercial custom in filling gaps and defining terms"[15]. One of the most prominent supporter of the plain meaning doctrine, Lisa Bernstein underlines, that even if unwritten usages exist, and their existence can be proved, there are a number of reasons for not taking into account such usages[16]. Although, it is argued by Professor Gillette[17], and Professor Katz[18], that trade usages are more suitable in international commerce, than in case of domestic transactions[19].

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[10] Katz, Avery Wiener, *op. cit.*, p. 186 et seq.

[11] See Section 1-303 of the UCC, available online at: https://www.law.cornell.edu/ucc/1/1-303, last accessed at December 1, 2019.

[12] Chen, James Ming, *Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant*, Texas International Law Journal, Vol. 27, 1992. p. 111.

[13] Ibid, p. 110 and footnote no. 121.

[14] Gillette, Clayton P., *The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG*, Chicago Journal of International Law: Vol. 5: No. 1, Article 12, 2004, p. 158.

[15] Ibid. See also for arguments in favor of the incorporation strategy Kostritsky, Juliet P. *Judicial Incorporation of Trade Usages: A Functional Solution to the Opportunism Problem*. Connecticut Law Review, vol. 39, no. 2, 2006, passim. See also Gillette, Clayton P. *Harmony and Stasis in Trade Usages for International Sales.* Virginia Journal of International Law, vol. 39, no. 3, 1999, passim.

[16] See for such a list of reasons Bernstein, Lisa. *The Myth of Trade Usages: A Talk.* Barry Law Review, vol. 23, no. 2, 2018, pp. 126-127. Also, for a detailed analysis of the issue based on jurisprudence, see Bernstein, Lisa E., *Custom in the Courts*. Northwestern University Law Review, Vol. 110, No. 64, 2015; University of Chicago Coase-Sandor Institute for Law & Economics Research Paper, No. 743. The document is available online at SSRN: https://ssrn.com/ abstract=2711831, last accessed at November 18, 2019.

[17] Gillette, Clayton P., *op. cit*., p. 173 et seq.

[18] Katz, Avery Wiener, *op. cit.*, p. 185 et seq.

[19] It has to be mentioned, that in the international setting, the traditional solution is the incorporation strategy, while there are instances that the parties contractually exclude any applicable usage and extraneous evidence, just the contract and the party intention – these are the so called four corner clauses.

Remaining with common law systems, we should mention the preoccupation of English courts in recognizing trade usages, with the House of Lords stating that usages have a normative character even in the case of a party's lack of knowledge[20].

In France, it is known that usages are traditionally accepted[21], and this situation persists even after the modifications in 2016. As it is stated in Article 1194 of the French Civil Code (previously article 1135), the parties are obliged „also to all the consequences which are given to them by equity, *usage* or legislation."[22] We can also mention the Romanian civil code[23], which in article 1, similarly to the first article of the Italian Civil Code[24] and without defining usages, mentions usages expressly as a source of law. On the other hand, in the case of Germany and Austria, the doctrine is more restrictive with respect to the acceptance of usages[25], and so are the legislations. In case of Austria, Art. 10 of the AGBG limits the applicability of usages only to the causes expressly determined by the law. Although there is a rule in the case of professionals, article 346 of the UGB, which extends the applicability of commercial practice. The German Commercial Code, art. 346 of the HGB, states that „due consideration shall be given to customs and usages that prevail in commercial practice (...)"[26]. But as Professor Dedek states: „From such a perspective, the concept of Verkehrssitte - and thus also the concept of trade usages - operates just as the concept of 'good

[20] See House of Lords, Comptoir d'Achat et de Vente Belge SA v. Luis Ridder Limitada, 1949, AC 293, in *DCFR – Full Edition* (C. Von Bar, E. Clive eds.), Sellier, München, 2009, vol. I, p. 141.

[21] Étienne-Ernest-Hippolyte Perreau, *Du Rôle de l'habitude dans la formation du droit privé*, L. Larose and L. Tenin, Paris, 1911. p. 261 et seq. Also, Valery, Jules. *Coutume Commerciale*. Revue Critique de Legislation et de Jurisprudence, Vol. 44, p. 425 et seq.

[22] The translation can be found online at https://www.trans-lex.org/601101/_/french-civil-code-2016/, last accessed at December 1, 2019.

[23] See for more details regarding usages in the Romanian Civil Code Ionuț Florin Popa, *Ierarhia surselor dreptului în noul Cod civil: rolul uzanţelor*, Revista română de drept privat, no. 3, 2013, pp. 51-64. For some application of usages, see also Gheorghe Piperea, *Contracte și obligații comerciale*, Ed. C. H. Beck, Bucharest, 2019, *passim*; Liviu Pop, Ionuț Florin Popa, Stelian Ioan Vidu, *Curs De Drept Civil. Obligațiile*. Ed. Universul Juridic. Bucharest, 2015, *passim*; Laurent Aynes, Philippe Malaurie, Philippe Stoffel-Munck, *Drept Civil. Obligațiile*, Ed. Wolters Kluwer, Bucharest, 2010, pp. 194-195; Paul Vasilescu. *Drept Civil. Obligații.* 2nd ed., Ed. Hamangiu. Bucharest, 2017, *passim*.

