



Virtual Meeting on Wednesday, 3 February 2021, 14.00 – 16.00 (CET)

Virtual Meeting on Microsoft Teams

Highlights and action items

- > **Next meeting – May/June 2021:** Date to come. Virtual meeting on Microsoft Teams.
- > **Incoterms® 2020 update and discussion:** NCs are actively providing training. ICC Argentina will develop a short user survey on difficulties in using the Incoterms® 2020 rules to be deployed as a regional pilot to gather information.
- > **UN/CEFACT eNegotiation:** Presentation of new UN/CEFACT Working Group aiming to define business processes and related data exchange requirements related to electronic contract negotiations. Lauri Railas (Finland) will keep the CLP Commission in the loop on the UN process and solicit ICC views as needed.
- > **Model Contracts for Startups:** Set of model contracts for international startups finalized and awaiting ICC Executive Board approval. Plan to develop a training module through the SME Labs for ICC Centres of Entrepreneurship.
- > **Update from IDI Project:** Report on recent developments in agency/distributorship/franchising law and related activities of International Distribution Institute (IDI Project), including annual meeting spread out over May and June 2021.
- > **EU Digital Agenda:** Update on legal developments regarding the EU Digital Agenda as it relates to liability, AI, data and neighbouring topics as well as possible ICC interventions. Coordination with ICC Commission on Digital Economy.
- > **ICC Arbitration Rules 2021:** Presentation of the main changes in the ICC Arbitration Rules 2021.
- > **Policy Department update: Transport + Supply Chains:** Briefing on Customs Commission's expanded work related to transportation and supply chains, including creation of new 3 Working Groups: Trade digitalisation and blockchain; Sustainability and circular economy; and Last-mile delivery and automation.



Executive Summary

1. Welcome and introductory remarks

Ercüment Erdem (Chair of the CLP Commission) welcomed participants to the third virtual CLP Commission meeting, celebrating the wide range of countries represented and the full agenda featuring interesting speakers and subjects. He noted this was an exceptional inter-sessional meeting, in addition to the standard twice-yearly meetings.

2. Incoterms® 2020 update and discussion

Emily O'Connor (ICC) led a discussion on efforts to improve understanding and use of the rules.

Highlights:

- Participants reported on various training and promotion efforts in different parts of the world.
- COSEC (the Senegalese Shippers Council, also acting as ICC Senegal) has been very active, holding 2 big events with hundreds of attendees, including companies, commercial court representatives, banks, maritime companies, customs officers, business schools and freight forwarders.
- ICC France is providing French training sessions through COSEC pre- and during the Covid pandemic, live in Senegal and other countries in the region and now virtually. In addition, business schools have organized sessions to show the seminar live, with the possibility for students to ask questions. Special pricing for trainings, the text of the rules, and local printing rights licensed to COSEC.
- ICC Colombia has held 7 events including a launch event, in addition to 10 private events involving 1500 people. Regional events also organized in collaboration with national committees in Colombia, Ecuador, Bolivia, Paraguay and the Dominican Republic.
- ICC Colombia notes that users still do not consistently use the Incoterms® 2020 rules correctly as in the past (confusing FOB and CIF, for example) and will soon hold a freemium master class with 16 course hours. The 'freemium' model in this case involves sponsorship, free attendance, with students having option to pay for certification at the end of the course. More than 4000 students are expected, and other national committees may be involved.
- ICC Austria has organized over 100 seminars and notes that use of the Incoterm® 2020 rules is increasing. In-house trainings, where full staff can be trained and pose their company-specific questions is an effective model, and it is hoped they can re-start full-day in-person events in May.
- ICC Argentina has offered many trainings and free webinars, one including Burghard Piltz of the Incoterms® 2020 Drafting Group. They have also held an 'Incoterms® Month' awareness campaign, including a cycle of short Spanish-language videos, containing fundamental things about each rule. The ICC Secretariat is exploring a platform to share these videos with other ICC national committees internally.

- ICC Argentina is also interested to know what difficulties traders confront when using the Incoterms® 2020 rules and will draft a short survey that can be circulated for comments and then rolled out as a regional pilot. If the information gleaned is useful, it may be replicated in other regions.
- The preference for national committees to use ICC accredited trainers was raised, since using non-accredited trainers risks providing students with trainings of questionable quality; it was suggested that the ICC Secretariat send a warning to national committees in this regard. The point was also made that it would be helpful for trainings to be able to be provided to students for free, but it was acknowledged that various countries handled this question differently.

