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FORMAL SOURCES OF INTERNATIONAL TRADE LAW. SPECIAL VIEW ON CUSTOM

M. NIȚĂ

Manuela NIȚĂ

“Valahia” University of Targoviste, RO

Faculty of Law and Administrative Sciences

E-mail: manuela_nita74@yahoo.com

ORCID ID: <https://orcid.org/0000-0002-8838-5990>

Abstract

In a period of time where the legal norm sought to cover by regulation all the fields of society, it could easily think that the custom has lost its relevance and its approach could only be done from a historical perspective. Such a conception is wrong because even at this time the customs have a special practical utility and even if they are apparently not widely used in business, it is necessary to know the rules regarding their operation and the effects they produce in the relations between the parties. The customary norm does not exclude the legal norm, they coexist in a relationship of complementarity. These are the basic parameters that form the basis of the present study through which we will analyze the custom and its role as a formal source in the regulation of international trade relations.

Key words: *custom; trader; normative usage; conventional usage; formal source.*

INTRODUCTION

One of the characteristics of international trade law is interdisciplinarity, being located at the confluence of national legal systems and public international law, but with defining, particular elements that give it an independent character in the whole of law.

Starting from this characteristic of international trade law and with regard to its own sources, it has as its source the sources of public international law within which we distinguish between the main sources custom and the treaty (*for more details to be seen, C. Mătușescu, 2003, pp. 12-13*) and subsidiary sources (sources): the general principles of law, international jurisprudence, doctrine, acts of international organizations, unilateral acts of states and equity.

Since, at the global level, three large legal systems have mainly emerged: the Romanist, common-law and the religious system, with major differences in

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the regulation of internal trade relations, whose norms coexist with international regulations, this determined outlining the main sources of international trade law in domestic sources and international sources. To these are added commercial usages, general principles and doctrine (*to be seen in this regard A.-D. Dumitrescu, 2014, pp. 15-26, judging that the use is characterized by continuity, constancy and uniformity, apud I. Macovei, 1987, pp. 20-21*)*.

In the present study, we will focus our attention on normative custom (*I. N. Militaru, 2013, p. 33 and p. 36.*) - custom, as a source of international trade law, the oldest source of unwritten law. In general, by custom we mean a continuous, constant and recognized practice (*A.-D. Dumitrescu, 2014 p. 22; D-A Sitaru, 2008, p. 137*) by a certain business community that applies it in compliance with the principle of good faith¹ in trade.

Most authors agree that customs represent a certain form of natural manifestation of entrepreneurs in a certain legal relationship, being considered as a practice, attitude, behavior, the existence of which, in principle, is not recorded in a written document at to be referred to, but which through repeatability in a certain period of time, in the contracts between the parties, its value and efficiency are recognized.

Thus, commercial usages are based on the following defining elements:

1. They contain a set of manifestations of participants in international trade, of a repeated nature, with a certain frequency over time, we consider reasonable, because a certain precise period of time cannot be identified with certainty. The frequency of the commercial practice is closely related to the other elements: constancy, i.e. not being isolated and repeating at a certain interval long enough to create the appearance of a new practice and its recognition or stability. In the conditions of the extraordinary evolution of trade in general and international trade in particular, these elements must be considered in another dimension, adapted to the modern period, but without the tendency to artificially create commercial customs according to a certain interest of the parties.

2. Another defining element is the general and impersonal character of the custom, called in the specialized literature "collective" character (*D-A Sitaru, 2008, p. 138; F. Cafaggi, 2022, p. 1*), because the custom is not addressed to a specific person, but to the business community which may differ according to certain criteria (from a certain area geographical, regarding a certain category of products or services, ethnic community, etc.)

The inclusion of a practice in the category of commercial customs does not automatically lead to its qualification as a source of law, the assessment being made according to the type of custom - normative or conventional, the latter not being considered a source of law.

¹ In Romanian law, art. 1 paragraph 4 of the Civil Code establishes that "Only customs in accordance with public order and good morals are recognized as sources of law."

