Liber Amicorum

en l'honneur de

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THE ROLE OF TRADE USAGES
IN ICC ARBITRATION

H. ERCÜMENT ERDEM

Arbitration is the most preferred and trusted way of dispute resolution for international commercial transaction. In this context, ICC Arbitration Rules have an established and well-earned significance in international practice. Indeed, more than 17,000 cases have been resolved pursuant to ICC Arbitration Rules and some of these awards have been published in line with the will of the parties. In this way, solutions brought by ICC arbitration process to international commercial relations and contribution of ICC arbitration to international practice have been shared with parties involved in this practice.

Parties may choose the applicable law to arbitration or they may leave this choice to the initiative of the arbitrators.

There are several possibilities, if the parties make this choice. These are mainly (a) adopting the national law of one of the parties, (b) adopting a national law other than the national laws of the parties, (c) adopting the application of an international convention, or (d) agreeing not to be bound by any law but adopting the application of international trade usages and international customs.

If the parties do not explicitly or implicitly decide on an applicable law or if they leave this duty to arbitrators, the arbitrators shall determine the applicable law to the dispute before them. This approach is stipulated under article 17 of the ICC Arbitration Rules as follows:

"1) The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.

2) In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.

3) The Arbitral Tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.

In that case, either party may agree that the international trade usages can be applied to the dispute, or the arbitrators may decide that the applicable law is not appropriate for the dispute and choose to apply the international trade usages. The arbitrators should also evaluate the dispute pursuant to international trade usages in addition to the chosen applicable law.

Article 17/2 of the ICC Arbitration Rules leads the arbitrators to keep in sight
of the terms of the contract and the trade usages in all cases regardless of whatever legal rules would be applied to the dispute. Moreover, it should be noted that Article 17/2 places trade usages on the same level as the provisions of the contract concluded by the parties\(^1\). This shows the significance given to trade usages under ICC Arbitration. One should understand that once the ICC Arbitration Rules are incorporated in a parties’ contract, the trade usages also become a part of that contract and arbitrators are required to take into account the trade usages in deciding a case.

In international trade, the parties frequently feel that the courts do not understand the realities of the trade and commerce. Arbitrator’s mission is derived from the parties’ contract and they should give precedence to the rules established for the relationship, which are the trade usages\(^2\). This approach reflects the aim of the Article 17 of the ICC Arbitration Rules.

What should we acknowledge from the concept of “international trade usages”? The scope and definition of this concept would be discussed under Section II (A). However, we should state that the concept is rather wide and it is very hard to deal with all aspects of this concept under this article. Therefore, amongst various international trade usages we decided to focus on Incoterms\(^3\) under Section II (B) by taking into consideration that Incoterms\(^4\) 2010 would be in force as of 1 January 2010.

Lastly we would mention some of the arbitral awards which deal with international trade usages.

I. TRADE USAGES

A. Scope and definition

Trade usages are an essential source of international commercial law\(^5\). They can be defined as practices usually followed by international traders\(^6\).

A suitable starting point may be the following definition: “Usage may be broadly defined as a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business”\(^7\).

Schmitthoff summaries the trade usages as “a method of dealing or a way of conduct generally observed in a particular line of business with such regularity that it is accepted as binding by those engaged in that line of business”\(^8\).

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The usages have been defined by Goldman as "the behaviour of traders in international economic relations, which have gradually acquired by their generalization in time and space, that could strengthen their findings in the arbitration case law, or internal case law, the power of prescriptions which is applied without the related parties reference, since they do not explicitly or clearly object".7

Ricodeau identifies usage by three characteristics as it must "be ancient, constant, well known. Being ancient is to have the experience of time; being constant is to be certain that another disposition is not better; being well known responds to a collective utility".8

The trade usages can be classified into two categories. First category may consist of the usages that the parties established between themselves. In other words, usages that arise out of the parties’ own course of dealing.9 Second category includes the usages that are regularly observed or widely known in international trade.10 Likewise, the Vienna Convention on International Sale of Goods 1980 ("CISG") Article 9 stipulates that parties are bound by any usage to which they have agreed and by any practice which they have established between themselves. Moreover, pursuant to the same article parties are considered to have impliedly made applicable any usage which is regularly observed by them in international trade.

The UNIDROIT Principles of International Contracts Article 1(8) regulates the Usages and Practices and categorizes the trade usages in the same manner.11

However, some of the authors argue that there are differences between the usages of the parties, the trade usage, conventional usages, rule-usages and the codified usages.12 From this point of view, international trade usages aim a type of trade usages, which could be distinguished from conventional usages. Whereas the conventional usages are the result of repetition between the same parties of contractual practices, trade usages has an extensive scope. It corresponds to repetition of practices in a specific professional area, so merely to be part allows expecting that related usage is respected.13

This brings us to the questions that whether lex mercatoria are same with trade usages or what is the difference and/or relation between lex mercatoria and trade usages. It is for sure both of these concepts are related to each other in many

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8 Ricodeau, Bernard; La distinction des usages et des pratiques en droit économique français, thèse, Orléans 1983, p. 74; Jolivet, p. 367.
12 Jacquet, Jean-Michel/Delebecque, Philippe; Droit du commerce international, Dalloz 2000, p. 76.
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aspects. Both lex mercatoria and trade usages are related to customary business practices, it is not easy to clearly perceive the frontier between them. It can be said that the trade usages constitute the core\(^{14}\) and one of the main sources\(^{15}\) of lex mercatoria.

