



CLP Commission Meeting Executive Summary

19 October 2023, 10.00-16.30 (CEST)

Hybrid virtual/in-person at DORDA Law Firm in Vienna

1. Welcome from CLP Commission Chair

Ercüment Erdem (Turkey) welcomed the group and thanked DORDA Law Firm for hosting and ICC Austria for their organization.

2. Welcome from DORDA Law Firm

Partner **Veit Oehlberger** welcomed participants to the meeting and to Vienna.

3. Welcome from ICC Austria Secretary General

Max Burger-Scheidlin greeted participants and noted one of the themes for the meeting: SMEs and their challenges in meeting increasingly complex and widespread compliance requirements.

4. Country/Regional updates

Commission Vice Chairs **Gao Xiang (China)**, **Valle Garcia de Novales (Spain)**, and **Christoph Martin Radtke (France)** presented National Committee projects and national/regional legal developments of interest.

[See presentations])

Highlights included:

- China
 - In March, a 41-question survey on use of the Incoterms® rules in China, drafted by an expert group, was circulated. 92 valid replies received.
 - The survey focused on trends in Incoterms use, as well as problems, with the aim of informing support and training for users and contributing to future revisions of the rules
 - Selected findings (see full presentation, linked to above):

- Top 3 trade terms used for export AND import: FOB, CIF, CFR
 - 58% of respondents use '(port of) destination' as most common delivery point, which doesn't make sense with the most-used terms.
 - Key considerations for parties in choosing an Incoterms rule: freight, risk, client preference
 - 75% of respondents say they use FOB/CFR/CIF instead of FCA/CPT/CIP for shipments in containers
 - Discussion
 - General findings echoed by delegates, most people use rules but no one reads the publication. Maybe different approach is needed (see the AI discussion below) for users to interact with the rules.
 - Results drawn from Incoterms 2020 Digital Guide seconds these findings, most people don't have a clue which Incoterms rule they should be using. Terms that are most used in Germany are very different from those used in China. German sellers use DAP and DDP and buyers use EXW. Most people don't use DPU, but it is such a good rule.
- Spain
 - ICC Spain has a mirror CLP Commission, in which Marta Prado is Vice Chair, and a mirror Banking Commission
 - New Working Group on digitalization of trade, looking at the adaptation of Spanish legislation to the UNCITRAL Model Law on Electronic Records (as are NCs in the UK, Germany, and France). Kick-off meeting 2 weeks ago with tight schedule for White Paper and proposed model law covering e-BLs but also non-transport documents. All major banks in Spain and some invited experts are involved.
- France
 - Incoterms: Interest in training decreases for NCs, in part because there are many competitive training organizations. Good news is that the message, 'Don't use the maritime terms for anything in containers' has been received because ICC France trained the trainers.
 - ICC France is merging its existing French CLP Commission with a new ICC France Digital Economy Commission. Digitalization requires so many new skills, including technical knowledge that trade lawyers in the French CLP Commission may not have. Members are excited to orient themselves towards the digital age. Currently, work is to find the right people and to create a governance structure for the new digital part.
 - ICC France is working with [Paris Europlace](#): trade finance specialists are collaborating on a 'white book' on digitalization and trade finance to convince the French government to adopt the UNCITRAL Model Law on Electronic Transferable Records (MLETR) (one of the keys is the transferable document that represents title to goods). A number of ICC NCs are working on the MLETR issue, a good example of coordination among NCs.

5. ICC Model Contract on Commissioning and Maintenance Services

Valle Garcia de Novales, Chair of the new WG (Spain) gave an update on plans for a new model services contract covering after-sales services related to the supply of equipment or an industrial solution.

Highlights included:

- The kick-off meeting of the new Working Group will be held tomorrow, 20 October. The target audience for the new model contract is SMEs, so the model will have some similarities in structure and area with the existing ICC Model Turnkey Contract for Major Projects, but will be much simpler. The new model will be only the second ICC model contract on providing services.
- Significant parts of many companies' income comes from service provision, and when posting workers to provide services abroad, there may be a lot of tax, labour, social security, etc issues. Often, services can be provided locally, so the model will contemplate several options.

6. ICC Model Clauses on Digitalization

Robert Parson (UK) briefed the group on a new project in collaboration with the ICC Digital Standards Initiative (DSI) to create model clauses to help drive digitalization throughout the global supply chains.