ACTION:

- ICC Argentina to develop a short survey on problems traders face when using the Incoterms® 2020 rules, which can then be rolled out as a pilot in the region.

3. UN/CEFACT eNegotiation

Lauri Railas (Finland) briefed the group on new UN/CEFACT Working Group aiming to define business processes and related data exchange requirements related to electronic contract negotiations.



UNCEFACT
eNegotiation_3 Feb 21

Highlights:

- The UN Centre for Trade Facilitation and Electronic Business (UN/CEFACT) is part of the UN Economic Commission for Europe (UNECE), but nonetheless has a global membership. Mr Railas has been the Finnish delegate to UN/CEFACT since 2006.
- UN/CEFACT produces trade facilitation recommendations and standards, the most influential of which is EDIFACT, and also endorses the Incoterms® rules. Its Single Window concept is also quite widely applied by customs and other national authorities.
- Purpose of the eNegotiation project (see slides as well):
 - i. Standardise semantics and information exchange in negotiation process, including re bid/bid comparison systems
 - ii. AI and robot process automation can assist in better negotiating conditions, but result will likely still need lawyer approval
- Lifecycle of transaction, legally: negotiation / formation of contract / performance of contract / post-contractual obligations such as confidentiality, dispute resolution, et al



- Observations of the project: The product will be operational and technical rather than a legal tool. Lawyers will not be redundant too quickly – not sure the tool could be used to negotiate a framework agreement, for example.

ACTION:

- Lauri Railas (Finland) will keep the CLP in the loop on the UN/CEFACT eNegotiation process and will solicit ICC as needed.

4. Model Contracts for Startups

Ercüment Erdem, Chair of CLP Commission (Turkey), and Chair of the Startups Working Group, gave an update on the finalisation of a set of model contracts for international startups and plans for launch and dissemination.

Highlights:

- The project was proposed by Mr Erdem in October 2018 to serve SMEs who need guidance on a legal framework when starting a new business. The Working Group was created in 2019 and developed several successive drafts, which led to comment drafts being circulated in the second half of 2020.
- The Working Group was very efficient and generous with their time and expertise and they are warmly thanked for their work.
- Very valuable comments were received from NCs from Iran, Russia, China, Sweden, Austria and Italy in September 2020, highlighting national approaches that call for notes in the models to help users in various jurisdictions.
- The Working Group revised the models in November and December 2020, incorporating as many comments as possible. The documents were subsequently circulated for approval on 18 December, giving the ICC network a last look to raise any 'fatal flaw' objections by 18 January. No counter-arguments or red flag issues have been received, so the models are approved by the CLP Commission. They will be submitted for approval to the next meeting of the ICC Executive Board in late February.
- The startups package will include the ICC Anti-Corruption Clause and ICC Principles to Facilitate Commercial Negotiation, and will incorporate the existing ICC Model Confidentiality Agreement and Confidentiality Clause.
- Since this is the first time the CLP Commission has prepared a bouquet of model contracts at once, the Working Group also created a model set of boilerplate provisions, to ensure coherence across these models and to be available for use in future ICC model contracts.
- As part of launch plan, there may be a webinar or similar as part of a new series of ICC SME Labs in connection with the ICC Centres of Entrepreneurship, currently in operation in Istanbul and Beirut, with more planned in the future.



- The bouquet of models is composed of 6 documents:
 - Term Sheet
 - Shareholders Agreement
 - Directors Services Agreement
 - Confidentiality Agreement
 - Employment Agreement
 - IP Guidance document

ACTION:

- SME Lab training to be prepared for use in the ICC Centres of Entrepreneurship and through the ICC network.

5. Update from IDI Project

Fabio Bortolotti, Chair of ICC Italy CLP Committee (Italy) and Silvia Bortolotti, Partner, BBM Partners (Italy) reported on activities of the International Distribution Institute (IDI).