From another point of view, Derains/Schwartz argue that the trade usages should not be confused with the distinct concept of lex mercatoria\(^{16}\). According to these authors on one hand, "lex mercatoria" refers to legal rules arising out of international commerce. On the other hand, trade usages normally constitute a part of parties' agreement. In other words, parties expect their contract to be performed in accordance with usual practices observed in their area of business. Thus, Derains and Schwartz argue that lex mercatoria is external to the parties' agreement while trade usages are internal.

We should state that we do not agree with the above stated opinion\(^{17}\). In the light of the previous ICC Arbitral awards\(^{18}\), it can be said that lex mercatoria covers trade usages, established practices and general principles of international law and it can be applied by arbitrators in ICC arbitration within the scope of the referral to Article 17/2 of the ICC Arbitration Rules as to "trade usages".

Another concept which must be given consideration when elaborating on trade usages in international trade is the "trade terms". International trade is fast processing with a great numbers of transactions. Therefore, the merchants must be able to stipulate the contractual provisions in a quick and legally secure way\(^{19}\). In this respect, the trade terms aim to match the present needs of international business. They can be described as generated abbreviations, each one providing a certain catalogue of duties for the parties to the contract\(^{20}\). Trade terms indicate a certain way of interpreting contractual terms\(^{21}\). Consequently, they are - like trade usages - means of construction or interpretation of a contract, although they may not add terms to the contract. Moreover, they may be considered as definite and certain as to their respective contents\(^{22}\). However, they need explicit incorporation to be part of the contractual provisions. Thus, although they may be the product and outgrowth of commercial usage and trade usages, they may assist in defining their very contents; trade terms do not directly represent such

\(^{14}\) Fouchard, Philippe ; Ecrits. Droit de l'Arbitrage, Droit du commerce international, Comité Français de l'Arbitrage, 2007, p. 337.


\(^{16}\) Derains/Schwartz, p. 225.

\(^{17}\) Erdem, p. 34.


\(^{19}\) Drettmann, Anne-Katherin; "Would English law on trade usages benefit from adopting a more formal approach such as seen in other jurisdictions as well as in international conventions?", http://www.cisg.law.pace.edu/cisg/biblio/drettmann.html


\(^{22}\) Benjamin, par. 18-001.
usages. They are contractual provisions explicitly incorporated by the parties, thus they are contractually agreed expressions. Trade terms provide for international practice in commercial sales. Consequently, although they do not represent trade usages, they play an important role in commercial law and are closely connected to trade usages.

It is very important for all parties involved in a transaction to interpret the trade terms in the same way in order to use them properly. Since some trade terms are interpreted differently throughout the various jurisdictions and business sectors, the ICC published a general guideline for the interpretation of the most common terms. They came to be known as "INCOTERMS" and represent trade terms with standardized content.

**B. Incoterms**

1. **Purpose and scope of Incoterms**

   a. Purpose

   The purpose of Incoterms is, as stated by ICC "to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade. Thus, the uncertainties of different interpretations of such terms in different countries can be avoided or at least reduced to a considerable degree."

   Since international sales contracts are generally realized between the non-present parties from different nationalities, it is very important that how the parties interpret the terms and the abbreviations commonly used in foreign trade. By this regulation of Incoterms, at least the confusions and the interpretation differences will be overcome and the conflicts arising out of international trade will be reduced.

   b. Scope

   The scope of the Incoterms is limited to the rights and obligations of the parties' arising from the delivery of the sale of goods. Incoterms do not define the goods, but the goods should be understood as commodities.

   Incoterms do not regulate any contract other than sale. However, even in a sale contract, Incoterms do not cover all the contractual aspects. The topics that Incoterms govern can be gathered under four groups: (i) the delivery of goods, (ii) transfer of risks, (iii) division of costs, and (iv) obligations concerning the documents. Incoterms do not provide rules for the (i) payment and payment methods, (ii) transfer of ownership, (iii) variants, (iv) dispute resolution and (v) other issues relating to fulfillment of the contract.

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2. Incoterms® 2010

a. Need for changes

It is stated under the Foreword of Incoterms® 2010, since the creation of the Incoterms® rules by ICC in 1936, this globally accepted contractual standard has been regularly updated to keep pace with the development of international trade.

It is also stated that the continued spread of customs-free zones, the increased use of electronic communications in business transactions, heightened concern about security in the movement of goods and changes in transport practices required the ICC to revise the Incoterms® 2000.

Moreover, the urge of the traders to commonly use Incoterms rules for purely domestic sale contracts within the boundaries of countries or trade blocks like EU and the greater willingness in the United States to use Incoterms rules in domestic trade rather than the former Uniform Commercial Code shipment and delivery terms also motivated ICC to revise Incoterms in way that would enable the trade terms to be used also on domestic basis in addition to its previous use on international basis.

b. Main novelties

i. New Incoterms rules

First of all to mention, the number of Incoterm rules has been reduced to 11 from 13.

