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THE LEGAL REGIME OF INTERNATIONAL COMMERCIAL USAGES IN ROMANIAN LAW

Stănescu Șerban-Alexandru
PhD, Associate Professor at Faculty of Law, University of Bucharest, Director of the International Private Law and International Environmental Law Centre at Faculty of Law, University of Bucharest, Arbitrator for Court of International Commercial Arbitration of the, Chamber of Commerce and Industry of Romania, Lawyer in the Bucharest Bar
serban.stanescu@drept.unibuc.ro

Abstract

As a result of practice, usages are placed, in international trade, on the border between temptation and uncertainty. The temptation to resort to them is explained by the non-existence or, as the case may be, the lacunae nature of the applicable international regulations, as well as by the inadequate nature of the national regulations. The uncertainty is mainly determined by their unwritten character and, consequently, by the evidential difficulties.
In this context, the objectives of the present scientific approach propose the outlining of their legal regime, aiming, on the one hand, at their legal force, and, on the other hand, at identifying the means of overcoming evidential obstacles. The first perspective evoked aims to identify the legal basis for the application of customs, investigating in this sense the applicable legal system and the agreement of the parties. The second perspective, starting from the premise of applying usages, aims to find that written support that would give them predictability and certainty about the content.
The research is carried out starting from the provisions of the international conventions to which Romania is a party and, as a subsidiary, the Romanian law possibly applicable to the legal relationship with the title of lex causae.

Keywords: *The legal force of usages, The role of usages, The codification of customs Lex causae*

1. Introduction

International trade usages represent the practices of traders. They arose from their need to establish their own rules where state rules are silent or inadequate. It is enough for the applicable law to be permissive (in other words, not to regulate a certain matter by imperative rules, which do not allow derogation), for the addressees of the legal rules to become themselves legislators, setting up the regulatory framework necessary for the conduct of business in the way it deems appropriate.

However, in international trade, the terrain is suitable for such a non-state "work of legislation", given that the international regulations are not numerous (at least in the contractual area, if we exclude the sales and transport contract, we will encounter a total unregulated land) and often non-binding, allowing parties to waive their application or modify their effects. For example, art. 6 of the United Nations Convention on Contracts for the International Sale of Goods, adopted in Vienna on April 11, 1980 (hereinafter "the Vienna Convention (1980)")[1], provides that "the parties may exclude the application of this

[1] Romania acceded to this convention through Law no. 24/1991, published in the Official Gazette no. 54/19 March 1991.

convention or, under the reservation of art. 12, to derogate from any of its provisions or to modify their effects" (for developments Moussseron et al, 2000, pp 190-191; Oprea, 2023, pp. 472-473; Sitaru and Stănescu, 2017, p. 7; Ungureanu, 2014, p. 50). In addition, the law applicable to the international commercial contract (*lex causae*) is often poorly adapted to the particularities that the presence of the element of foreignness imposes on the contract, such as: the contractual obligation must be performed at a long distance and, often, in another country than the one in which the supplier of goods / the service provider or the executor of the work operates, the currency of payment currently used by the parties is different (which determines, for example, that the method of calculating the punitive legal interest provided by the *lex causae*, considering the currency of a certain state, is not appropriate in relation to the payment currency chosen by the parties), administrative, fiscal or customs rules or tasks that are not incident to internal trade may intervene (such as the obligation to obtain import-export authorization or to pay customs duties) etc.

International trade usages find their origin in specific rules established by the parties to organize the course of their own contractual relationship. The parties have neither the purpose nor the competence recognized by the legislator to establish general rules applicable to third-party legal subjects. However, the development of commercial relations with other merchants may lead to the extension of the application of these rules and, over time, their generalization. Although a mechanism for the transformation of individual practices into international commercial usages cannot be proved, this route is indubitable, as it is inconceivable that an indefinite number of traders from different states could simultaneously establish certain rules applicable to their relations without there being any "source" of inspiration.

The distinction between individual practices and international trade usages lies primarily in terms of their scope. If the former are incident to the relationship between two or more (but, in any case, a determined number) of parties, united by a determined contractual relationship, the latter are applicable to an indefinite number of traders, usually from a certain field of activity or from a geographical area. This feature that we can call "collective element" is added to the "objective element", understood in the sense of old, stable, repeated practice - *longa diuturna inveterata consuetudo* (Sitaru, 2017, pp. 153-154).