Highlights:

- IDI focuses on distribution and agency law and contracts, with members comprising in-house counsel and firm lawyers. Its purpose is to provide information and documents through the IDI website (<http://www.idiproject.com/content/idi-international-distribution-institute>) on developments and practice in specific jurisdictions. IDI also holds an annual conference of c. 180 attendees from around the world.
- In September 2020 IDI members gathered to discuss dispute resolution strategies for overcoming problems arising from the Covid-19 pandemic.
- Preparation for the IDI 2021 online annual conference is underway, and it is hoped that the 2022 conference can be held in person in Madrid. The 2021 conference will be held in 5 sessions spread over several weeks in May and June. Sessions will deal with practical issues and in-house lawyers will be involved as much as possible.
- Session 1: Applicable law and jurisdiction in arbitration. Strategies on dealing with overriding mandatory rules. Choosing the best mechanism of dispute resolution in distribution.
- Session 2: Organizing a mock case under Institute for Digital Arbitration and Mediation (IDAM) arbitration rules.
- Session 3: Franchising – Looking at recent tendency in some countries to hold franchisees liable through application of general rules (e.g., good faith) or specific national rules, which is leading to challenges of contracts on the grounds that they are unbalanced in favour of franchisors. In Italy, for example, antitrust authority has opened an investigation of Benneton for abuse of economic dependence.
- Session 4: IP protection in distribution - illicit registration, use of awards and antitrust aspects, social media strategy, etc.
- Session 5: Hot issues



- i. Brexit from 2 points of view: One, EU company doing business with UK companies; jurisdiction not at all clear. Will EU choice be fully effective, will award be fully recognized? The second, U.S. company looking at EU market. Unknown whether the UK will enter into Lugano agreement.
- ii. Managing direct sales online: Focus on ICC B2C Online General Conditions of Sale (<https://iccwbo.org/media-wall/news-speeches/icc-publishes-model-online-business-to-consumer-b2c-conditions-of-sale-for-new-online-sellers/>).
- iii. Internet strategies in and after the pandemic – distribution methods of the future.
- iv. New block exemption on vertical agreements, which will be the core topic of the 2022 IDI conference, and any new draft available will be discussed at the 2021 Hot topics session. It is hoped there will be a new draft of the regulation by June 2021.

6. EU Digital Agenda

Christian Steinberger, Vice Chair of CLP Commission (Germany), provided an update on legal developments regarding the EU Digital Agenda as it relates to liability, AI, data and neighbouring topics as well as possible ICC interventions.

Highlights:

- The European Commission pushes forward with EU Digital Agenda as top priority. Positioning EU as leader in data-driven society, creating right infrastructure for safety, trust and innovative business models.
- There are many dossiers, these remarks cover a few key topics: AI and consequences for liability (especially product liability); data and consequences for privacy and security; freedom of B2B contracts.
- AI - one of hottest topics on the 2021 agenda. Legal Act on AI, dealing with safety, liability and data, is expected in 3-4 months. No official information yet on what it will look like; the European Commission is working on the basis of White Papers of February 2020. (https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf) (https://ec.europa.eu/info/sites/info/files/report-safety-liability-artificial-intelligence-feb2020_en_1.pdf).
- White Paper set out risk-based approach with 2 main aspects:
 - Cases where AI applied in high-risk sector (e.g. health sector)
 - Cases where AI is applied in a manner in which significant risks can arise for individuals/companies/property, such as serial damages for effectively autonomous systems (self-driving vehicles, robots) or self-learning systems that get out of control.
- How does the existing liability regime need to be adapted or changed? Quite likely that the Commission will propose strict liability for these 2 high-risk applications. Key business concern is that those cases not be defined too generally/widely.
- First big danger is that every smart product will be defined as AI subject to strict liability. Second big danger is that the Commission will exaggerate and

make the whole product liability directive stricter for all products (not just AI), which is the wish and demand of many groups, including consumer protection groups. Concern that definition of 'product' (now limited to tangible products) not be widened, even to services, software. Is imbedded software a product? We expect a wide-ranging discussion, including on burden of proof, etc. Manufacturers may have to foresee every imaginable danger.