[24] It is also interesting to note that Article 1 (3) and the second sentence of 1 (4) also have a correspondent in the Italian Civil Code – article 8 and 9, respectively. Also, it must be mentioned that in case of the Italian Law, we have the criteria that the parties believe that the usage is legally binding. See Galgano, Francesco. *Diritto civile e commerciale.* vol. I., Padova, CEDAM, 2004. p. 69 et seq.

[25] Ionuț Florin Popa, op. cit., p. 55. See also Dedek, Helge, *Not Merely Facts: Trade Usages in German Contract Law*. Fabien Gélinas (ed), *Trade Usages and Implied Terms in the Age of Arbitration*, Oxford University Press, 2016, passim. ("The German position was—and, to a certain degree, is still—characterized by the idea that the normative ambivalence of usages is poorly captured by any one half of the dichotomy of factual is and legal ought: that they are rather fact and, at the same time, a special kind of 'non-legal' ought.").

[26] Idem, p. 11.

faith' does, that is as a normative standard in the judicial creation of the 'objective' meaning (...)."[27]

2.2 International framework

International Commercial Law materials can be divided into three categories: international treaties or conventions, sets of norms created by non-governmental organizations, and arbitration rules[28].

In the first category the CISG[29] should be mentioned, which touches the topic of usages in its art. 9.[30] It must also be taken into consideration that even though commercial practice (and this time we can also think about party-practice or 'course of dealing' and trade usages) plays an impactful role in the regulation of transactions under the CISG, there is no definition given to it. However, the concept should be autonomously interpreted without any analogy from national law, its rules and orientations[31]. For the application of a custom, the CISG offers a subjective and an objective criteria[32]. The subjective criteria states that contracting parties „knew or ought to have known" the usage. The objective criteria or 'test'[33] entails that such a usage is „widely known to, and regularly observed by" the players in a given industry. Professor Gélinas states that a usage is not necessarily an international trade usage, it is not excluded that "it may apply to all types of commercial contracts in all trades and regions".[34] There is no provision regarding

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[27] Idem, p. 14. For an analysis about the situation of usages in German Law, See Phillip Hellwege, *Understanding Usage in International Contract Law Harmonization*, American Journal of Comparative Law, No. 66, 2018, p. 144 et seq.

[28] For a brief history, see Gábor Szalay, *A Brief History of International Arbitration, Its Role in the 21st Century and the Examination of the Arbitration Rules of Certain Arbitral Institutions With Regards to Privacy and Confidentiality*, Analele Universității de Vest din Timișoara, Seria Drept, No. 2, 2016, pp. 6-16. Fülöp György: *A választottbíráskodás múltja és jelene – történeti előzmények és azok hatása a választottbíráskodás szabályozására*. In Kecskés László, Tilk Péter (Eds.), *A választottbíráskodás és más alternatív vitarendezési eljárások jogi szabályozásának alapjai.* PTE ÁJK, Pécs, 2018. pp. 38-48.

[29] United Nations Convention on Contracts for the International Sale of Goods, 1980. For a discussion on incorporating custom through the CISG, see Walker, Gregory C., *Trade Usages and the CISG: Defending the Appropriateness of Incorporating Custom into International Commercial Contracts*. Journal of Law and Commerce, vol. 24, no. 2, 2005. The document is available online at HeinOnline, last accessed at November 18, 2019.

[30] (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

[31] Graffi, Leonardo. *Remarks on Trade Usages and Business Practices in International Sales Law*. Annals of the Faculty of Law in Belgrade - International Edition, 2011, p. 105.

[32] For a tripartite criteria of usage-recognition under the CISG, see William P. Johnson, *The Hierarchy That Wasn't There: Elevating "Usage" to its Rightful Position For Contracts Governed by the CISG*, Northwestern Journal Of Int. Law & Business, Volume 32/2, 2012, p. 277.

[33] Idem, p. 107.

[34] Gelinas, Fabien, *Toward a Transnational Law of Trade Usages?*, YearBook on Arbitration & Mediation, No. 49, 2015, p. 52.

the criteria for the existence of the usage, but we can mention reasonableness, which is a general principle of the CISG, and therefore will have its place in the structure of commercial practice.

Professor Goode arguments in one of his articles that usage under the CISG „takes effect as an implied term of a contract", and highlights the fact that the Convention is consistent with an objective contract theory. That, in contrary with the subjective theory, interprets the provisions of a contract not as the parties intended, but „as a reasonable person would interpret (...)".[35]

In the second category, we have rules from the Unidroit Principles, and the Draft Common Frame of Reference, as it was accepted based on the Principles on European Contract Law. The Unidroit Principles regulates usages in Art. 1.9[36], keeping the reference to trade usages and party-practices as well in the first paragraph. In the second paragraph, we have the same rule as in art. 9 (2) of the CISG, but with major differences: in case of the Unidroit Principles, there is no subjective test regarding the knowledge of the parties of the custom, only the objective test remains but with an important addition. The norm states expressly that the reasonability of such usages are requested. In case of the Unidroit Principles, that reasonability is an objective condition, which is activated if the particular conditions of the trade make the usage unreasonable. It is also mentioned that they prevail over the conflicting provisions of the Principles, due to the fact that „they bind the parties as implied terms".[37]

The norm in the DCFR, art. II. – 1:104[38] does not present important differences compared to the Unidroit Principles, apart from a change in the objective criteria. With respect to that, there is no reference for a given industry or trade sector, and also a usage under the DCFR does not need to be 'widely known', but rather it has to be 'generally applicable' by players in the same situation as the parties. At first glance this may appear the same, but due to that difference the two test differ majorly. A usage that is widely known may be expressly excluded from a part of the contracts of a given field, an exclusion which does not trump at all its applicability. But if it is held under scrutiny from the point of view of 'general applicability', such practice by a part of the field may make a potential incorporation into the contract questionable, at a minimum.

