Trade Usages and Standard Conditions of Contract: Distinguished

A. Trade Usages

A ‘Trade Usage’ consists of a particular course of dealing or line of conduct generally adopted by persons engaged in a particular trade-dealing or conduct which has become so notorious that where persons contract in that trade, they are assumed in law to have intended to be bound by such dealing or conduct, except in so far as they have by the terms of their contract expressly or impliedly excluded it. To be a valid trade usage, capable of forming part of the bargain between the parties, a usage must satisfy four conditions:¹

Firstly, it must be notorious, that is to say, so well known in the trade that, persons who make contracts of a kind to be effected by such usage must be taken to have intended that such usage should form part of their contracts. Notoriety is a matter of evidence.

Secondly, the usage must be certain; that is to say, it must have the same degree of certainty as any other contractual term. The issue of certainty is an issue of law.

Thirdly, the usage must be reasonable. Reasonability is a question of law. A usage cannot be reasonable unless it is fair and proper honest and right-minded men would adopt. A usage, which is of general convenience to all parties engaged in the trade, will not usually be regarded as unreasonable.

Fourthly, the usage must not be contrary to law; that is to say, a usage which sanctioned conduct, which was illegal, would be void.

If a usage satisfies the above conditions, then the express terms of a contract in the trade to which the usage applies are to be regarded as expressing what is peculiar to the bargain between

the parties, while the usage supplies what is usual and unexpressed. The usage is just as much a part of the bargain between the parties as the express agreement. It is, however, always possible for the parties, by the terms of their contract, to exclude the operation of a trade usage, either expressly or impliedly.

The applicability of usage or custom in any commercial transaction is evident. In the Ethiopian legal system, for example, we find a plethora of legal provisions referring the parties to the applicability of the usage or custom in the particular business relationship. For example; Civil Code Articles 1713, 1732, 2291(2), 2292(2), 2301, 2304, 2330, 2333, 2619(1), 2622(2), 2626(1)-(2) etc are just few of the legal provisions that make references to the usage or custom that is pertinent to the particular transaction in order to fill up any potential legal gap in the transaction that the parties did not or could not reach an agreement.²

Some international arbitration rules also provide that the arbitrators will take into account trade usages, even if they apply a national law. It is not uncommon that trade usages are frequently fill gaps in the applicable law. Since practices in the world of international commerce may well be developing more rapidly than the law. However, arbitrators may not depart from the law chosen by the parties on the ground that they are taking into account trade usages. When parties have not chosen an applicable law, arbitrators sometimes rely exclusively on trade usages to provide legal grounds for their decision. In doing so, arbitrators will have to base their choice on those international conventions and/ or arbitration rules which provide that arbitrators may, or will, in any event, take into account trade usages.³

The UNCITRAL Model Law on International Commercial Arbitration (1985) states blesses the applicability of ‘trade usages’ in the following glaring terms:⁴

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² See also George Krzeczunowicz, *Formation and Effect of Contracts in Ethiopian Law*, AAU, Faculty of Law, 1980, pp.59-60, 83.
³ International Trade Center UNCTAD/ WTO, *Arbitration and International dispute resolution: How to settle international business disputes*, p.90-91
⁴ Art.28(4)
… in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

_Similarly, the ICC Arbitration rules (1998) provides for the applicability of trade usages thus:_

… in all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.

The existence of construction trade usages have been precisely indicated by Charles Molineaux. (1997:64) He writes:

_If there can be said to be a lex mercatoria for international traders, we should as well recognize that there are construction law principles which, by reason of the activities of the multinational engineering firms (which draft contracts) and of the development banks (which standardize contract terms), already receive de facto recognition for international construction._

**B. Standard Forms (Conditions) of Contract**

Standard Forms (Conditions) of Contract are issued by certain private or public organizations so as to follow them in similar contractual relationships. They may be widely followed once they are put into use by a certain body or professional association. The widespread use of standard forms of contract merely show that a large number of builders and building owners choose to contract in the same terms. It is noteworthy to mention the following facts on the Standard Forms of contract:

- They may not be relied upon as evidence of custom;
- They are subject to frequent revision, and
- They are open to severe criticism on grounds of policy and obscurity.

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5 Art.17(2)  
6 Charles Malineaux, _Moving Toward a Construction lex mercatoria: A Lex Constructionis_, 14 J.Int.Arb.1, March 1997, at 64
A famous writer and arbitrator on construction Law, Nael Bunni, sums up the development and use of Standard Forms of Contracts thus:

In the commercial activities of today’s highly complex society, standard forms of contract have become an essential part for the day-to-day transactions of most agreements. The majority of standard forms have been developed by commercial organizations for the purpose of efficiency to build on the experience gained from the repeated use of these forms, but most of all for the optimum protection of one or both parties’ interests. Standard forms of contract developed for construction activities however, have mostly been drawn up by independent professional organizations, rather than by one or other of the parties to the contract, in order to establish or to consolidate a fair and just contract. Knowledge accumulated through experience and recurrent use over a long period of time brought about revisions and modifications in construction standard forms with the aim either of achieving greater certainty in the intention of the wording or of providing a response to the needs of the parties and/or society. The use of standard form in construction contracts where tendering is the conventional method of obtaining quotations has also ensured a common basis for the comparison and evaluation of tenders.

