Content:

No. I.2.2 - Trade usages

The parties are bound by any usages to which they have agreed and by any practice which they have established between themselves. Unless agreed otherwise, they are considered to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Commentary:

1 The fact that parties to international business are bound by trade usages of the nature defined in the Principle, even if they did not positively know them, as long as they ought to have known them, results from the presumption of professional competence of international businessmen. Because of this presumed professional competence, businessmen must accept that they are bound by trade usages which they knew or ought to have known.

2 The usage is qualified in three ways: 1) it must be a usage which the parties knew or ought to have known; 2) it must be widely known and regularly observed in international trade (thereby excluding domestic or local usages) by parties to contracts of the type involved and 3) the usage must emanate from the particular branch of trade in which the parties are operating. If the parties conclude the contract in full knowledge of the usage, it may be regarded as deriving its quasi-normative force, which overrides other non-mandatory rules of the Lex Mercatoria, from the contract itself. If the parties ought to have known the usage, it is endowed with a type of de facto normativity.

3 A trade usage may be defined as a general or at least widespread regular observance of a particular line of conduct amongst those engaged in a particular branch of international trade over at least a short period of time (Vogenauer, in: Vogenauer/Kleinheisterkamp (eds.), Commentary on the UNIDROIT Principles of International Commercial Contracts, 2009, at 194).

4 The fact that the parties are bound by any practices which they have established between themselves follows from the Principle of sanctity of contracts and the prohibition of inconsistent behavior. Like a usage, a practice is a particular line of conduct, but contrary to a usage, it must not be observed by businessmen of a particular branch of trade, but only by the parties to the contract at hand.

5 Whether a practice has been "established" between the parties depends on the circumstances of each individual case. The reference to the Principle of sanctity of contracts means that the practice must be based on a common understanding of the parties and that the other party feels bound by it because of this common understanding which has developed between the parties to the contract in the past. This common understanding can emerge with respect to the performance of previous contracts concluded between them, or - in case of long-term contracts - with respect to previous performances under the contract at hand (see Vogenauer, id., at 195).