Two new rules that may be used irrespective of the agreed mode of transport being namely (1) DAT (Delivered at Terminal) and (2) DAP (Delivered at Place) replace the Incoterms 2000 rules DAF, DES, DEQ and DDU. Both of the new rules provide for delivery to occur at a named destination. In DAT, the delivery occurs at the buyer's disposal unloaded from the arriving vehicle. In DAP, it occurs at the buyer's disposal, ready for unloading. These new rules, like their predecessors, are “delivered”, with the seller bearing all the costs, other than those related to import clearance, where applicable, and risks involved in bringing the goods to the named place of destination.

ii. Classification of Incoterms

Under the previous version of 1990 and 2000 of Incoterms, the rules were classified under four groups as:

- “E” Group consisting of “Ex Works: EXW”;
- “F” Group consisting of “FCA, FAS and FOB”;
- “C” Group consisting of “CFR, CIF, CPT and CIP”; and
- “D” Group consisting of “DAF, DES, DEQ, DDU and DDP”.

Incoterms® 2010 prefers a completely different distinction and a classification system based on modes of transport each Incoterm could be used for. Under the new classification, there are two groups as:

- Group 1: Rules for any mode or modes of transport consisting of EXW, FCA, CPT, CIP, DAT, DAP and DDP; and
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- Group 2: Rules for sea and inland waterway transport consisting of FAS, FOB, CFR and CIF.

The first group includes the seven Incoterms® 2010 rules that can be used irrespective of the mode of transport selected and irrespective of whether one or more than one mode of transport is employed.

In the second group, the point of delivery and the place to which the goods are carried to the buyer are both ports. Under FOB, CFR and CIF all mention of the ship’s rail as the point of delivery in the previous versions of Incoterms has been omitted in preference for the goods being delivered when they are “on board” of the vessel. ICC states that this approach more closely reflects modern commercial reality and avoids the rather dated image of the risk swinging to and to across an imaginary perpendicular line37.

iii. Electronic communication

Incoterms® 2010 grant electronic means of communication the same effect as paper communication, as long as the parties so agree or where customary under Articles A1/B1 of each Incoterm. It is emphasized by ICC that this formulation facilitates the evolution of new electronic procedures throughout the lifetime of the Incoterms® 2010 rules38.

iv. Insurance cover

There are only two terms which provide an insurance obligation for the parties. CIP and CIF refer to Institute Cargo Clauses as to the coverage of the insurance. Institute Cargo Clauses were subject to a revision which started on 2006 and finalized on 2009. The Incoterms® 2010 rules take account of the Institute Cargo Clauses 2009.

The Incoterms® 2010 rules provide for information duties relating to insurance in articles A3/B3, which deal with contracts of carriage and insurance.

v. Security related clearances

ICC paid attention to the heightened concern about security in the movement of goods, requiring verification that the goods do not pose a threat to life or property for reasons other than their inherent nature in the new version of Incoterms®.201029. Therefore, ICC have allocated obligations between the buyer and seller to obtain or to render assistance in obtaining security-related clearances, such as chain-of-custody information, in articles A2/B2 and A10/B10 of various Incoterms rules.

vi. Terminal handling charges

The Incoterms® 2010 rules seek to avoid multiple payments of terminal handling charges by the buyer. Under Incoterms 2000 CPT, CIP, CFR, CIF, DAT, DAP, and DDP, the seller must make arrangements for the carriage of the

37 Incoterms 2010, p. 7.
38 Incoterms 2010, p. 8.
goods to the agreed destination. While the freight is paid by the seller, it is actually paid for by the buyer as freight costs are normally included by the seller in the total selling price.

The carriage costs will sometimes include the costs of handling and moving the goods within port or container terminal facilities and the carrier or terminal operator may well charge these costs to the buyer who receives the goods.

In these circumstances, the buyer would want to avoid paying for the same service twice: once to the seller as part of the total selling price and once independently to the carrier or the terminal operator. The Incoterms® 2010 clearly allocate terminal handling costs in articles A6/B6 of the relevant Incoterms rules.

vii. String sales

During the sale of commodities, goods in subject are frequently sold several times during transit “down a string”. ICC notes that a seller in the middle of the string does not “ship” the goods because these have already been shipped by the first seller in the string. The seller in the middle of the string therefore performs its obligations towards its buyer not by shipping the goods, but by “procuring” goods that have been shipped.

Incoterms® 2010 rules includes the obligation to “procure goods shipped” as an alternative to the obligation to ship goods in the relevant Incoterms rules.

c. Significant issues that must be taken into consideration when using Incoterms® 2010

Not only uniform interpretation of Incoterms is significant but also being well informed about Incoterms in order to be able to choose the appropriate Incoterm rules convenient for the particular transaction between them is rather important for the parties. Therefore, while incorporating the Incoterms 2010 rules into their contract, parties must carefully read the rules and the guidelines that are placed before each Incoterm. The mentioned guidelines explain the fundamentals of each Incoterm rule and try to assist the users to accurately and efficiently choose the appropriate Incoterm rule for that particular transaction.

It is also very important to specify the place or port as precisely as possible in order for chosen Incoterm rule to be able to work and to avoid the parties to face unexpected duties to be born on them.

As a last remark, as stated under Section II (B) (1) (b) above Incoterm rules do not regulate every aspect of a commercial relationship and do not give the parties a complete contract of sale. Therefore, parties should deal with through express terms in the contract of sale or in the law governing that contract as to issues not covered by Incoterms.