2. Methodology

The object of this study are international trade usages, understood as practices, generally unwritten, established by traders in international trade, delimited by the objective element (that is, by the possibility of identifying in the objective reality some old, stable, repeated practices, therefore characterized by constancy in application) and by the collective element (that is, by their application by an indefinite number of traders, and not by the parties to a determined contractual relationship).

The analysis concerns, on the one hand, their legal force, and, on the other hand, the identification of the means of overcoming evidential obstacles (considering their unwritten character).

Regarding the legal force of international trade usages, the research starts from the finding of the lack of identity between their existence (as a result of the cumulative fulfillment of the objective and the collective element) and the obligation of their application. Thus, for example, a useful and, consequently, repeated and stable practice regarding the packaging of goods to facilitate their handling during transport (without conditioning, however, the preservation of their quality), can be considered binding in itself for traders who did not contractually assume it? The answer depends on the legal force of the usage, that is, whether or not it has a binding character for the parties. The present research examines the sources of this binding character.

As for the proof of usages, it constitutes a premise to analyze their legal force. Indeed, to ask whether a rule is binding in a given context, we must first establish that it exists. The main obstacle in this regard is the unwritten character of usages. From this perspective, the present scientific endeavor tends to identify

the possible means of fixing the customs on a written support, so as to provide predictability and certainty on their content, and, of course, adequate possibilities of proof.

With regard to both problems stated above, the research is carried out based on the provisions of the international conventions to which Romania is a party and, as a subsidiary, the Romanian law possibly applicable to the legal relationship with the title of *lex causae*.

3. The legal force of international commercial usages in Romanian law

Analyzing the legal force of international trade usages means, as we have shown, identifying the source of their eventual binding character, independent of their practical utility, or, in other words, the reason why a contracting party, which has not assumed a certain obligation, would still say "I must" respect it, and not "it is useful / advantageous" to respect it.

What determines, therefore, that *opinio juris sive necessitatis* is born in relation to a usage (the belief that the usage is obligatory just like the law)? The answer can only be sought in the sources of the parties' obligations, i.e. in contract or in law.

Conventionally, the contract is considered the "law of the parties". We find such a rule, for example, in Romanian law, in art. 1270 para. (1) of the Civil Code, according to which "the valid concluded contract has the force of law between the contracting parties" or, at the international level, in art. 1.3 of the Principles of International Commercial Contracts, 2016 edition (hereinafter, "UNIDROIT Principles (2016)")[2], according to which "A contract validly entered into is binding upon the parties". Therefore, to the extent that the parties have assumed through a contractual clause the observance of existing international commercial usages in the field, those usages will become binding for the parties, just like the contract in which the said clause is contained. To give this legal force to usages, a simple indication of application through a generic clause such as "this contract will be executed according to international commercial usages in the matter" or through a somewhat more personalized clause such as "this contract will be executed according to the usages applicable in the port of Constanța (Romania)" or "this contract will be executed according to the international trade usages in the matter of grain trade" etc. Through such a clause, the international commercial usages in question acquire contractual force (we can call them "conventional usages", but without becoming contractual clauses. In other words, the conduct prescribed by the usage is binding for the parties as a conventional usage (obligatory usage under the contract), and not as a contractual clause.

Conversely, if the parties take over a certain usage and include it as such among the contractual clauses, the conduct prescribed by that usage will no longer be binding on the parties as such, but as a contractual clause. For example, suppose that in port X the usage is that sugar is loaded on the vessel packed (and not in bulk). In the event that the parties, concluding a contract for the delivery of sugar at that port, include in the contract a clause by which they refer to the usages of the place of loading and do not stipulate anything regarding the packaging of the goods, the said rule will be incident to the relations between them as a conventional usage. But, if the parties include that usage in their contract, specifying the seller's obligation to deliver the packaged goods, the usage becomes for them a contractual clause, independent of whether or not the usages of port X (among which the said usage) apply to the contract.