Highlights included:

- These new ICC model clauses are intended to enable and empower businesses to digitalize trade in their respective areas and reap the many resulting benefits.
- Progress in world trade has been hampered over many years by a widespread lack of resources that would allow companies to use digital trade to do business more safely, securely and efficiently. Small companies have been especially disadvantaged.
- There have been some landmark moves for example in the UK, such as e-signature legislation at the start of the millennium and this year's Electronic Trade Documents Act, which over time will enable many commonly used trade documents to be used electronically.
- Partly in light of recent developments, it seems the right time to develop a set of model clauses that can be adapted in local jurisdictions to enable participants in international trade to maximize benefits and pick up the pace of adoption of digital solutions. And more generally, the aim is to ensure that companies of all sizes are able to participate in international trade by harnessing the productivity gains of digitalization.
- The newly-constituted ICC Working Group is of limited size to allow efficient operation and drafting, but includes members from some 15 jurisdictions with a range of different views and experiences. An initial introductory meeting has been held recently and at the next meeting the group will discuss the scope, decide which selective set of clauses we will prepare that can be widely used.
- Many parties have been engaged in international trade while not having access to legal advice to allow them to adapt existing terms and conditions to accommodate digitalization. Bigger companies take for granted the ability to afford to hire legal counsel to prepare bespoke legal clauses on digitalization topics from formation through to delivery of services and we want to make this possibility available widely for a constituency that was formerly shut out.
- We won't cover every possible topic but will give a good grounding, particularly for people without resources/staff. The aim is to produce a strong legacy benefit for trading parties, a set of fundamental building blocks.

- In the digitalization space, there has been a natural hesitance by politicians and legislators to make laws that might be out of date in 10 weeks/months/years from now, so our WG will be doing a bit of crystal ball gazing to see what will stay useful.
- Consider the debate that has raged around adoption of e-contracts. Everyone knows we can click and form a contract, the problem is that many parties are not confident that their terms and conditions are within the law on issues such as
 - digital contract formation
 - how to ensure that contracts are entered into and executed in a timely fashion
 - how to enforce contracts
 - how services will be delivered digitally
 - how data will be dealt with
 - how parties will deal with performance interruptions
 - immutability and security of information (as in the context of smart contracts or distributed ledger technology).
- The types of issues the model clauses are intended to resolve will be considered carefully by the WG – we want an inclusive scope so they can be used by as wide an audience as possible, but we have to be pragmatic and focused.
- The initial projection is to have something ready during 2024 - we will have a better sense once the WG starts scoping and drafting work.

7. Update on EU Data Act

Christian Steinberger, Chair of CLP Commission (Germany), briefed the group on the status and evolution of the trilogue agreement on the EU Data Act and some concerning implications for business.

[See presentation]

Highlights included:

- The EU Data Act is quite a strategic pillar for the EU to regulate the digital world.
- European Commission trilogue process finished quite quickly, agreement reached in June 2023. Text likely won't change significantly until final adoption. Unfortunately, not a lot of business' pain points were cured by the trilogue negotiations.
- Key elements focus on access to and use of data (B2B and B2C), on which there is a wide range of rules. 'Connected product' has very broad application – most modern machinery will be in scope. There is, however, an SME privilege (companies with 10-50 employees).
- 2 basic scenarios are foreseen:
 - data generated by machine/process must be accessible automatically to the user free of charge (a design challenge). Might conflict with a lot of existing business models. and
 - where this can't be designed, then data holder has to give direct access to the product user to the data on request, and user can request data be given to third parties
- Critical aspects for business
 - No adequate distinction between B2C and B2B
 - No differentiation among sectors – 'one size fits all'. The customer is king/queen – regarding use of data as well as fate

- No reciprocal rights for data holder
- Unclear legal terms
- Far-reaching restriction of B2B freedom of contract
- Insufficient protection of IP and trade/business secrets
- Exemptions and transitional periods are too short
- Sanctions framework not yet quantified
- No satisfactory differentiation from/synchronization with other applicable regulations (eg, GDPR, antitrust law, etc.)
- Adoption envisioned for Q4 2023, applicability 20 months later.
- New ICC Model Clauses on Digitalization could be useful, dovetail with EU Commission efforts to come up with model clauses under the new Data Act

8. CLP Discussion Lab – A.I. and the Incoterms® rules, Part 2

Marta Prado, Vice Chair of ICC Spain CLP Commission (Spain) led a continuation of April 2023 discussion exploring possible application of A.I. in the context of the Incoterms® rules.