Professor Mak argues that reasonability in the DCFR should have a subjective value making the usage binding. She states that the value in our case may be „efficiency, though one could also argue that contract law is based on a

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[35] Goode, Roy. *Usage and Its Reception in Transnational Commerical Law*. International and Comparative Law Quarterly, vol. 46, no. 1, 1997, p. 8. Cf. Gelinas, Fabien, *op. cit*., p. 53 et seq.

[36] (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.

[37] *Unidroit Principles of International Commercial Contracts*, 2010, Rome, pp. 27-28.

[38] (1) The parties to a contract are bound by any usage to which they have agreed and by any practice they have established between themselves. (2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable. (3) This Article applies to other juridical acts with any necessary adaptations.

broad range of other – moral, doctrinal or sociological – values."[39] It is also expressed that in the framework of the Common European Sales law, the problem of local usages in a cross-border transaction is not a problem of uniform application, but of know ability of these usages, and therefore there is a need for transparency.[40]

Furthermore, the difference between the CISG on the one hand, and the DCFR, the PECL and the CESL on the other should be highlighted. Professor Helwege argues that in the case of the latter the usage will apply „independently of the intent of the parties", thus, conferring to the usage a „normative force"[41]. The former offers support both for normative and contractual understanding of usages, with the majority of the doctrine sliding with that contractual understanding. And overall, „there is a trend toward the normative understanding of usage in international contract law harmonization".[42]

Arbitration rules most commonly deal with the overall applicability of usages only. The New York Convention[43] for example states in the last sentence of its Article VII that „In both cases the arbitrators shall take account of the terms of the contract and *trade usages*."[44]. The UNCITRAL Arbitration Rules also states in its article 33 paragraph 3 that „In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the *usages of the trade* applicable to the transaction."[45] Therefore, due to the fact that „arbitrators often seek solutions from commercial practice and trade usage"[46], there is a need to determine the criteria for such trade usage to become observable by the arbitral tribunal through the applicable substantive law.

2.3 The mask behind every other mask – structure in international commercial law

Hereinafter, based on the framework presented, the author is going to enlist and argument for the different criteria to be fulfilled in order to have usages recognized under international commercial law, and the related dispute resolution. Due to the fact that the resolution of disputes can take the form of litigation or

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[39] Mak, Vanessa, *According to Custom...? The Role of 'Trade Usage' in the Proposed Common European Sales Law (CESL).* Tilburg Law School Legal Studies Research Paper, No. 02/2014, p. 7.

[40] Idem, p. 16.

[41] Phillip Hellwege, *op. cit.*, p. 142.

[42] Idem, p. 140. For a Doctrinal perspective over contractual and normative understanding, See p. 150 et seq.

[43] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

[44] Emphasis added. The text is accessible at http://www.uncitral.org/uncitral/en/uncitral_texts /arbitration/NYConvention.html, last accessed on December 1, 2019.

[45] Emphasis added. UNCITRAL Arbitration Rules are accessible online at http://www.uncitral.org/ uncitral/en/uncitral_texts/ arbitration/2010Arbitration_rules.html, last accessed at December 1, 2019.

[46] Larry A. DiMatteo, *Soft law and the principle of fair and equitable decision making in international contract arbitration*, The Chinese Journal of Comparative Law, 2013, p. 4. doi:10.1093/cjcl/cxt013.

arbitration, and the many possibilities for the governing law implies that such set of criteria should only be taken into account orientatively.

i) *consuetudo* – repetability and continuity. The criteria of repeatability and continuity is an element of common sense in a custom's structure. It is accepted in the majority of the doctrine that this is an essential trait of a usage[47]. The attribute 'long-term' is omitted intentionally due to the fact that under the current international trade, there are way more transactions happening in a fraction of the time frame that was needed in the past. Therefore, for the existence of a usage, we only need the repetitive play and its continuity for a certain period. That's the reason why it was stated that the importance of time in the formation of commercial usage is relative[48]. This means that repeatability is not the determining criteria of a usage – in determining whether the time frame was enough to create a conduct respected by the majority of the players, we should take into account the other criteria. For example, in the case of a stock market, where there is a high level of transparency and the incentive to follow the reasonable actions, a commercial practice can be created in a matter of weeks or even days. While in other industries having lower transparency there is a possibility that a habitual action of a player becomes known and followed by others only after a long period of time.