1. NORMATIVE USAGE (CUSTOM) VERSUS CONVENTIONAL USAGE

It is known and accepted by theorists and practitioners that this source of law, custom includes unwritten practices (customs), but over time there has been an increased interest of international organizations and international professional associations to collect these practices and to codify them (in written form), making them available to practitioners to facilitate their transactions (*E.N. Vâlcu, 2008, pp. 23-24*). In this way, some of the customs undergo form transformations depending on the interest of the practitioners. We highlight the role of the International Chamber of Commerce in Paris which consolidates and codifies existing commercial practices, mainly through the Uniform Practices for Documentary Credits (UCP 600) and the Incoterms Rules²

This operation of collecting trade practices frequently used in trade, for which there is a concern of international bodies³, is called codification by harmonization. Use of this tool is optional for merchants. They can take over a usage made available through the effort of these bodies

The most important criterion for differentiating customs is that of legal force, according to which we distinguish between normative and conventional customs (*for details see also C.T. Ungureanu, 2018, pp. 17-19*)*. We will briefly refer to the latter because our study is not specifically addressed to this category.

Conventional usages have the legal force of a contract clause because the parties express their agreement to the use of a particular trade usage, either expressly by a reference clause in the contract, or tacitly or by implication, inferring the will of the parties. For this reason, conventional customs are not a source of law.

The parties are the ones who decide the use of a custom, usually using the codified customs, it being much easier to determine the rights and obligations of the parties throughout the entire process of developing the contract.

The primary difference between custom and normative custom (*we find that in the doctrine there is no unity of view regarding the use of the notion of usage and the meaning it has. See in this regard D-A Sitaru, 2008, pp.140 et seq.; C.T. Ungureanu, 2018, pp. 17-18*)* is that custom in principle is optional, while

² The business partners will indicate in their agreement, if they decide to obey the Incoterms Rules, specifying the version they opt for showing the year, because the Incoterms Rules have been found in various versions over the years: 1923, 1928, 1936, 1953, 1967, 1974, 1980, 1990, 2000, 2010, 2020; for details see Incoterms® rules history - ICC - International Chamber of Commerce (iccwbo.org)

³ International merchant associations (such as: International Chamber of Commerce - ICC; International Federation of Consulting Engineers - FIDIC; International Association of Commercial Collectors - IACC) or international organizations (such as: United Nations Economic Commission for Europe - UNECE, International Institute for the Unification of Private Law - UNIDROIT, Organization for Economic Co-operation and Development - OECD, European Free Trade Association - EFTA, Asia-Pacific Economic Cooperation - APEC)

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custom (normative custom) is respected by parties with the value of law, like any legal regulation.

We also join the opinion outlined in the specialized literature (*see in this regard D-A Sitaru, 2008, pp.140 et seq; A-D Dumitrescu, 2014, pp. 15-26*), which appreciates that the normative usage, established also under the name of custom, constitutes a source of law in the matter of international trade law. The name normative usage comes from the perception that it is valid as a legal norm.

Referring to the previous presentation of the defining elements of customs in general, we can appreciate that custom is a general, constant, relatively long and repeated practice of the active parties on the market, considered by them to have binding legal force (*A. Severin, 2004, p. 90*). It is appreciated that, for a custom to have the legal force of custom, it must meet the conditions: longevity, stability, generality, credibility, complementarity and compatibility (with the fundamental principles of the legal system it complements and within which it integrates).

In the legal literature, it is considered that the central element of custom is its use, its repeatability at the level of social practice, which differs from other social practices in that, custom is respected and accepted as obligatory for all (*opinio necessitatis*), and in case of non-compliance, the consequences are much greater than simple social blame (*S. Ionescu, 2008, p. 92*).

Since the custom has binding force (being respected with the conviction that it is worth "right", with the awareness of its obligation), compared to the conventional usage that has binding force under the contract, it must be better determined, more stable and with an increased degree of continuity and repeatability. It is known that a feature of the custom is its antiquity, but at the same time, it adapts much better than the state norm to the needs of social life, proving that it is often extremely mobile, being dynamic and easy to adapt to social changes, economically from a community.