[See presentation]

Highlights included:

Presentation

- In April 2023, the CLP Commission started discussion on whether to start a Working Group to consider AI and Incoterms. Discussion earlier today highlighted the well-known big distance between the official text of the Incoterms rules and users' understanding and use of the rules.
- The market is not sufficiently aware of existing ICC resources, including for example the excellent *Transport + Incoterms 2020 Handbook* – query whether ICC's promotion and marketing efforts are currently enough?
- Can ICC find another way to make this information available? Books are becoming less and less relevant. ICC Germany has done excellent work with the Incoterms® 2020 Digital Guide, perhaps we should look at taking it one step further.
- ICC Spain's CLP Working Group has been collecting bad practices, and the recent Ibero-American report and Chinese survey confirm the general global picture: rampant wrong use, unconscious use (wrong and users don't realize it). This appears across the whole supply chain, not just buyers and sellers.
- **Proposal → Facilitate knowledge of the Incoterms rules by users through Generative AI**
 - **Create Bot/Assistant tool**
 - Users interact with natural language
 - Free statements of what users are looking for
 - Bot will ask questions if more information is needed, in reliable and reasoned way
 - Could be open to other documents
- [See Video presentation]: Spanish WG fed the *Transport + Incoterms 2020 Handbook* into Claude system, which gave correct answers but not 100% right yet. Questions were also tested with existing ChatGPT and similar tools and answers were wrong. Problem is that people don't know the answers are wrong.

- ICC can consider creating its own tool. This could represent a new revenue model for ICC in the long term. If ICC doesn't take the chance, someone else will. Offering a tool where users can interact would provide an enormous opportunity to give and get information.

Discussion

- Well known that book is not used or read enough – the Incoterms 2020 Drafting Group made the publication as clear as possible but ICC did not accede to DG recommendation to make the digital publication available free or at a symbolic price, also made by some NCs.
- Re AI, before showing any revenue, the proposal will carry significant costs – is the idea to use an existing Large Language Model via a license, or for ICC to make its own? To be considered – along with any possible future revenue models - if there is interest in continuing the general discussion.
- Re proof of concept – questions posed to Claude were quite specific but most clients are not nearly so specific, often at the level of 'I want to sell my goods'. This is exactly why the idea is to have dialogue between the Bot and user. The system allows the Bot to pose questions to the user when Bot knows it doesn't have all the required information.
 - Must consider liability arising if ICC creates a Bot that gives advice that might be considered by courts as legal recommendation. Bot could give wrong answers or all possible answers might not have been considered when the Bot was trained. In Germany, for instance, lawyers can't simply disclaim their way out of legal advice. Generative AI is giving its own opinion.
 - It would need to be made clear that this isn't providing legal advice or opinion. If users want one for a court, they need to go to a lawyer. The Bot is simply a tool to help users have a better understanding of the rules.
 - Also concern re reputational risk to ICC if answer given were a hallucination.
 - Another commercial novelty would arise if for the first time ICC HQ started competing with consultancies such as law firms. Members would no longer be amplifiers of ICC messages but would become competitors.
 - Training the AI Bot should certainly be the next step – need to navigate very fine lines, eg, 'the seller says I have to do x and Y, shall I?'. If we have people all over the world using it, we can better train the Bot, taking into account real experiences of the companies.
 - Interest in the room for continuing to explore, formation of a Working Group.
 - **ACTION: Emily to consult internally at ICC Secretariat, after which a small focused Working Group to be assembled.**

9. Current legal and compliance challenges for SMEs in practice (see also items 10 and 11, below)

Angelika Zoder, Legal Affairs (ICC Austria) spoke about the range of compliance issues SMEs must grapple with and the challenges posed.

[See presentation]

Highlights included:

- ICC Austria does a lot of grass-roots work with SMEs, who are completely overwhelmed about compliance duties, if they are even aware of them.