ii) legality. This means that the usage is not contrary with any so-called 'lois de police' or 'jus cogens' norm. Furthermore, whether the usage can function *contra legem*, should rather be an exception than a rule. The exception would occur in the case when a suppletive norm is disregarded due to the incorporation of a usage. Usages are efficient sources of law, but only if the norm-making activity is reduced. Considering the 'juridicialization' of international commercial law, which means that over time there are more and more international instruments regulating different aspects of trade, the matter where usages can intervene is getting more and more reduced.

iii) reasonableness – an underrated test. Reasonableness appears frequently as a requirement in sets of norms, and it is also accepted by some authors.[49] Reasonability from the author's point of view should not be objective, as it is for example under the Unidroit Principles, but a subjective analysis. It was stated by Charpentier that *opinio juris* should be a sentiment of utility of the principle rather than a conviction of its mandatory nature[50]. Therefore, the subjective criteria

[47] See Ionuț Florin Popa, op. cit., p. 54; Dragoș Alexandru Sitaru. *op. cit*., p. 140; Ioan Macovei. *Tratat de Drept al Comerțului Internațional*. Ed. Universul Juridic. Bucharest, 2014, p. 50; Laura Magdalena Trocan, *Considerations On International Commercial Usages*, Annals of the „Constantin Brâncuși" University of Târgu Jiu, Economy Series, Issue 5, 2013, p. 91. (The author states that usages in international commerce "contain an objective element, namely they constitute a social practice representing an ensemble of juridical documents (sic!) and material facts", making a confusion between juridical acts and juridical documents. It must be presumed, that it is just an error in translation. Sadly, there are not just multiple mistakes of that kind, the author also makes serious confusions regarding 'conventional usages', as opposed to normative usages).

[48] Ioan Macovei, *op. cit*., p. 50.

[49] Ionuț Florin Popa, *op. cit*., p. 50. Vanessa Mak, *op. cit*., p. 7.

[50] „un sentiment de l'utilité des principes et non pas une conviction de leur valeur obligatoire." See for the whole argument and other considerations, Charpentier, Jean. *Tendances de L' Élaboration*

should be regarded as the following: the parties knew our ought to have known about the action or inaction requested by the usage and perceived that it contributes alternatively either to the efficiency, equitability, or prevents the obligation from becoming impossible to perform, or believed that it has such a thing as its fundament. Of course the parties can perceive that the action was required with another scope, but the value behind that scope shall be analyzed prudently by the judge or arbitrator deciding the dispute.

Having as a premise the conclusion of Professor Hellwege, who concludes that „[t]he normative understanding of usage is from a theoretical perspective unsound, it leads to doctrinal problems and inconsistencies, and it is from a historical perspective a "rudiment."[51], the author is inclined to believe that a normative understanding disregards party autonomy, causes issues concerning the knowability of a usage, and can make inexplicable deviations from the will of the contractors, without making the transaction more efficient. Objectively interpreting a contract is one thing, but understanding usages normatively is quite another. If we recognize reasonableness as an objective criterion, such as Art. 1.9 of the Unidroit Principles based on the commentaries, then party autonomy may lose its relevancy due to the considerations of a judge or an arbitrator that such usage is not reasonable. It should be inherent in case of trade to consider such thing unacceptable.

A reasonable usage means also that the parties were following the conduct due to the fact that they considered it as an added value to the contract, not because they had some strange beliefs that such a conduct is mandatory under the law. Some authors recognize such criteria, such belief[52]. Goode heavily criticizes the belief of a legally binding usage (*opinio juris*), and states that „if the belief is true it is unnecessary, whereas if it is false that is a strange basis for giving the practice binding force.", also claiming that such a rule would make it nearly impossible for a new usage to be created[53]. The same author reaches a similar conclusion: „it is based either on circularity or on paradox, for it presupposes a belief in an existing legal duty which if correct would make the belief itself superfluous and if erroneous would convert non-law into law through error."[54]

The author shares the view that there is no room for such criteria in the structure of a commercial practice. If we think for example of multinational companies, with vast legal departments, it is quite ridicule to sustain either that such party believing that a conduct is mandatory without anything implying that[55], reaching a false legal conclusion (which is, let's say, not happening that frequently

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du Droit International Public Coutumier. In A. Pedone (ed.), *L'Elaboration du Droit International Public*, Societé Français pour le Droit International, Paris, 1975. pp. 105-131.

[51] Phillip Hellwege, *op. cit*., p. 174.

[52] See Dragoș Alexandru Sitaru, *op. cit*., p. 141.

[53] Goode, Roy. *Rule, Practice, and Pragmatism in Transnational Commercial Law*. International and Comparative Law Quarterly, vol. 54, no. 3, July 2005, p. 551.

[54] Goode, Roy, *Usage and its Reception*, op. cit., p. 9.

[55] The case when it has a legal fundament is not mentioned due to the fact that in this case we are not talking anymore about a usage, but about a norm. The argument, that some usages were expressly codified by nation states, and therefore they become normative usages cannot be met by anything else than hostility.

in this case), or that such company cannot invoke a usage, due to the fact that it was clear that a belief that such conduct is obligatory is totally inexistent. Also it is quiet weird to think about the 'normative usages' widely recognized, such as anatocism of bank accounts. It would mean that some merchants were practicing such thing knowing that it is not compulsory at all, then from a given point – nothing have changed, just that their conduct is widely and continuously repeated – they start to believe that they must comply with that conduct involuntarily. Some sort of legal amnesia?