The parties should also be aware that mandatory local law may override any aspect of the sale contract, including the chosen Incoterms rule.

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16 Incoterms 2010, p. 9.
II. TRADE USAGES IN ICC ARBITRAL AWARDS

A. In the absence of the applicable law chosen by the parties

1) In the ICC Arbitral Award dated 1996 and numbered 850231, a Vietnamese seller and a Dutch buyer, acting through a French company as its agent, entered into a contract for the supply of rice. The parties did not include a choice of applicable law clause in the contract. However, the contract provided for the application of the Incoterms 1990 and of the Uniform Customs and Practice for Documentary Credits (UCP) 500.

The Arbitral Tribunal noted that, although the Contract contains no choice of law clause, it refers to international trade usages. Article 6 of the Contract, with respect to the price to be paid by the buyer, provides that Incoterms 1990 shall apply. Similarly, Article 13 of the Contract stipulates, as regards force majeure, that the clause of UCP 500 shall apply. Thus, it appears that the Parties have, to a large extent, agreed to submit their relationship to recognized trade usages such as the Incoterms or the Uniform Customs and Practice for Documentary Credits (UCP), published by the ICC. The Arbitral Tribunal considered that by referring to both the Incoterms and the UCP 500, the Parties showed their willingness to have their Contract governed by international trade usages and customs. The application of the relevant trade usages is consistent with Article 13(3) of the ICC Rules and with the arbitral practice.

For the foregoing reasons, the Arbitral Tribunal found that it shall decide the present case by applying to the Contract entered into between the Parties’ trade usages and generally accepted principles of international trade. In particular, the Arbitral Tribunal shall refer, when required by the circumstances, to the provisions of the CISG or to the UNIDROIT Principles of International Commercial Contracts, as evidencing admitted practices under international trade law.

2) In the ICC Arbitral Award dated 1989 and numbered 57132, a dispute arose between the Turkish seller and a Swiss buyer in a series of contracts for sale of goods concluded on FOB terms. The buyer disputed both prior to shipment and upon arrival, the conformity of goods covered under one of the contracts with certain contract specifications. The buyer treated the goods in order to make them more saleable and sold them at a loss. The seller demanded full payment and the buyer filed a counterclaim demanding compensation for direct losses, financing costs, lost profits and interest.

The Arbitral Tribunal held, pursuant to article 13(3) of the 1975 ICC Arbitration Rules, which allows the tribunal in the absence of a choice of law by the parties to determine the applicable law by applying the private international law rule that it deems appropriate, that the contract was governed by the law of the country where the seller had his place of business. In addition, pursuant to

31 http://www.unilex.info/case.cfm?pid=2&id=655&do=case
32 http://cisgw3.law.pace.edu/cases/8957131.html
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article 13(5) of the ICC arbitration rules, the tribunal decided to take into account CISG as a source of prevailing trade usages. As the applicable provisions of the law of the country where the seller had his place of business appeared to deviate from the generally accepted trade usages reflected in CISG in that it imposed extremely short and specific time requirements in respect of the buyer giving notice to the seller in case of defects, the tribunal applied CISG.

The Arbitral Tribunal stated that "there is no better source to determine prevailing trade usages than the terms of the United Nations Convention on the International Sale of Goods".

3) In the ICC Arbitral Award dated 1997 and numbered 88173, two Danish companies entered into an exclusive distribution contract for certain foodstuffs in Spain and Portugal with the Spanish company. The contract provided for a one-year notice of termination and allowed for termination without notice in the case of a substantial breach of contract. The circumstances for substantial breach are stipulated as court-ordered suspension of payment, "lack of ability" to pay and a "substantial modification in the ownership, organization or management of the distributor".

The parties also incorporated an ICC arbitration clause in the contract.

The above mentioned Danish companies were acquired by another Danish company. The new Danish principle decreased the time periods for payment and requested Spanish distributor to pay outstanding sums within five days. When the Distributor failed to do so, Principle notified Distributor that it was terminating the contract due to distributor's failure to pay the outstanding sums and changes in distributor's management, namely the dismissal of its general manager. The Danish principle subsequently concluded an exclusive distributorship agreement for Spain and Portugal with another Spanish company.

The Spanish distributor applied to ICC arbitration claiming damages for unjustified termination of the distribution contract.

The sole arbitrator issued a procedural order on the law applicable to the dispute and decided to apply CISG and its general principles, as presently elaborated in the UNIDROIT Principles on International Commercial Contracts to the dispute.

Within the procedural order, the sole arbitrator emphasized that the contractual relationship is globally defined as a sale; the arbitrator shall determine the appropriate law to settle the dispute, as he is also required to do by Article 13(3) of the ICC Arbitration Rules. According to established jurisprudence in arbitration practice, a criterion for the appropriateness of a provision is that provision's presence in the legal systems of both parties. This is the case of the CISG, which was signed in Vienna on 11 April 1980. This Convention entered into force in Denmark on 1 March 1990 and in Spain on 1 August 1991, that is, after the contract was signed but long enough for it to have been studied and

http://www.unilex.info/case.cfm?pid=2&id=659&do=case

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specifically commented upon in Spain. The reservation made by Denmark excluding the application of the second part of the Convention does not hinder, in the present case, the determination of a law which only applies to the formation of the contract.