- Compliance obligations are far-reaching and are not limited to
 - Sanctions & Embargoes
 - Anti-Money Laundering
 - Supply Chains
 - Sustainability
 - Pharmaceuticals, etc.
- Companies want to be compliant but don't know the law or that they are out of compliance with it. Many don't know they should do a compliance check and document it, often put all compliance burden on people in the company who handle customs clearance. And those who do try to report many be faced with duplicative, overlapping requests from different agencies within a single jurisdiction.
- Risk is that SMEs will lose ability to trade internationally because they can't figure out compliance (not because of lack of technology, etc).
- Ideas for ICC to consider
 - Collect compliance requirements in different countries from NCs/chambers and present them in a database that SMEs can consult
 - The collection could also identify overlapping data requests from various institutions/partners that NCs could use to approach their national regulators to request streamlining_
 - Develop new tools to make reporting work for SMEs easier
 - Establish a practical peer-coaching network where SMEs that have established compliance management structures in their own companies can encourage and de-mystify the process for other SMEs in their countries (see Discussion, below)
- ICC Sweden strongly supports this very important overall initiative. Any service developed would need to be very ambitious to be useful, could be a selling point for NCs. The starting point work of compiling the obligations in a database would already be an important tool for SMEs, and could then be built upon.
- Concerns were raised about the potential expense of developing a database and the long lag between outlay and recouping costs, based on the experience of one member law firm. Also need to consider whether such a tool would be prohibitively expensive for users.
- The German Mechanical Industry Engineering Association (VDMA) has had good experience with practical input from SME experts who show other SMEs the first steps in developing a compliance management structure in their companies. Peer coaching/mentoring can show it's not so difficult to have risk management, etc. and can give a sense of how many resources an SME would need in HR, time, etc.
- In any case, ICC communications and marketing would need to promote any developed tools well as the range of existing ICC tools is not always widely known by the market.

10. Presentation: Project of OeKB harmonizing questionnaires for sustainability

Nastassja Cernko (Austrian Export Credit Agency) presented a project to facilitate compliance for SMEs.

[See presentation]

Highlights included:

- OeKB provides specialized services for capital markets, has many daughters: Austrian National Bank, tourism financing agency, etc
- 1 ESG questionnaire developed free for companies, gives overview report of where they stand re ESG. Owner of ESG data stays in the company, OeKB is just the platform. Companies fill it in once and share it with their house bank. Reduces complexity, helps with increasing requirements on sustainable finance
- The project is labor, time and cost-intensive - small team did design workshop with design firm, some interviews with companies, then design test of first prototype with users and more interviews. Project went live in 6 months, Big lesson learned is that it's not just a question of coming up with a tool – there is an incredible amount of communications and ongoing support needed. Creating the tool is relatively easy.....Maintaining it requires dedicated people to maintain and constantly improve it.
- User guides created and updated based on feedback to build up know-how in the companies, which use it for educational purposes.
- We started with a general tool and then sector-specific, now for tourism and real estate development (we worked with banks and real estate/tourism experts).
- Important: OeKB does verification! Users can call or write for support. Enormous amount of effort needs to go into communications and support.
- Focus on Austrian user uptake, now have a sales representative in Germany.

11. Further reflection on SME compliance: Exchange of experiences, brainstorming, and open discussion on facilitating SMEs' compliance obligations (see items 9 and 10, above)

Interventions by **Forrest Zheng (China)** and **Christian Steinberger (Germany)** and open discussion building on earlier presentations on SME compliance challenges.

Highlights included:

Presentations

- Forrest Zheng presented a range of Issues faced by SMEs in China seeking to export, including international sanctions, labor and overseas dispute risks, tax risks, customer credit investigations obligations, and shipping and maritime loss risks.
- Christian Steinberger noted that even the smallest company should have the basic structure of a compliance management system to allow them to analyze risks on an ongoing basis. SMEs need practical advice to get started, and the experience of VDMA in German was that peer mentoring by other SMEs that have taken the journey is very helpful. Companies realize it's not so difficult and they have someone to go to with particular questions. One idea is for NCs to set up Working Groups to find practitioners from SMEs in their countries who already have done compliance management that could coach/train other companies.

Discussion

- The ICC Global Anti-corruption Commission, Global Banking Commission and perhaps others have done some work on compliance, including on financial fraud in trade finance, and sanctions clauses in letters of credit. Antitrust issues, and others would also be implicated.