To sum up, we need to reject in international commercial law a structure of usages containing *opinio juris sive necessitatis*, or anything similar. Reasonability implies the will of the parties to comply with the usage – but that is due to the 'reason' behind it, which is one that develops future trade relationships and increases efficiency in international transactions.

iv) widely known in a given industry or place. The fact that a usage is widely known in a given industry[56] (industry having a broad sense in that case, thus it can even contain trade fields which are situated on the frontier of two industries, viewed restrictively) or place (which can vary from a port, trade center, etc. to a continent, or it can even be global) refers to a general, collective character[57]. As it was stated above, that does not exclude usages which are applicable in the case of several types of commercial contracts, or are applicable globally. This criterion presupposes the reduction of uncertainty in probation of a usage.

The approach should be one similar to the greatest common factor in mathematics and informatics – we need to analyze the situation *in concreto*, extract the specifics of the given transaction from the background, taking into account that the burden of proof shall only include the smallest common subpart – for example, in the case of a transaction involving the sales of beverages through a port, it is enough if the reclamant demonstrates the existence either locally, at a given port, without a need to expand that proof to a larger scale, or either industrially, for the smallest common market possible, for example a national or regional usage.

3. To Incoterms, and beyond

3.1 Judicial and arbitral confusions

The rules published by the International Chamber of Commerce, Incoterms, are popular terms in international trading. They are usually considered by players of the field, if there is a need to agree upon the delivery of goods. As it is with such popular things, there is a confusion is the doctrine about the nature of such terms. Some authors are arguing that Incoterms are commercial usages[58],

[56] Larry A. DiMatteo, *International Business Law and the Legal Environment. A Transactional Approach, 3rd Edition.* Routledge, New York, 2016, p. 354.

[57] Ioan Macovei, *op. cit.*, p. 50. Ionuț Florin Popa, *op. cit.*, p. 54. Dragoș Alexandru Sitaru, *op. cit*., p. 141.

[58] See Tomáš Masný, *The UNIDROIT Principles on International Commercial Contracts as a tool to interpret and supplement the UN Convention on Contracts for the International Sale of Goods*. LL.M. thesis, Central European University, 2017, p. 66; William P. Johnson, *Analysis of Incoterms as Usage Under Article 9 of the CISG*, University of Pennsylvania Journal of International Law,

while others state that we are in presence of standard clauses[59]. The situation is a bit more complex, as it is going to be presented hereinabove.

First of all, Incoterms started as a codification process of international usages, and therefore, the essence of some terms are truly customs. But, it is known, that there are some details of these terms which went through modification by the ICC, with the intention to increase efficiency. That private law-making[60] resulted in clauses which not only state the mean of transportation, but regulate every aspect of the issue. Therefore, that increased level of specificity of the terms suggests that Incoterms are rather standard clauses. Even more, due to the fact that there are many terms, without the opt-in of the parties we cannot sustain that Incoterms are going to apply. Also, there are many editions of these terms, which implies a clarification regarding the edition taken into account by the contracting parties. These make it impossible to accept any term as a usage, and not as a standard clause. Nevertheless, these terms are that widely used, that we can sustain, that including Incoterms to settle transportation is a commercial practice. But, including Incoterms, and determining the exact Incoterm which is going to apply is not the same thing.

That is the paradox of these rules – the terms have customs as a source, but are standard clauses as a nature – yet, resorting to Incoterms in transportation is a usage in itself. It is held that Incoterms is an example of written usages, but we cannot accept such a thing in light of that. A codification[61] of usages is not compatible with unilateral modifications of such usages. For an example of codified usages, we can mention the 'Bibliothèque des usages'[62], a project lead by Pierre Mousseron and Aurélie Brès from the University of Montpelier.

Vol. 35, 2014. p. 390 et seq.; Emmanuel Jolivet, Les Incoterms: étude d'une norme du commerce international, Lexis Nexis, 2003, passim; Emmanuel Jolivet, Giacomo Marchisio, and Fabien Gelinas, *Trade Usages in ICC Arbitration*. Fabien Gelinas (ed), Trade Usages and Implied Terms in the Age of Arbitration, Oxford University Press, 2016, p. 215; Aleksandra Kiraca, *The Role Of Usages And Business Practice In The International Trade – Challenges And Controversies*, Journal of Sustainable Development, No. 22, 2019, p. 166; Dan Chirică, *Tratat de Drept Civil. Contracte Speciale. Volumul I.Vânzarea și schimbul,* 2nd ed., Ed. Hamangiu, Bucharest, 2017, p. 348; Laura Magdalena Trocan, *op. cit.*, p. 92.

[59] Ioan Macovei, *op. cit*., p. 54; Ionuț Florin Popa, *op. cit*., p. 62; Goode, Roy, *Usage and Its Reception*, *op. cit*., pp. 25-26; Graffi Leonardo, *op. cit*., pp. 112-115;

[60] For an exhaustive analysis of private rule-making, see Cafaggi, Fabrizio, *The Many Features of Transnational Private Rule-Making: Unexplored Relationships between Custom, Jura Mercatorum and Global Private Regulation*. University of Pennsylvania Journal of International Law, Vol. 36, No. 4, 2015.