The sole arbitrator also stated that according to Art. 3/2 of the CISG, it applies where there are both a supply of services and a sale, and the preponderant part of the obligations is based on the sale.

The arbitrator concluded that CISG and its general principles, as presently elaborated in the UNIDROIT Principles on International Commercial Contracts, are perfectly suited to the settlement of the present dispute.

It is also stated in the Procedural Order that the Danish principle tried to change the practices and usages between the parties. The mentioned efforts prejudiced the payment conditions and continuous balance between the deliveries of goods and their payment. Thus the arbitrator stated that according to Art. 9/1 of the CISG, the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. This rule has been extended to all international commercial contracts by the UNIDROIT Principles. Principle 1.8 provides that the parties are bound by any usage which they have agreed to apply and by any practice which they have established between them. The arbitrator considered that this provision is perfectly suited to the settlement of the dispute in subject. Consequently, a modification of previous practices requires that a proposal made by one of the contracting parties be accepted by the other party. However, in this case the Spanish distributor never accepted the modifications brought by the Danish principle to their ongoing commercial relationship. Thus, lacking an agreement between the parties, the arbitrator held that Spanish distributor’s continued application of the practices previously accepted at least tacitly by the parties does not constitute breach of the contract. Therefore, the arbitrator decided that the ground for termination of the contract based on the breach of contract is not founded.

4) In the ICC Arbitral Award dated 1994 and numbered 7331, a Yugoslavian seller and an Italian buyer concluded a contract for the sale of cow hides. The contract provided that the buyer would give the seller notice of the lack of conformity of the goods within one month of their arrival, together with an expert statement. Upon their arrival in Italy the goods were examined by the expert, who apparently found them defective. The buyer failed to give notice thereof to the seller. Subsequently the parties held a meeting in Moscow. The Russian supplier of the seller also attended this meeting. The parties agreed that the buyer would immediately pay part of the price due, while the remaining amount would be paid 30 days later. In the meantime the Russian supplier should inspect the goods in Italy. The Russian supplier failed to proceed with the agreed examination. The buyer then informed the seller that, due to the Russian

34 http://cisgw3.law.pace.edu/cases/947331ii.html
supplier's omission, it was released from the obligation to pay the remaining part of the price: in its opinion the Moscow agreement amounted to a true novation of the original obligation to pay, by virtue of which the Russian supplier assumed the debt, releasing the buyer. Finally the buyer sold the allegedly non-conforming goods.

Pursuant to Article 13/3 of the ICC Arbitration Rules, the arbitral tribunal held that the contract was governed by general principles of international commercial practice and accepted trade usages, and as such, by CISG, which reflects those principles and usages. Moreover CISG was applicable as the parties had their places of business in Contracting States. The Tribunal noted that as CISG is silent with regards to novation, this question is to be solved in compliance with the relevant principles and rules common to the domestic laws related to the dispute. A novation, in fact, differs from a mere modification of the contract, dealt with in Art. 29 of the CISG stating that a contract may be modified by mere agreement of the parties, replaces the common law rule requiring new consideration for a modification agreement to be binding, the doctrine of novation demands proof of the "animus novandi" of the parties.

In order to ascertain whether the parties actually had an "animus novandi", the Tribunal applied Art. 8 of the CISG, regarding the rules of interpretation generally accepted. In the Tribunal's opinion, notwithstanding its literal wording, Article 8 of the CISG can be applied to cases when negotiations result in the simultaneous signature of writing by the parties. The Tribunal, taking into consideration the wording of the Moscow agreement and all relevant surrounding circumstances as required by Article 8/3 of the CISG, held that the parties did not intend to novate their relationship releasing the buyer from its obligations under the original contract.

5) In the ICC Arbitral Award dated 1988 and numbered 5314, an American manufacturer and an Italian licensor entered into a patent agreement where the Italian licensor granted the US Manufacturer the exclusive right to manufacture and sell equipment in US and Canada based upon the patent and technology subject to the agreement. A dispute arose between the parties and both of them applied to ICC Arbitration.

The Terms of Reference provided for the arbitrators to decide on the applicable law. The Italian party requested the application of lex mercatoria, including the general principles of law and equity. On the other hand, the American party requested the application of American Law in general and Massachusetts Law in particular with reference to lex mercatoria, if necessary.

In their interim award the arbitral tribunal decided that American Law and Massachusetts Law would be applied as these are the laws of the place of closest connection. The tribunal referred to Article 13/3 and 5 of the ICC Arbitration Rules and stated that in all cases the arbitrators should take account of the

provisions of the contract and the relevant trade usages. Moreover, the arbitrators noted that \textit{lex mercatoria} takes its source in the trade usages and in principles generally applicable in international trade.

6) In the ICC Arbitral Award dated 1985 and numbered 4650\textsuperscript{36}, an American architect and a Saudi Arabian company concluded two service agreements for a building project in Jeddah Saudi Arabia including preparation of drawings, construction documents and negotiating with potential contractors. The parties agreed on ICC Arbitration to take place in Geneva. The agreements did not contain any provisions as to choice of applicable law. The American party referred the dispute regarding the amount of fee to ICC arbitration.