The application of usages based on the will of the parties is provided, for example, by the Vienna Convention (1980), which holds that the will of the parties can be formulated both expressly and tacitly. Thus, according to art. 9 para. (1), "The parties are bound by the usages to which they consented (...)", and, according to art. 9 para. (2), "Unless the parties agree to the contrary, they are considered to have tacitly referred in the contract and for its formation, to any usage that they knew or should have known and which, in international trade , is widely known and regularly observed by the parties to contracts of the same type

[2] *Soft law* legal instrument, developed by the International Institute for the Unification of Private Law, Rome (https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/).

in the commercial branch in question". It should be noted that the usages considered by art. 9 para. (2) do not become incidents under the Vienna Convention (1980), i.e. the source of their legal force is not the mentioned international instrument, but the will of the parties, which the convention presumes, when international commercial usages cumulatively meet the specified conditions. The same view regarding the contractual source of the legal force of usages and its express or tacit manifestation method results from the provisions of art. 1.9 of the UNIDROIT Principles (2016)[3].

In the preceding I have shown that one of the sources of the legal force of international commercial usages is the contract and I have called the customs that derive their binding character from it as "conventional usages". What happens, however, when such a source cannot be identified, that is, when the parties have neither directly nor tacitly expressed their will for international trade usages to be applied? Could they simply be ignored by the parties? The answer must be sought in the applicable legal system *(lex causae*).

There are legal systems that place usages among the sources of law (in general or in a limited way), as well as legal systems that recognize such a status only to the norms issued by the competent state institutions. In the case of the latter, obviously, the legal force of usages cannot have its source in the law. In the first situation, however, the answer is different. Thus, if in the applicable legal system, usages are a source of law, it means that they must be respected exactly like the state law, taking into account the hierarchy of legal norms that the analyzed legal system establishes. We will call these usages "normative usages". It follows, therefore, that in the example taken previously, the parties would have been required to comply with the usages of port X regarding the packaging of sugar, even if they had not established by the contract concluded between them that international commercial usages are applicable to it. Of course, to the extent that the applicable legal system allows, the parties could exclude the application of normative usages (that is, those usages whose legal force has its source directly in the applicable law). The Romanian legal system is part of the first mentioned category, including, in a limited way, usages among its sources. Thus, according to art. 1 paragraph (1) of the Civil Code, "the law, usages and general principles of law are sources of civil law". Their application is detailed in the following paragraphs of the mentioned legal provision, distinguishing according to whether or not the respective matter is regulated by state law. If in the latter case the usages are incidental without restrictions, in the situation of regulated matters they will be applicable only if the law expressly refers to them (for developments, Perju, 2014, p. 2).

As shown above, in the case of normative usages, the interested party could demand from the co-contractor a conduct in accordance with them, even if the contract concluded between them does not provide for the application of usages. Nothing prevents, however, the parties, who choose as applicable to the contract a law that gives usages such a character, to exclude them by their will.

4. Proof of international trade usages

The existence of commercial usages is a distinct matter and prior to their application in a given situation, and their unwritten character opens the ground for their contestation by the against whom it would operate. It means, therefore, that, unlike a law whose content is known by the court (in Romanian law, the presumption of knowledge of it - *jura novit curia* - being retained by art. 252 of the Code of Civil

[3] By the Arbitral Award no. 261/September 29, 2005, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania ruled that by choosing the UNIDROIT Principles *as lex causae*, with the exclusion of any national law system, the parties tacitly referred to usages - the arbitral award summarized in the "Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 261/29 September 2005" (2005), pp. 214-215. Also, by the Arbitral Award no. 11/8 April 1994, the same arbitration court retained the application of international commercial usages by the presumed will of the parties, in the relationship between commercial partners from different states and in the absence of a contrary agreement of the parties - the arbitral award summarized by Osipenco and Cozmanciuc (2002), p. 98.

Procedure[4]), the application of usages raises the additional problem of establishing their existence and content.

Even in the case of normative usages, the application of which is independent of the will of the parties, which determines that their invocation can be made even by the court *ex officio*, the presumption of *jura novit curia* is usually removed. In Romanian law, a provision in this sense is contained in art. 1 paragraph (5) of the Civil Code, according to which "the interested party must prove the existence and content of usages". It means, therefore, that, at least theoretically, it is possible that, in a litigation of the type imagined above, in which the plaintiff would request the obligation of the defendant to pay compensation for the bulk delivery of the goods that are the subject of the contract (sugar), the court, *ex officio*, to invoke the application of the usages of port X where the goods had to be delivered (to the extent that these usages would have a normative character according to the *lex causae*), but to consider the plaintiff to provide proof of their existence and content.