[61] For some considerations about private lawmaking, see Cuniberti, Gilles, *The Merchant Who Would Not Be King - Unreasoned Fears on Private Lawmaking*, University of Luxembourg Law Working Paper No. 2014-7, 2012. For codification of commercial law in general, see Goode, Roy. *The Codification of Commercial Law*. Monash University Law Review, vol. 14, no. 3. 1988. Also, see Aleksandra Kiraca, *op. cit*., p. 165. There is no causality between the acceptance of usages by the 'economically stronger' entities, and their codification by international trade organizations, as the author would suggest. Also, the author frequently uses the word 'uzanses', which is, with all due respect, not an accepted word of the English language.

[62] The library is available online at https://bibliotheque-des-usages.cde-montpellier.com/bibliotheque-des-usages-definition, last accessed at December 2, 2019.

There are numerous decisions[63] in international commerce, when a court or arbitral tribunal clarified things referring to Incoterms as usages. Firstly, it must be stated, that incorporation or opt-in does not have as a ground article 9 (1) of the CISG, as it is sustained in the doctrine[64]. Due to the fact that Incoterms are standard clauses in nature, the ground of its application is party autonomy. It is also sustained that Incoterms may be incorporated through article 9 (2) of the CISG[65]. The opinion of the author is that the occasions when such an incorporation can be legally withheld are met rarely in the practice. There are some decisions which are reaching a correct result, but their ground is not totally acceptable[66].

There are occasions when a contract only contains a reference such as 'CIF' or 'FOB', or anything similar. If the parties did not determine expressly that they are referring to Incoterms, or the edition which is regarded by them when the agreement is concluded, a correct procedure takes 3 steps. First of all, there is a need to analyze the practice of the parties, and their course of dealing. If through that we can establish the use of Incoterms, or the edition previously taken into account, or through specifics of a previous performance we can presume all this, then the practice shall prevail. If there is no such practice between the parties, or it is not concluding, we should go to the second step.

Through the second step we should enlist the potential editions which contain the term accepted by the parties[67]. As it was already stated, the use of Incoterms might be regarded as a usage. Therefore if there is not any sign which implies a derogation, such as a reference to an autonomous or local interpretation, we should have a simple presumption in sense of using Incoterms. After the list is made, we need to exclude any edition in which the rules of the term are in an essential conflict with the contractual terms. After these editions are excluded, we can either have a *tronc commun* approach, or, we can give effect to the latest

[63] For some cases on this issue, see St. Paul Guardian Insurance Co. et al. v Neuromed Medical Systems & Support et al., 2002 U.S. Dist. Court Lexis 5096 (S.D.N.Y. 2002); China North Chemical Industries Corporation v. Beston Chemical Corporation, Dist. Court (Texas 2006), available online at: http://cisgw3.law.pace.edu/cases/060207ul.html, last accessed at December 2, 2019; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Award 406/1998, Unilex; Corte d'appello Genova (Italy), 24 March 1995, Unilex; Tribunal Cantonal du Valais (Switzerland), 28 January 2009, available online at: http://cisgw3.law.pace.edu/cases/090128sl.html, last accessed at December 2, 2019. BP Oil International and BP Exploration&Oil Inc. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador et al., U.S. Fifth Circuit, 11 June 2003, Unilex; ICC, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, ICC Arbitration Case 229/1996, June 5th 1997. Available at: http://cisgw3.law.pace.edu/cases/970605r1.html, last accessed at December 2, 2019. Also, ICC, Court of Arbitration of the International Chamber of Commerce, ICC Arbitration Case, 9333, 1998. Available at: http://cisgw3.law.pace.edu/ cases/989333i1.html, last accessed at December 2, 2019.

[64] Graffi Leonardo, *op. cit*., p. 112.

[65] Ibidem. See also Oviedo Albán, Jorge, *Usages and Practices in Contracts for the International Sale of Goods*, Vniversitas, No. 135, 2017, pp. 271-273.

[66] See Graffi Leonardo, *op. cit*., p. 114 and note 54 and 55 for a discussion.

[67] There are Incoterms which are present in some edition but are not included in the latest editions, or vice versa. There is a need to take into account all the potential editions with the given term.

edition in which such a term is regulated, keeping in mind that later editions are usually more specialized.

A third and final step has as a scope diligence, and there is a need to exclude any possible solution which, analyzing the circumstances of the contract *in concreto*, is manifestly impossible or contrary with it. Such a manifest thing can be the fact that a latest edition was published after the term was incorporated but before the agreement was concluded, or after the agreement was made. In case of a *tronc commun* solution such a manifest thing might be that the result is contrary with contractual terms[68].

Considering Incoterms as interpretative tools "even when the Incoterms were not incorporated into the contract explicitly or implicitly"[69] does not mean that the will of the parties is going to be altered by the court or arbitral tribunal. The authors problem with the jurisprudence cited above, is that it might give incentives for a mechanical solution in future disputes, applying Incoterms without a global analysis of the transaction. The strength of the 3 step process suggested above is, that it reaches a solution on a case-by-case basis, considering the circumstances and the actual intention of the parties.