Whenever a custom regulates a matter of international trade, it is also a source of international trade law. The awareness that it is worth right represents the internal psychological element of custom, because the normative usage is applied and assumed with the conviction that it must be respected like a legal norm, the violation of which can be sanctioned, and can be imposed by means of coercion.

In order for a custom to have these valences shown above, it is absolutely necessary for the legal system determined as *lex causae* in the specific case, to recognize the normative force of the custom (*See in this regard D.- A. Sitaru, 2008, p. 141*; The author presents the positions of different legal systems in relation to normative usage, showing that some of them are universally accepted by exemplifying Italian law, where the civil code by art. 1 mentions customs among the sources of law, others admit them specifically, recognizing them in a certain field of activity, and other systems admit them through a reasoning per a

contrario, not being considered contrary to the fundamental principles of the respective legal system, *apud I. Rucăreanu, 1980, p.78 et seq.*).

The importance of recognizing the normative force of custom (normative usage) resides in the determination of the rights and obligations of the parties born from a legal relationship, like the law, as a state normative act. Obviously, the normative intervention of custom in a certain legal system must be understood in the following senses:

- to regulate where the legislator has not intervened or the norm is lacunar, fallen into disuse or there are texts adopted considering other historical realities⁴;
- to interpret the legal provisions when they are incomplete, confusing, anachronistic;
- to regulate when the legal provisions allow it.

2. THE COMPLEMENTARITY OF THE CUSTOMARY NORM WITH RESPECT TO THE STATE NORMATIVE ACT

Economic life knows such an intensity that traders allocate a lot of resources: human, capital materials. Trade is carried out at a very fast pace and professional traders create their own rules to govern the relationships that arise between them. On the other hand, the authorities cannot remain passive to this evolution of trade, being concerned with normatively regulating (through legal rules) the operation of the market, of competition. The formalism, the rigidity of the normative procedures sometimes lead to regulatory delays, the usage being the one that is created more quickly from the traders' need to respond to their interests being recognized and repeated. A custom that proved in practice to be ineffective, that it did not have the result expected by the parties, will not be taken over and repeated, being only isolated in one or a few operations that demonstrated its inefficiency.

At the same time, we can admit as a paradox, considering the features of custom, that a custom can arise faster⁵ than the state norm, and if the legal system recognizes it, there is a coexistence, a complementarity between them.

⁴ In our law, the civil code by art. 1 paragraph 2 expressly enshrines this: "In cases not provided for by law, customs are applied, and in their absence, the legal provisions regarding similar situations, and when there are no such provisions, the general principles of law";

⁵ This is explained by the difficulties that the normative process sometimes encounters, for certain reasons, such as: the lack of cohesion of political interests in the adoption of a normative act; delays, long term postponements due to organizing issues; expressing and supporting diametrically opposed points of view and not reaching a common point of view agreed by a majority. All this means that a normative act is not adopted or is adopted late and no longer corresponds to the requirements of regulating the operation in a certain business community. The parties quickly find a solution because business has to run and if the solution proves to be optimal, it will have a constancy. Usually there are networks of entrepreneurs and good ideas are shared with the community and if they are appreciated they have continuity

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In this last situation the discussion is more extensive because we have to clarify what is the ratio between the state norm and the customary norm or which of them applies with priority. As shown in the specialized literature (*D.- A. Sitaru, 2008., p. 142*), we also express our opinion that normative usage is applied with priority referring to a supplementary law⁶ (when the parties do not reject the application of custom), considering their special character ("*Specialia generalibus derogant*"), and the supplementary norm it allows the parties to choose their conduct and if they do not choose it the state rule applies. Undoubtedly, only customs in accordance with public order and good morals, according to the legal system that represents the *lex causae*, are recognized as sources of law.

Compared to conventional usage, in which the parties choose by contract to submit to conduct established by way of practice in a certain business community (collectivity), in the case of normative usage (custom), the conduct of the parties does not have its genesis under the contractual agreement, but based on the normative authority of the custom, which is binding, recognized at the level of the respective business community (of course with the fulfillment of the other conditions – continuity, constancy, repeatability).