- ICC has already made its points to the Commission and Parliament and continues to monitor the situation carefully, looking for opportunities to intervene and bring practical business examples to the regulators. This engagement will begin once a Commission proposal is on the table, then discussion with the Parliament and Council will start. The discussions will be very interesting and exciting this year.
- Data strategy - 2 proposals published in November and December 2020: for a Regulation on EU Data Governance and a Digital Services Act. Key topics include data governance and sharing in order to foster innovation, and circumstances under which digital service providers are liable for content, such as fake news or hate speech, in order to make the digital economy more trustworthy, clean, and safe.
- These EU data strategy topics are within the domain of the ICC Commission on Digital Economy, which is very active in this field, sending out a questionnaire and preparing a position paper on data governance. The CLP Commission can contribute as well, for example on contractual questions, and link has been made with ICC Secretariat lead on the digital work.
- In future, certain B2B data exchange services may be subject to data notification obligations, compliance with which will be notified to national authorities. It is hoped that this chapter will not be applicable to data in existing data sharing arrangements, there is also lots of uncertainty on which data sharing providers are caught by this regulation. We suggest scope should be further clarified by mentioning clear criteria and perhaps narrowed with an exemption for small and close data-sharing networks.
- Regarding a Digital Services Act, one aim is to prevent exaggeration and the creation of too much bureaucracy. The Commission plans to update the old E-commerce Directive of 2000, and some are concerned there may wind up being excessive cost and effort required from network actors in the new Act.
- There are many other dossiers in pipeline – we expect in second half of 2021 a Data Act re B2B and B2C data exchanges. Maybe compulsory access to data among B2B networks. Business needs to be very careful and attentive when this Rubicon between voluntary and mandatory data exchange might be crossed. May be expropriation and IP issues implicated.

ACTION:

- CLP Vice Chair/Secretariat to continue to monitor EU developments on free flow of data, AI, and product liability and to stay in touch with relevant DGs.



- CLP Vice Chair/Secretariat to keep in touch with ICC Digital Economy Commission on relevant issues.

7. ICC Arbitration Rules 2021

Ercüment Erdem, Chair of CLP Commission (Turkey) presented the main changes in the ICC Arbitration Rules 2021.



ICC Arbitration Rules
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Highlights:

- The release of the updated ICC Arbitration Rules is of interest to the CLP Commission since we privilege ICC arbitration in the dispute resolution provisions of ICC model contracts, and many CLP members are involved in arbitration.
- Key objectives of the update were to modernise, increase transparency and flexibility, allow for electronic submission.
- The 2021 rules also include a guidance note on measures to mitigate effects of the Covid-19 pandemic, with suggestion to submit pleadings electronically, and have virtual hearings.
- Some key features include (but see attached slides as well)
 - Complex arbitrations – joinder of parties & consolidation
 - Important – new paragraph in art 12 (constitution of arbitral tribunals) provides that court can appoint all 3 arbitrators
 - Party representation – Art 17
 - 3rd party funding – Art 11
 - 2 novelties for treaty-based disputes: appointment and confirmation of arbitrators + emergency arbitration
 - Expedited procedure rules: threshold increased from 2 à 3 million USD value with conditions

8. Policy Department colleague report: Transport & Supply Chains

Tom Voege, Head of EU Affairs; Customs and Trade Facilitation Commission (ICC) briefed the group on Customs Commission's expanded work related to transportation and supply chains.



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Highlights:

- The Customs & Trade Facilitation Commission has a strong transport-related membership, and is now in the process of revitalising the transport work to look at issues on rebuilding supply chains in and after the Covid era.
- From just in time / just in case, building resilience into supply chains and adding elements of sustainability in logistics sector.
- 3 Working Groups:
 1. Trade and digitisation/blockchain (WCO cooperation topic)
 2. Sustainability and circular economy (WCO cooperation topic)
 3. Last Mile Delivery and automation
- At kick-off meetings for each of the new groups, we'll see what member backgrounds are and co-create terms of reference for the groups.
- Work includes thought-starter documents for 2 of the groups and plans are to produce specific guidance and to work with other international organizations, such as the International Civil Aviation Organization (ICAO), during 2021.
- The Last Mile WG has held its first meeting in January, and discussed issues including:
 - Congestion, due in part to e-commerce surge partly tied to pandemic
 - Large time lag between emergence of new business models and products and corresponding regulatory frameworks
 - Widespread urbanisation in much of the world. Current systems are strained and businesses have lack of experience with challenges faced. There is lots of scope for ICC to give advice.
 - Aim is to work with relevant other groups, we have received positive signals for desire to forge partnerships with ICC.

9. AOB + Next meetings

- Next meetings
 - May 2021 – Virtual CLP Commission meeting, date to come.
 - 2022 – Explore face-to-face joint event in Rome with Unidroit on Force Majeure/Hardship