3.2 FIDIC, JCT and NEC Contracts compared with Incoterms

There is a possibility to make a parallel between the situation of transportation terms and standard construction contracts, such as FIDIC[70], JCT[71] or NEC[72]. Due to the fact that a complete analysis of the two domain falls outside of the scope of this article, we will limit ourselves to stating only the essential similarities and differences.

First of all, in case of transportation terms, there is not any viable alternative to Incoterms clauses. We can mention the RAFTD[73], but due to the fact that it does not have recent editions, and it did not has an international character, it remained rather domestic, the primacy of Incoterms cannot be questioned on a global scale. On the other hand, if we take into account construction contracts, even though that there is a tendency to consider FIDIC contracts as trade usages[74], that cannot be accepted. Due to the fact that we are talking about standard contracts, even if we have a majority in case of one, if there are possible and viable

[68] There is a possibility that editions are not excluded after the second step, but the result of the rule-creating process from these editions cannot be upheld against a contractual provision.

[69] See Tribunal Cantonal du Valais (Switzerland), 28 January 2009. (supra note 65)

[70] International Federation of Consulting Engineers (’Fédération Internationale Des Ingénieurs-Conseils’), an international standards organization for consulting engineers. More informations are available online at http://fidic.org, last accessed at December 3, 2019.

[71] Joint Contracts Tribunal, is a limited company producing standard forms of contract and documentation. For more information, see http://jctltd.co.uk, last accessed at December 3, 2019.

[72] New Engineering Contract, is a system created by the Institution of Civil Engineers. It consists of standard contracts having as a basis good project-management. See https://neccontract.com, last accessed at December 3, 2019.

[73] Revised American Foreign Trade Definitions, trade terms which were created in 1919 and revised in 1941. They were published by the US Chamber of Commerce, but from 1985 they are no longer in use.

[74] See Tomáš Masný, *op. cit*., p. 66

alternatives, we cannot regard it as a commercial practice. At the maximum extent, we can give effect to FIDIC clauses due to a practice of the contracting parties, but in any cases not because an existing usage.

There is a decision in the jurisprudence referring to FIDIC clauses as usages[75], but its ground objectionable. It uses FIDIC terms as a proof of the existence of given usages[76]. Taking into consideration the fact that these contracts are the result of a private law-making process, it is questionable whether a FIDIC or any other standard contract term in itself can validly demonstrate the existence of an international usage.

Other than that, FIDIC, JCT and NEC are standard contracts, and not standard clauses. Incoterms are accessories of an international contract[77], settling transportation, and can only exceptionally have an existence in its own right. But through a cooperation between economic agents, a contract can also incorporate certain terms of FIDIC, JCT and NEC through practice, without an express incorporation. Such an example might be referring to a clause in a contract such as "FIDIC Red", after the two economic agent used a certain edition of these standard contracts in their previous transactions. All in all, the author wants to underline the fact that such standard contracts cannot create usages in international trade.

4. A clash of '*titans*' – the priority of usage or party-practice

A relevant question in connection with usages will be if they prevail over party-practice, if one is contrary with another. There are certain situations with different outcomes:

i) expressly incorporated usage and a contrary course of performance. In that case, the parties incorporate a given usage into the contract, but have a course of performance contrary to that usage. In that case, we have a contractual provision, and there is a need for a deeper analysis, based on the circumstances of the dealing. It is to be determined if the course of performance can be interpreted as a subsequent tacit modification of that clause, or just a deviation from a contractual provision, accepted by the other party. In the second case, the author has the opinion that such an acceptance cannot be considered as a waiver of the right to request contractual liability of the party disrespecting the contract.

ii) expressly incorporated usage and a contrary course of dealing. The difference between the first and the second case is slight, although with a major importance. We are not just having a single contract, but as the UCC section 1-303(b) defines, "[a] sequence of conduct concerning previous transactions between the parties to a particular transaction". On these terms, an incorporated usage was disregarded in every instance of the relationship. That causes, that the usage is going to be trumped, and the course of dealing prevails over the usage. That can also be argumented by the *venire contra factum proprium* doctrine. The practice

[75] ICC Case No. 14392 of 2009, where the sole arbitrator concluded, that even though the terms were not applicable, it can provide an indication of the type of contract concluded by the parties.
[76] Emmanuel Jolivet et. al., *op. cit*., p. 220.
[77] William P. Johnson, *Analysis of Incoterms*, *op. cit*., p. 391. See also note 29.

have created "[a] factual element of trust, which may not be frustrated"[78]. In that case, we have a conflict between party autonomy and the material facts of the parties.

iii) implied usage and a contrary course of performance. In that case, the parties did not regulate the given segment of their contractual relationship, but they also do not have a course of dealing, just a practice which occurred once. If a usage is going to be implied, that involves that the parties 'knew or ought to have known' it. In that case, the solution will be the same such as in case of section (i), with the same comments – a tacit and subsequent modification of that implied term can only result from the circumstances of the case, and normally we would have a violation of the terms.

iv) implied usage and a contrary course of dealing. The difference between section (ii) and this situation is the following: we do not anymore have party autonomy as the source of application of the usage, but the normative effect of it[79]. Therefore, the result remains the same, but with a different argumentation: if in case of a bargain and an incorporation of the usage, and a subsequent and repetitive disregarding of that, the practice creates a legitimate expectation, there is more so in case when that bargain is lacking.