The arbitral tribunal rendered an interim award on the applicable law. The American party contended that Laws of State of Georgia or alternatively Swiss Law should be applied. Moreover, they contended that \textit{lex mercatoria} should apply by relying on "analogous international rules regarding the provisions of engineering services which suggest that the law of the place of domicile of the engineer rather than of the employer will govern the legal relations between the parties, in the absence of any express agreement to the contrary"\textsuperscript{37}.

The defendant company alleged that Saudi Arabian Law should apply. Defendant contended that there exist no such usages which have direct bearing on the provision of architectural services by an American architect for a project in Saudi Arabia. Thus, the defendant stated that neither Swiss law nor \textit{lex mercatoria} should be applied.

Arbitrators stated that it is not disputed that the parties did not make any choice of law in their agreement. Therefore, an actual agreement or concurrent intentions of the parties is missing. The arbitral tribunal was in the opinion that in order to apply Swiss Law or \textit{lex mercatoria} would require an agreement between the parties which in present case was not reached.

The tribunal decided that the services have been predominantly performed in Georgia and therefore, held the laws of State of Georgia to be applied.

It is interesting to note that, differently from the dominant opinion which do not require the agreement of the parties for the application of \textit{lex mercatoria}, this award, in my opinion wrongly, looked after the agreement of the parties. Even in the 1980's version of the ICC Arbitration Rules that should be applied in the case, the trade usages have an direct application regardless that the parties have expressly referred or not to them.

7) In the ICC Arbitral Award dated 1969 and numbered 1675\textsuperscript{38}, a Brazilian seller has agreed to deliver to a French purchaser a quantity of rice. The loading


\textsuperscript{38} Jarvin/Deanis, Recueil des Sentences Arbitrales de la CCI, 1974-1985, ICC Publication No. 433, p. 197
of the cargo has to take place after opening documentary credit by the purchaser. In case of delay in opening the credit, the seller could seek an extension of loading of the cargo. The purchaser was late in opening the credit, the seller estimated to terminate lawfully and unilaterally the contract. The buyer considers that such rescission is unfounded. The arbitrator decided in his favor.

According to the observation of Derains, the arbitrator shall establish a de facto classification. First the arbitrator consults the contractual provisions, and then when contractual provisions are silent, the arbitrator refers to international usages. Finally the arbitrator mention the solutions of domestic laws that solutions can only be applicable if no usage contradict them. In this way, arbitrator establishes a hierarchy between contract, usages and domestic law.

The arbitrator stated that according to the international trade usages, the delay in opening of a documentary credit does not constitute just cause for rescission of a contract of sale when the term in which the cargo have to be loaded is expired. It is also indicated that the solution of international trade usages is not without recalling those of the Uniform Law on International Sales of 1964 and therefore we notice a close relation between international trade usages and the Uniform Law.

8) In the ICC Arbitral Award dated 1976 and numbered 2583, the arbitrator was to determinate legal consequences of abandonment of a construction site in Libya by a Spanish company, in charge of electrification work. A contractor who had already cashed a part of the amount justified his attitude by certain failures of the master of structure. That party did not respect contractual term for opening letters of documentary credit and did not provide the contractor all the help to accomplish administrative formalities.

9) In the light of international trade usages, the arbitrator rejected the justifications of the contractor. Moreover, the arbitrator emphasized that that it is sufficient to refer to usages commonly accepted in markets in most countries and in Libya, to judge that only one or several serious failures of the master to his essential obligations justify abandonment of the construction site by the contractor.

B. In the presence of the applicable law chosen by the parties

1) In the ICC Arbitral Award dated 1995 and numbered 7645, there was a sale of crude metal. Parties agreed that payment was to be by letter credit which specified 30 September 1991 as the latest date for shipment and 20 October 1991 as its expiry date. The contract called for a performance bond with a 3% penalty for delay of shipment over and in excess of the last day of the tolerance period allowed for shipment. The shipment and L/C dates were changed to 15 October and 31 October 1991 respectively, with the expiry date of the L/C further changed to 15 November but no modifications made to the 15 October shipment date. Uncertainties surrounded the actual date of shipment. There were discrepancies between the document negotiated by seller's bank and the conditions of the L/C. It

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40 http://econw3.law.pace.edu/casec/95764541.html
later became clear that the goods were put on board ship on 20 October 1991. The vessel was involved in a collision, the ship grounded. Buyer terminated the contract in January 1992. Seller referred the dispute to ICC Arbitration.

The parties had chosen the law of Austria. During the proceedings, the parties concurred that the CISG is the applicable law.

In contract clause IV, under the heading "price" the parties referred to "CNF FO [port, country] (Incoterms 1990)". The Arbitral Tribunal stated that Incoterms 1990 do not include a CNF term. The parties however contested that the clause to which they intended to refer was the clause 'CFR' – 'Cost and Freight (named port of destination). Thus the Tribunal concluded that the parties, although referring to the Incoterms 1990, had still in mind the designation used for such clause in the prior Incoterms, namely 'C+F' or 'C and F' in extended terms, 'cost and freight' and held that the reference in the contract was indeed a reference to the clause 'cost and freight' – CFR – of the Incoterms 1990. Although in the Contract the reference to the Cost and Freight clauses is contained in the clause dealing with the price both parties in their briefs clearly assumed that the reference to the Incoterms clauses was not meant to define the price only but was to be understood as a general reference to the CFR terms applying also to the Contract in general. Thus, the arbitral tribunal stated that the wording of the contract has therefore to be seen in conjunction with the provisions of the CFR clauses of the Incoterms 1990, which are held to have been integrated in their entirety into the contract.