In Ethiopia, we can observe that a number of standard forms of construction contracts have been formulated and put in use. The prominent ones are:

- The Standard Conditions of Contract for Construction of Civil Work Projects that was authored by the Ministry of Works and Urban Development in May 1994;
- BATCoDA Standard Conditions of Consulting Services for Design and Supervision of Construction Works, January 1990;
- The FIDIC (Red Book) Conditions of Contract for Works of Civil Engineering, and
- The Standard Bidding Document for the Procurement of Works, issued by the Public Procurement Agency (PPA), January 2006.

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7 BATCoDA is an acronym and stands for Building and Transport Construction Design Authority.
8 The PPA is established under the MoFED by virtue of the Federal Public Procurement Proclamation No.430/1997, and it is mandated, among other things, to supervise and audit whether all Federal
Furthermore, the distinction becomes clear when one sees the applicability of the trade usages and standard condition of contracts in the dispute settlement process.

5.2 The FIDIC FORM OF CONTRACT (THE RED BOOK)

The Conditions of Contract (International) for Works of Civil Engineering Construction was prepared by the Fédération Internationale des Ingénieurs Conseils (the International Federation of Consulting Engineers, FIDIC) and the Fédération Internationale du Bâtiment et des Travaux Publics (the International Federation of Building and Public Works, now known as the International European Constructors Federation, FIEC). As its cover was printed in red, it has become popularly known as the ‘RED BOOK’. FIDIC is the international Federation of duly elected associations of consulting engineers representing the profession in their respective countries.

Since 1913, the Fédération Internationale des Ingénieurs Conseils (FIDIC) has produced the contract forms used in the majority of all transnationally financed civil engineering projects carried out in the developing world. Of the various contract forms introduced by FIDIC, the FIDIC Fourth Edition has claimed an unparalleled success throughout the world today and this success is also owed to the World Bank. The International Bank for Reconstruction and Development (IBRD), known as the World Bank, the largest financing agency in the international field, produced the first edition of its standard bidding documents for the

procurements are carried out in accordance with the Public Procurement Proclamation and the Directives.

9 Ibid, at 6.
11 Ibid
13 Ibid, at 274.
procurement of works of civil engineering construction (“SBDW”).\textsuperscript{14} The use of SBDW was made a\textit{ conditio sine qua non} for contracts financed in whole or in part by the World Bank for construction works estimated to cost more than USD 10 million and it is submitted that the SBDW is almost entirely based upon the FIDIC Red Book.\textsuperscript{15} Bunni (1995:467) says:

The adoption of the Red Book by the World Bank in its SBDW is a major vote of confidence and an endorsement of the FIDIC Red Book.\textsuperscript{16} Thus, according to Nael Bunni, “…in view of the importance of the World Bank as a financing agency for works of civil engineering construction in the developing countries, the use of the Red Book has escalated considerably.”\textsuperscript{17}

Space and time does not allow dealing with the FIDIC Red Book here. However, in an attempt to encourage students to read the document and analyze it and as a supplement to the Chapter on the Construction Dispute Settlement,\textsuperscript{18} one or two brainstorming issues can be raised in relation to the provisions containing the dispute settlement mechanism. For example, since the Red Book is based on the British Model, “it allots a high degree of authority to the project consulting engineer that appears to have offended developing country governments, contractors, civil law proponents and common law lawyers”.\textsuperscript{19} We believe it is within his/ her ambit for the consulting engineer to provide services such as counseling services, pre-investment studies, design, preparation of documents and supervision, project management, etc. As it is discussed below in the next Chapters, under the FIDIC Red Book, however, “the engineer must also resolve most of the day-to-day differences of opinion which frequently occur in multi-million or multi-billion

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\item \textsuperscript{14} Ibid
\item \textsuperscript{15} Nael Bunni, supra note 4, p.466. The document is officially referred to as Standard Bidding Documents for the Procurement of Works- Major Contracts (over US$ 10 Million; The World Bank, Washington D.C., January 1995.
\item \textsuperscript{16} Ibid, at 467
\item \textsuperscript{17} Ibid
\item \textsuperscript{19} Lyon, Supra note 26, at 273.
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dollar projects involving years of works by multiple sub-contractors. It is this broad spectrum of
decisional powers, binding both the contractor and the employer, which makes “the FIDIC
engineer uniquely strong and independent.” 20 The consulting engineer, who is the agent of the
employer in the particular project, is entitled to the pre-arbitral decision-making process whose
non-acceptance by the parties will lead to the initiation of arbitration. This decision-making
power may even relate to disputes relating to the engineer’s own design, specifications or
instructions handed down to the contractor on the employer’s behalf.