5. Principles or just jacks of all trades?

When talking about usages in international commerce, it was frequently asked what can be regarded as a part of that notion. It is highlighted by Professor Gélinas, that there are two existing conceptions of usages in trade. The narrow conception is supposed to contain only contractual practices in a given industry, forasmuch as a broad conception would consist of normative practices (mainly rules and principles) also[80]. A deeper analysis of this issue exceeds the scope of this article, and therefore the author will only present the situation of general principles of international trade, and whether it can be interpreted as trade usage.

Professor Gaillard argues in one of his article on the subject, that the term 'international commercial usage' shall be restricted to practices which are usually followed in a determined branch of activity[81]. In his view it is inacceptable to regard general principles as usages as it causes an upheaval in the hierarchy of sources[82], and also it would not be consistent with different international arbitration

[78] For a similar opinion, see Graffi Leonardo, *op. cit*., p. 109 and note 32 and 33.

[79] For a presentation of the rationale behind that character, see Coetzee, Juana. *Trade Usage: Still Law Made by Merchants for Merchants*. South African Mercantile Law Journal, vol. 28, no. 1, 2016, p. 95 et seq..

[80] Gelinas, Fabien, *Trade Usages as Transnational Law.* Fabien Gelinas (ed), Trade Usages and Implied Terms in the Age of Arbitration, Oxford University Press, 2016, p. 257. The document is available online at SSRN: https://ssrn.com/abstract=2874597, last accessed at November 18, 2019.

[81] See Emmanuel Gaillard, *La distinction des Principes généraux du droit et des usages du commerce international*, in Etudes offertes à Pierre Bellet, 1991, p. 216.

[82] See Dalhuisen, Jan Hendrik, *The Sources of Law and the Hierarchy of Norms in Transnational Commercial and Financial Law. The Issues of Intellectualisation and System Thinking and the Role of the Public Interest*. About the author's view upon usages, see Dalhuisen, Jan Hendrik, Custom and its Revival in Transnational Law. Duke Journal of Comparative & International Law, Vol. 18, No. 339, 2008.

instruments[83]. The two arguments are considered by Gélinas that "generally fail to convince", as the second lacks basis, while such an upheaval causes problems only if we consider that international arbitration functions under the umbrella of international private law[84]. Gélinas is also pleading for a broad conception of usages.[85]

The same author presents two sets of juridical and arbitral decisions, some in favor of understanding general principles as usages[86], while some rejecting the idea *tale quale*[87]. The conclusion reached is "both interpretations contribute to a conception of usages"[88]. Although it is stated by Gaillard at another occasion, "General principles are sometimes viewed as rules generated spontaneously by a community of merchants, whereas, in reality, they are rooted in national legal systems."[89] The author is inclined to agree with the opinion of Gaillard. Even though, that such a broad conception cannot be rejected at all, it cannot contain general principles of trade. If general principles are considered usages, that implies things that a repetitive, continuous contrary practice might change the content of the usage, or that these practices shall be generally accepted in a given industry. These principles are in reality axioms of legal thinking, guidelines, which, if rejected, the whole system collapses.

6. Conclusion

Professor Glenn questions whether the reconstruction and marginalization of usage is followed by revivification[90]. It can be clearly stated, that custom, or trade usage has a meaningful role in international commerce, although, as most of the things, it is not without any academic debate.

Through the article the author presented a structure through which a usage of international trade can be analyzed. Such a structure or set of criteria needs to reject to the traditional subjective criteria of *opinio juris*, and give place to reasonableness – a concept which does not makes an objective interpretation of contracts inadmissible, but rather solves the problem in a way which is consistent with the realities of international commerce.

Some confusions regarding Incoterms were considered, with the presentation of a 3-step method, to resolve disputes arising of incomplete incorporations of these. Outside of that, there was a comparison made between standard contracts in construction, and trade terms. Alongside Incoterms, the problem of contrary practice and usage was presented, with a proposed solution for such cases. Finally, the author visited the problem of a broad or narrow

[83] Emmanuel Gaillard, *La distinction, op. cit*., p. 212 et seq.
[84] Gélinas, Fabien, *op. cit.*, p. 265.
[85] Idem, p. 265 et seq.
[86] Emmanuel Jolivet et. al., *op. cit*., p. 220 et seq.
[87] Idem, p. 228 et seq.
[88] Idem, p. 232.
[89] Emmanuel Gaillard, *General Principles of the Law in International Commercial Arbitration — Challenging the Myths*, World Arbitration & Mediation Review, Volume 5., No. 2, 2011, p. 162.
[90] Patrick H. Glenn, *The Capture, Reconstruction and Marginalization of "Custom"*, The American Journal of Comparative Law, Vol. 45, No. 3, 1997, p. 620.

understanding of usages, with the conclusion that even a broad understanding cannot contain general principles of international trade. The habits of the players can shape the international setting between given limits – and most often than not, *usages may choreograph the affair*.

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