Another particularity of the custom that results from the mandatory character is that it is imposed on the contracting parties without having to be accepted in a certain form, as in the case of conventional usage. The parties respect it with the awareness that it is worth right. On the other hand, it is possible that the parties do not know the customary practice or do not agree with it, their common will being in a different direction, for which fact, nothing prevents them from expressing their will in a other meaning than the customary norm, because in business we are talking about the freedom of legal expression, expressed by the availability recognized by the participants in business relations to contain the elements and conditions of the business.

On this aspect, regarding the possibility to refuse the application of a custom (explicit refusal of the parties), in the specialized literature it is stated that a custom is an optional normative custom, because the parties can refuse it, unlike an imperative normative custom (*see in this sense A. Severin, 2004, p. 90*; The author exemplifies as imperative normative customs: the legal provisions that establish imperatively that the duration of a certain operation will be that resulting from the customs of the port where the operation takes place; provisions that establish that a commodity must have the quality established by the customs of the country of manufacture), appreciating - it is known that the latter is a custom accepted by the law, as the law refers to the custom in order to complete its own provisions.

⁶. As far as permissive norms are concerned, we cannot discuss about a relationship between two categories of norms because by their nature permissive norms give freedom to the parties to choose their conduct;

3. ROUTINES

Apparently between custom and routine is only a terminological difference, but with the same meaning. In fact, they are different concepts. A routine is a practice created by certain business partners, without being taken up at the community level. It is reflected in the practice of two or more parties (usually a small number) with a certain contractual tradition, who over time have (used to) accommodated to certain clauses, considering them self-enforceable when they renew their commitments. These parties get to know each other very well because they are "old" partners for whom there is mutual respect. It is no longer a concern for them to identify new contractual rules as long as the ones already used to them are effective and meet their requirements.

Obviously, nothing prevents the parties from sharing their experience with other parties who can take it up and similarly, over time a routine acquires the characteristics of usage.

The Romanian Civil Code specifies in article 2 para. 6 that "usage means habit (customs) and professional usage". We note that the Romanian legislator gives the same meaning to habit and custom (*see in this sense I. Boghirnea, A. Tabacu, 2011, pp. 137-142*), but we must not confuse the habit (in the sense of normative usage in international trade) with routine, which we referred to above.

4. CUSTOM IN ROMANIAN LAW

As was natural, the Romanian Civil Code establishes from article 1 paragraph 1 what are the sources of civil law⁷: the law, customs and general principles of law, so that later, in the content of this article, it clarifies what their legal force is, the order of application and their sample. We refer to the Civil Code as its provisions represent common law in the matter.

Also, as we have shown above, the legislator explains what is meant by custom, referring to two categories: habit or custom⁸ (*regarding the customs in romanian law, see N.E. Hegheș, 2022, p. 71.*) and professional usage. This last category is also found in international trade, being specific rules that govern the relationships that arise between the members of a certain profession or between

⁷ It is known that the Romanian legal system abandoned the dualistic view of private law and with the entry into force of the Civil Code (Law no. 287/2009, entered into force on 01.10.2011) our system opted for the unity of private law. In this sense art. 2 para. 2 of the Civil Code states "This code is made up of a set of rules that constitute the common law for all areas to which the letter or spirit of its provisions refer" and art. 3 paragraph 1 "The provisions of this code also apply to relations between professionals, as well as to relations between them and any other subjects of civil law".

⁸ Art. 1 para. 6 of the Civil Code. The Romanian legislator "puts the sign of equality" between habit and custom, compared to the Civil Code from 1864 which used the notion of custom. Moreover, in the regulation of the current code, the legislator prefers to use the notion of custom (art. 1349, 662, 613, 603)

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them and their clients in connection with the exercise of the profession. The provisions of paragraph 6 in conjunction with the other articles in which we find references to custom, using the expression "custom of the place"⁹, entitle us to draw the conclusion that custom is a general practice, while usage is specific to a certain profession.

Also, in order to be considered sources of law, only customs in accordance with public order and good morals have this quality (art. 1 paragraph 4), and they can be proven by the interested party only if they prove the existence and content of the customs. On the other hand, for usages published in compilations developed by entities or bodies authorized in the field, it is assumed that they exist, until proven otherwise (art. 1 paragraph 5).