Another interesting part of the award is where the Tribunal referred to a 1954 English case, stating: "Even though in the present case the contract was not a C.I.F. but rather a C.F.R. contract, and although the applicable law is not the English law but rather the Vienna Convention respectively Austrian law, the opinion in the mentioned English case may be taken as an expression of an internationally recognized understanding of the C.I.F. clause. The C.I.F. and the C.F.R. clauses being of the same nature under the aspect here under review, what has been said relating to the C.I.F. clause is valid also with regard to the C.F.R. clause"41.

2) In the ICC Arbitral Award dated 1995 and numbered 832442, there was a contract between the claimant seller and buyer, which was a subsidiary of the respondent as regards to sale of magnesium. A dispute arose between the parties and it was brought to ICC Arbitration. The contract designated French Law as applicable, without specifying whether it was the intention of the parties that this was a reference to French Domestic Law or International French Law. The autonomy of the parties being a rule of private international law, their designation of French law in this case leads to the application of the CISG to avoid all uncertainty on this point, this interpretation was confirmed in the terms of reference by stating in summary that arbitration clause provides that the applicable substantive law is French Law and French Law applicable to international sales is CISG and therefore CISG should be applied.

41 http://cisgw3.law.pace.edu/cases/9583241.html
42 http://cisgw3.law.pace.edu/cases/9583241.html

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Within the evaluations as to substance of the dispute, the tribunal found out from the pleadings of the parties that there is no market price in the common sense of the term, that is to say, a price determined in a market like the London Metal Exchange or any other analogous institution and varying according to the offer and the demand, but a reference price which results from the annual negotiations between the Japanese steelworkers and the Australian and South African miners. It is that price which serves as a reference to all mineral professionals as miners and transformers and which will enable each and every one to fix their own contractual price. The parameters generally used are the cost of transport, the quality of the mineral, the quantities bought, the links between each of them which can result in linking clause establishing a relationship between the price of the finished product and that of the mineral.

These practices were standard and provide the guidelines for what should be the price of the mineral re-sold by Buyer. However, given the variety and the number of parameters used by these operators and notably the importance of the influence of the links between the miners and the transformers on the determination of the final price, which will ultimately be paid by the buyer, there is not one price. Therefore the tribunal proceeded at a more circumstantial analysis of the relations between the parties, to establish if despite the controversial drafting of the clause relating to price, a definitive price was determinable and capable of numeric expression. Thus, the tribunal considered that given the prior relations between the parties, the good relationship which appeared to exist at the time of formation of the contract as amicable tone of correspondence, exchange of information, drafting of an agreement significantly less detailed than other contracts produced by the parties in their evidence and the trade usages, it decided that “actual price paid” means the definitive actual price, after discounting by usage or negotiated. It is on the basis of the intention of the parties that the price can be determined.

3) In the ICC Arbitral Award dated 1998 and numbered 890641, an Italian manufacturer and a Liechtenstein distributor entered into a number of contracts with for the supply of pipes. After the first deliveries a dispute arose between the parties each accusing the other of having breached their obligations under the contract. The parties finally entered into a settlement agreement, however this time another dispute arose as to proper fulfillment of the settlement agreement. The arbitral tribunal held that, while the individual sales contracts concluded under the distribution contract were governed by the CISG, the settlement agreement was governed by Italian law. However, when deciding the merits of the case, the arbitral tribunal applied in addition to Italian Civil Code, the provisions contained in CISG and the UNIDROIT Principles, defining them as the "normative texts that can be considered helpful in the interpretation of all contracts of an international nature".

41 http://www.unilex.info/case.cfm?pid=2&id=663&do=case

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4) In the ICC Arbitral Award dated 2004 and numbered 12173\textsuperscript{44}, there was a Frame Contract for the sale and purchase of a certain product. Frame Contract provided that the agreement was governed by and should be interpreted in accordance with Swiss law and the disputes shall be referred to ICC Arbitration in Zurich.

A dispute arose between the parties and arbitration proceedings commenced in Zurich as provided for in the Frame Contract. The Arbitral Tribunal stated at the outset that the CISG applied to the Frame Contract because the Frame Contract was a purchase agreement. It noted that the principles of contract interpretation under the applicable Swiss law, and the CISG, require that the parties' common understanding as to the meaning of a specific provision be determined first. If no such common understanding can be established, then the express wording of the contract must be considered, and then the contract negotiations, both in respect of the individual provision and within the context of the agreement. Further, contract interpretation must consider the principle of good faith and take into account the rules of conventions and trade usages.

As regards the ICC Arbitral Award dated 1990 and numbered 5514\textsuperscript{45}, the parties applied to the arbitral tribunal about the difficulties of execution of an agreement by which a State has undertaken to provide funding to a company under French law, for the construction of an industrial facility. The agreement provided for an amount paid in advance in four parts but only two were paid by the State. The company decided to demand compensation between the amounts of interest on the first two parts and that of the third part. The State estimated that the non-payment of interest entitled him to claim the amount paid and the compound interest.