In support of the party bearing the burden of proof, Romanian law establishes in art. 1 paragraph (5) from the Civil Code a simple presumption regarding the existence of usages that have been published in compilations developed by entities or bodies authorized in the field (such a compilation representing, for example, the UNIDROIT Principles (2016) which constitute a codification of the applicable usages in the matter of international commercial contracts). We call the usages contained in such collections "codified usages" (for developments, Jacquet & Delebecque, 2000, pp. 78-79). Said presumption reverses the burden of proof in the case of codified usages, shifting it from the party invoking a usage to the one disputing its existence.

To the extent that the evidence is necessary (in proving the existence of an uncodified custom or contesting the codified one), it can be done by any means because it is about the evidence of a factual situation (Macovei, 2014, p. 53; Sitaru, 2017, p. 163). A non-exhaustive inventory of available evidence might include:

- certificates of usages issued by authorized institutions, such as chambers of commerce, commodity exchanges, port authorities, associations of professionals etc. Thus, for example, in Romania, the county chambers of commerce have the authority to issue such certificates according to art. 4 lit. e) from the Romanian Chambers of Commerce Law no. 335/2007[5]);

- jurisprudence. It is, therefore, possible that a judicial or arbitral decision has taken into account in the motivation of the solution the existence, for example, of the usage that in port X the sugar is delivered packaged, and not in bulk. In another similar litigation, the said decision can be used as a means of proof of the existence of the said usage. The similarity of the two disputes does not necessarily determine the application of the usage whose existence would be established by this means of proof, this being influenced, as I have shown previously, by the normative or conventional nature of the custom and the will of the parties;

- standardized contracts applied repetitively in a field of activity can also constitute a means of proof regarding the existence and content of international commercial contracts, as it can be assumed that their clauses codify practices in the matter. By hypothesis, however, the parties in the relationship between which the question of the application of usages arises, should not be bound by such a standardized contract, only in such a case, the rules established by it can be applied to them under the title of usages, and not of contractual clauses;

- expertise or any other appropriate way of proof.

[4] Law no. 134/2010 regarding the Code of Civil Procedure, republished in the Official Gazette no. 247 of April 10, 2015.

[5] Published in Official Gazette no. 836 of December 6, 2007.

Conclusions

As follows from the above, international trade usages can be applied based on the express or tacit will of the parties (as conventional usages) or on the basis of the legal system that constitutes the *lex causae* in the case (as normative usages).

Identifying the will of the parties, when it is not expressly expressed, can be a challenge for the courts or arbitral tribunals. Sometimes, based on the factual situation, such a will can even be presumed.

If *lex causae* is Romanian law, usages have a normative character either if the matter is not regulated by law, or if, although it is regulated, the law expressly refers to usages. Normative usages can be removed from application by the will of the parties.

According to Romanian law (which would be the *lex causae* in this case), the burden of proof of international trade usages rests with the interested party in their application. By way of exception, in the case of codified usages, the burden of proof rests with the party contesting their existence or content.

Finally, being a factual situation, the existence and content of usages can be established by any means of evidence.

BIBLIOGRAPHY

Jacquet, J.M. & Delebecque, P. (2000). *Droit du commerce international* (2nd ed.). Paris: Dalloz;

Macovei, I. (2014). *Tratat de dreptul comerțului internațional*, București: Universul Juridic;

Mousseron et al (2000). *Droit du commerce international. Droit international de l'entreprise* (2nd ed.). Paris: Litec;

Oprea, E.A. (2023). *Dreptul comerțului internațional*, București: Hamagiu;

Osipenco and Cozmanciuc (2002). In Babiuc, V. și Căpățînă O. (Ed.). *Jurisprudență comercială arbitrală 1953-2000*; București, 2002;

Perju, P. (2014). In Baias, F.A. et al (Ed.). *Noul Cod civil. Comentariu pe articole* (2nd ed., pp. 1-3); București; C.H. Beck;

Sitaru, D.A. (2017). *Dreptul comerțului internațional. Tratat. Partea generală*, București: Universul Juridic;

Sitaru, D.A. & Stănescu, S.A. (2017). *Dreptul comerțului internațional. Tratat. Partea specială*, București: Universul Juridic;

Ungureanu, C.T. (2014). *Dreptul comerțului internațional. Contracte de comerț internațional*, București: Hamangiu.