In response to the severe criticism, FIDIC came up in November 1996 with a document titled
Construction-reprinted 1992 with further amendments’21 with a view to providing, inter alia, an
alternative to clause 67 of the Red Book for the ‘settlement of disputes’, i.e., offering an option to
the quasi-arbitrator consulting engineer with a ‘Dispute Adjudication Expert or Board” that gives
decisions on any dispute referred to it, which decision may further be referred to arbitration.

It should be noted here en passant that, its being widely used notwithstanding, the irreconcilable
divergence between the FIDIC Form and the existing construction principles (especially
principles of public works contracts) in the Civil Law Countries has posited it as an inevitably
haunting guest rather than deserving the rolling of the red carpet.

According to Sykes, however, FIDIC principles represent a balanced and fair form of contract
for a number of reasons:22

- It is the result of continuous development work over a number of years by experts in
  the field of international construction and embraces, therefore, not only purely
domestic but also foreign concepts.
- It has been widely used on many types of contract in different legal jurisdictions in
different parts of the world.
- Its extensive use abroad has served to identify many problems associated with

20 Ibid, at 276.
21 Nael Bunni., at 15
22 Sykes, p.73
differing cultural, contractual and legal attitudes.

- It is based on informed advice from practitioners in many fields associated with international construction, including lawyers, bankers and insurers as well as clients, contractors and engineers.
- Successive editions have taken account of problems, disputes and arbitration and litigation cases, which have arisen following the use of earlier editions.
- It is regarded by the World Bank as acceptable, with few reservations, for projects funded by the World Bank.

5.3 The World Bank Standard Bidding Document (SBDW)

In connection with this, it is worthwhile to note that construction projects that are partly or wholly funded by the World Bank are treated differently.

In 1985, the World Bank produced bidding documents for the procurement of works of civil engineering construction in the form of sample documents. These sample documents were upgraded by the Bank to a standard bidding documents in January 1995, having incorporated into them the valuable international experience gained during the intervening period and having made their use mandatory in all contracts from construction works financed in whole or in part by the World Bank and whose cost is estimated to be more than USD 10 million. In January 1995, the World Bank, the largest financing agency in the international field, produced the first edition of its standard bidding documents for the procurement of works of civil engineering construction, ‘SBDW’. The use of these documents was made a condition in all contracts financed in whole or in part by the World Bank for construction works estimated to cost more than USD 10 million.

The SBDW included a set of conditions of contract, which was based on the Fourth Edition of the Red Book, in the form reprinted in 1992 with amendments. For example, the World Bank’s SBDW provides for the use of the three-member Dispute Review Board (DRB) for the

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construction contracts with the estimated value exceeding USD 50 million. For other contracts under the SBDW, the employer will be free to choose from the DRB, a one-member Dispute Review Expert (DRE), or the independent consulting engineer under clause 67 of the FIDIC Red Book.

The adoption of the Red Book by the World Bank in its SBDW is a major vote of confidence and an endorsement of the FIDIC Red Book. Furthermore, in view of the importance of the World Bank as a financing agency for works of civil engineering construction in the developing countries, the use of the Red Book has escalated considerably.

5.4 The 1994 MoWUD Standard Conditions of Contract

This Standard Conditions of Contract for Construction of Civil Work Projects was authored by the Ministry of Works and Urban Development (MoWUD) in May 1994. It is being widely put in use in government construction contracts both at the federal and state levels.

It is not appropriate or indeed possible to discuss its terms here. However queries can be posited for brainstorming purpose. It appears to have been, with minor adjustments or even rehashes, adopted from the FIDIC Red Book (1987). This is not, however, a definitive conclusion as it needs further studies regarding its origin. Be that as it may, it is dubious whether it can be applied consistently side by side with the administrative contracts principles enshrined in the Civil Code. In fact, one is bound to face with lots of difficulties in attempting to reconcile the two: the rights and obligations of the Governmental Department under the MoWUD Standard Conditions of Construction Contracts vis-à-vis the rights and obligations of the same under the Administrative Contracts Law. It is not also clear whether private parties to a construction contracts can also apply it. Furthermore, recently, its status is even dubious as the PPA’s Standard Bidding document for the Procurement of Works was issued and put in use by Federal Government Departments as of January 2006. The latter covers a number of standard contractual terms subdivided into three parts: Part 1 governing bidding procedures for the procurement of works in addition to the Federal Public Procurement Proclamation and Federal Public

24 However, mention of some clauses have already been made to elucidate some concepts in this Material.
Procurement Directives, Part 2 dealing with the schedule of requirements, and, Part 3, dealing with the contract, consisting of the General Conditions of Contract, Special Conditions of Contract and Contract Forms. This Standard Condition, its clarity and precision notwithstanding, is not as overarching in covering the number of construction issues as the MoWUD Standard Conditions of Construction Contract is.