International trade usages are mentioned here about the interests. The tribunal determined a rule-based international trade usage and based on awards and doctrine on the acquisition of compound interest. However, it is not certain that usages are firmly established in this field. We can say that the analysis of arbitral jurisprudence reveals that the arbitrators have a reticence to allocate interest compounds. This is probably why the Arbitral Tribunal notes that the commercial usages require allocate compound interest "in the relevant case". Derains indicate that the solution should be recommended in terms of funding, only to allocating compound interest can achieve this aim.

5) In the ICC Arbitral Award dated 1998 and numbered 5346\textsuperscript{46}, the parties applied to the arbitral tribunal about a dispute in a consortium. The consortium was formed to execute a contract related to the extension of a cement factory in Egypt. The consortium aimed the construction of the factory from the beginning, the construction was not completed when the contract related to the extension

\textsuperscript{44} http://cisgw3.law.pace.edu/cases/94121731.html
\textsuperscript{45} Arnaud/Desains/Hascher; Recueil des Sentences Arbitrales de la CCI, 1991-1995, ICC Publications No. 553, p. 463
was signed. The main contract of 1982 contained a usual clause, which conditioned its entry into force in various administrative authorizations, the establishment of financing, a down payment and remittance of warranty for the well execution by the consortium. It is stated that if these conditions were not effectuated on December, 31 1982, the contract shall be null and void. These conditions were not effectuated as scheduled. The arbitrators presumed that the parties were unable, because of their experience, to be mistaken the scope of their contractual commitments. The arbitrators estimated that the parties paid great attention to the wording of their contract. But this is not the only role of the presumption of professional competence of international traders. It constitutes a reference to practice and usages that experienced parties can not ignore. As regards to Article 9 of the CISG, Arbitral Tribunal presumed that the parties drafted the contract with great attention but also they dominate completely the contractual technique concerning construction. Beyond the international trade usages trend to the security of transactions, the presumption of competence of international traders appears here as an anchorage point in the trade usages. The usage does not to interpret the will of the parties but to confront the validity of their contractual stipulations. Moreover, Article 13 paragraph 5 of the ICC Arbitration Rules requires arbitrators to estimate usages.

6) The ICC Arbitral Award dated 1997 and numbered 8873\textsuperscript{47} was made concerning a contract between a Spanish and a French company for the construction of works in a third country. Faced with a number of unforeseen difficulties which substantially increased the cost of the construction, the contractor requested the renegotiation of the contract invoking hardship according to Articles 6.2.2 and 6.2.3 of the UNIDROIT Principles. According to the contractor, although the contract contained a choice of law clause in favour of Spanish law, the UNIDROIT Principles were applicable as they represent veritable trade usages which the arbitral tribunal had at any rate to take into account under Article VII of the 1961 Geneva Convention on International Arbitration and Article 13(5) of the ICC Arbitration Rules.

In deciding against the applicability of the UNIDROIT Principles, the Arbitral Tribunal first of all recalled that, according to their Preamble, they are applicable only where the parties have so expressly agreed or where the contract refers to "general principles of law", the lex mercatoria or the like as the applicable law. As to the argument that the UNIDROIT Principles represent veritable trade usages to be taken into account even where, as here, the parties have chosen a particular domestic law as the law governing their contract, the Arbitral Tribunal held that the provisions of the UNIDROIT Principles on hardship do not correspond, at least presently, to current practices in international trade.

\textsuperscript{47} Arnaldez/Dersins/Hatcher; Recueil des Sentences Arbitrales de la CCI, 1996-200, ICC Publications 553, p. 300.
7) The ICC Arbitral Award dated 1997 and numbered 7518\textsuperscript{48}, the arbitral tribunal examined a dispute between an Italian claimant and a Portuguese defendant. Both parties had concluded two agreements under Portuguese law, one of whom qualified Consortium Agreement in order to effectuate works for a Portuguese client. The defendant alleged the invalidity of certain provisions of the Consortium Agreement, including those relating to the sharing of results, for the reason that they were incompatible with the dispositions of the Portuguese Law applicable to relevant type of agreement.

Although the parties submitted their agreement to Portuguese Law, the Arbitral Tribunal estimates first it is necessary to determinate the extent of choice of law in the case of an arbitration under the ICC Rules. The Tribunal stated that law applicable to the facts of present issue is the Portuguese Law. However under Article 13 paragraph 5 of the Rules of ICC Arbitration, the arbitrators shall in all cases estimate the stipulations of the contract and trade usages. One of these usages more established as a principle of public order, is the principle of \textit{pacta sunt servanda}. Thus, the Tribunal shall apply the stipulations of the agreement of the parties when these stipulations are not in conflict with mandatory rules of positive law Portuguese.

CONCLUSION

In the light of the arbitral awards examined herein above, we would like to state that trade usages are of utmost importance to arbitration because the application of trade usages provide arbitrators a more flexible area where they can evaluate the characteristics of every dispute relying upon the facts of the commercial relationship between the parties and the arbitrator own expertise in the particular business sector, rather then strict rules of law sometimes which do not exactly correspond to the nature of the dispute.

\textsuperscript{48} ArnaudZ/Derains/Hascher; Recueil des Sentences Arbitrales de la CCI, 1996-200, ICC Publications 553, p. 516.