- ICC Sweden sees this as an ambitious cross-Commission project initially focused on collecting information for a database, a single resource on what rules exist
 - ICC Austria notes that the concern is that small companies risk being shut out of international trade and perhaps part of work would be advocacy about simplifying requirements.
 - Important that any project define scope of 'compliance' - eg, 6-10 areas companies need to investigate - and explain them first in very general areas. Then as a second step, identify what they are in detail.
- **ACTION: Emily to put ICC Austria and ICC Sweden in touch with Charly Gordon, ICC Global Policy Department Small Business lead, to explore ideas presented by various speakers on this cross-discipline topic.**

12. Ibero-American Report on the Incoterms® 2020 rules

Marcelo Elizondo (Chair, ICC Argentina; Regional NC Coordinator for the Americas), Juan Diego Alzate (Colombia), Miguel Angel Bustamante (Mexico), and Roberto Rosales (Ecuador), presented report on Incoterms® 2020 rules trends and issues, prepared by a cross-NC Ibero-American expert group.

[See presentation] and the [full text of report](#)

Highlights included:

Presentation

- ICC Argentina proposed the project on use and trends re the Incoterms rules. Responds to need for better empirical understanding of scope of rules, how users perceive and apply them, and how ICC can improve support. The project involved 2 years of research by ICC NCs from Argentina, Bolivia, Costa Rica, Colombia, Ecuador, Guatemala, Mexico, Panama, Paraguay, and Spain.
- Research questions
 - How are Incoterms® rules applied in different sectors of the economy?
 - Do users apply the rules according to the written text or business practice?
 - How much do respondents know about the rules?
 - How clear is the content of Incoterms® 2020 publication from the users' perspective?
 - What do users propose to improve the latest version?
- Mixed qualitative and quantitative approach
 - What people say they do: 245 surveys responses from 22 countries to a 28-question survey
 - What people actually do: 160 case studies in 5 countries capturing 18 trade operations
 - Panel of experts structured interviews
- Some key findings
 - Commercial practice predominates over text of Incoterms rules
 - Learning in commercial practice comes much more from trade uses and customs
 - Internet and blogs are a frequent source of knowledge
 - General ignorance of text of Incoterms rules
 - It is wide commercial practice to use FOB, CFR and CIF for containers despite ICC warnings against

- Cause for difference between Incoterms rules text and practice?
 - Repetition/history especially if no legal or logistical problem arises even if the chosen rule is wrong
 - Want to carry out business rather than use correct Incoterms rule
 - Use of charts/graphics from the internet, no guarantee of quality
 - Lack of – or poor – training
- Why resistance to using official Incoterms® rules?
 - Rejection of change, resistance to studying what is new, people prefer comfort if they have not had a bad experience
 - Even if they have the Incoterms® rules, don't always read or apply correctly
- Question: Is it time to adapt the Incoterms® rules to what people do?

Discussion

- Acknowledgment that Incoterms rules users often don't fully understand the choice of rules and risks that come with choosing wrong rule (for example, goods in containers under FOB, CFR, CIF).
- Question as to whether the rules should be amended to match the wrong usage – views on both sides. Noted that ICC should not rush to change the rules to accommodate mistaken practice as it takes time for people to learn: the maritime Incoterms® rules are centuries old and containerized goods only about 60 years.
- Observation that there are not many disputes centered on the Incoterms® rules, whether they are being used correctly or not. And many people use them correctly, so ICC shouldn't penalize them by reversing course on containerized goods. Perhaps make the warning in the text stronger. Perhaps highlight painful consequences that may arise when using the wrong rule – SMEs in particular may sit up and take note.
- How to help educate people on correct usage in today's world? . Thoughts include
 - Focus more attention on universities, educational institutions that provide first approach to future users
 - More training for traders through NCs. Focus on buyers and sellers, lots of wrong information ends up coming from customs brokers, carriers, logistics providers
 - Time to explore new modes of delivery of the information; books are less and less consulted. Interactive chatbot (see discussion on Incoterms + AI, at 8, above); gamification, etc.
 - Attention-catching messages: How best to reduce projects! Kill your contracts! EXW + a Bill of Lading, other common mistakes
 - Consider restoring a system along the lines of the previous Incoterms Panel of Experts so that enquirers from the public can be referred to someone locally who can provide a quick response in cases where the local NC doesn't have relevant experts.
 - Sell Incoterms 2020 text in a digital version accessible through the existing Incoterms app. This would increase revenues and the text would be easy for users to locate. Consider ways to design 'gamification' of Incoterms 2020.

13. Next meeting – 4 April 2024, hybrid meeting in Seville, Spain

- 4 April 2024 – Seville, hybrid with in-person participation warmly encouraged by ICC Spain.
- Q3/4 2024 – Date/place to come.