From the content of the text we understand that customs can be proven by any means of proof, and practice shows us that judicial expertise is often used, being carried out by people with expertise in this regard. In the case of codification, specific documents certify the existence and content of the usage.

The Civil Code establishes that customs are applied both in cases not provided for by law, and in cases where the law regulates a certain matter and expressly refers to them.

CONCLUSIONS

Custom is a practice that fulfills certain conditions, respected by the parties with the awareness that it is valid, with the awareness of its obligation. Recognition as a source of law by the legal system that represents the lex cause is an essential element for a custom to produce legal effects.

Custom as a formal source of international trade law, although it is the oldest source of law, evolves at the same time as the whole society and, perhaps surprisingly, copes with its dynamics. The businessman is innovative, he adapts to the market in an extraordinary way, creating rules in the development of contracts, in full accordance with the law and which have an immediate echo at the level of the business community. These rules are sometimes spontaneous, sometimes they are the result of a rational process, generated by the complexity of a situation. The selection of these rules to be put into practice is done by the business community, applying first of all the criterion of efficiency, followed by other possible criteria such as: consistency, clarity of the rule.

The recognition of the legal value of customs by the laws of the states proves precisely their importance and role in regulating the relations between the parties. The taking over and codification of customs by national and international

⁹ For example, "... to respect the rules of conduct that the local law or custom imposes..."; "In the absence of legal provisions, urban planning rules or local custom..." (excerpt from art. 1349 para. 1, respectively art. 662 para. 2)

bodies making them available to the business community in written form proves once again the major interest in customs.

BIBLIOGRAPHY

- I. Boghirnea, A. Tabacu, *The custom - a subsidiary law source*, Supplement of Valahia University Law Study, 2011;
- F.Cafaggi, *Custom and law in transnational commercial contracts: A coevolutionary perspective*, Transnational Commercial Law Review - TCLR (2022), Issue 2;
- A-D Dumitrescu, *Dreptul comerțului internațional*, Editura C.H.Beck (publishing house), 2014;
- N.E. Hegheș, *The Romanian State and Law in the Medieval Period. Transylvania in the Voivodship Era*, <http://rais.education/wp-content/uploads/2021/03/Proceedings-of-the-21st-International-RAIS-Conference.pdf> on Social Sciences and Humanities, Washington DC, USA, The Scientific Press, Cambridge, MA, 2022;
- S. Ionescu, *Justiție și jurisprudență în statul de drept*, Editura Universul Juridic (publishing house), București, 2008;
- I. Macovei, *Instituții în contracte comerciale internaționale*, Editura Junimea (publishing house), Iași, 1987;
- C. Mătușescu, *Consimțământul statelor la tratate. Mijloace juridice de exprimare*, Editura Lumina Lex (publishing house), București, 2003 ;
- I. N. Militaru, *Dreptul afacerilor. Introducere în dreptul afacerilor. Raportul juridic de afaceri. Contractul*, Editura Universul Juridic (publishing house), București, 2013;
- I. Rucăreanu, *Curs de drept. Elemente de drept civil și comercial comparat*, A.S.E., 1980 ;
- A. Severin, *Elemente fundamentale de drept al comerțului internațional*, Editura Lumina Lex (publishing house), București, 2004 ;
- D-A Sitaru, *Dreptul comerțului internațional, Partea generală*, Editura Universul Juridic (publishing house), București, 2008 ;
- C.T. Ungureanu, *Dreptul comerțului internațional*, Editura Hamangiu (publishing house), 2018 ;
- Elise Vâlcu, *Dreptul comerțului internațional. Curs universitar*, Editura Sitech (publishing house), Craiova, 2008;
- The Romanian Civil Code;
- [TCLR 2 - Centre for Commercial Law Studies \(qmul.ac.uk\)](http://qmul.ac.uk);
- [Incoterms® rules history - ICC - International Chamber of Commerce \(iccwbo.org\)](http://iccwbo.org);
- [ICC | International Chamber of Commerce \(iccwbo.org\)](http://iccwbo.org);
- [WTO | official documents and legal texts.](http://wto.org)