WHAT ARE THE SPECIAL USANCES IN CONSTRUCTION?

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ABSTRACT

Half a year ago, the Croatian Chamber of Economy and the Croatian Employer’s Association issued the Special Usances in Construction, which regulate the legal relationship between the client (employer) and the contractor. This continues a long tradition of codifying the commercial usages into usances (uzance). It was, however, never sufficiently explored whether the commercial usages can at all be codified. Even if the answer is affirmative, it was not sufficiently explored whether the usances indeed reflect the existing commercial usages. The aim of this research paper is to bridge such gap by analysing the nature of usances and, in particular, the Special Usances in Construction. Several methods are used. First, the textual analysis of the usances. Second, the analysis of jurisprudence. Third, historical method, which explores the origin of usances in former Yugoslavia. The analysis leads to the conclusion that neither earlier usances nor the Special Usances in Construction reflect the existing commercial usages. Instead, they imitate statutory provisions, e.g. by containing the date of the entry into force and even (purportedly) mandatory provisions. Consequently, the Special Usances in Construction have to be qualified as a quasi-legislative instrument. Considering that the legislative power cannot be delegated, unless the parties agree on their application, the Special Usances in Construction cannot be used as a source of law.

KEYWORDS
Usances, Commercial usages, Construction contract, Merchants, Codification.
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1. INTRODUCTION

On last year’s Saint Nicholas Day Croatian construction industry got a brand new Special Usances in Construction (SUC, Posebne uzance o građenju). It remains to be seen to whom they are a gift and to whom a punishment.

The SUC are a result of a long drafting process under the auspices of the Croatian Chamber of Economy and the Croatian Employer’s Association. It all began with the Construction Act (CA) from 2013, which authorised those two organisations to issue and publicise the special usances (Art. 199 CA).

The SUC continue the Croatian tradition of subjecting the commercial contracts to so-called usances (uzance). The usances purport to be a codification of the existing commercial usages in certain or all areas of commercial activity. The first of them – the General Usances for the Trade of Goods – were issued in 1954. In 1950s, 1960 and 1970 more of them followed, often in very specific industries. One of the practically more important usances were the SUC from 1977, which were applicable until 2021.

Although usances are often mentioned in scholarly writing as one of the main sources of commercial law (Goldštajn, 1991, pp. 158-161; Barbić, 2005, p. 122, Zubović, 2006, p. 311), their true nature and origin have rarely been analysed. It seems that their application was too convenient and no one wanted to stir up trouble. However, the issuing of the new usances in an important industry such as construction, should raise the scholarly scrutiny.

In that regard, this paper will try to provide answers to two research questions. Are usances, especially the SUC, indeed a codification of commercial usages? If not, what is their power as a legal source? The chapter structure mirrors the research questions. First chapter is focused on usances in general, second on the SUC and third, the conclusion, discusses their application as a source of law.

Several research methods are used, seamlessly and interchangeably. First method is the textual analysis. It is suitable for determining what is the content of the SUC and other usances. Second method is the analysis of scholarly texts. It determines what is the prevailing opinion on usances. Third method is the historic analysis. It analyses why did the usances appear, why they became popular, why such popularity abated and how the SUC continue past trends.

2. ARE USANCES COMMERCIAL USAGES?

Practically all scholars consider usances to be a codification of commercial usages (Goldštajn, 1991, pp. 158, 159; Zubović, 2006, p. 311; Babić, 2004, p. 66). This is confirmed by statutory texts. The CA provides that the SUC should be issued and publicised “in accordance with the business usages and practice” (Art. 199 CA). The Obligations Act (OA)
from 1978 mentioned “the general or special usances or other commercial usages” (Art. 1107 (3)).

Commercial usages are, in turn, defined as a course of conduct between the merchants which occurs so frequently that the merchants expect its continuation in the future (Goldštajn, 1991, p. 152; Zubović, 2006, p. 309; Marušić, 1972, p. 92). Commercial usages are one of the principal sources of commercial autonomous law, i.e. the law created by merchants themselves (Barbić, 2005, p. 87). They apply to the commercial contracts as default rules, and have a priority over non-mandatory statutory provisions (Art. 12 (2, 3) OA).

Thus, if the usances were commercial usages, this would be rather significant. Considering that the statutory law of obligations mostly consists of non-mandatory rules, usances would apply as a source of law immediately after the contract and the course of dealings between specific parties (Barbić, 2005, p. 123).

However, it was rarely examined whether the usances indeed represent commercial usages. The initial question is whether the commercial usages can at all be codified. It seems that there are, to say at least, serious obstacles.

2.1 The nature of commercial usages defies codification

The commercial usages are an autonomous source of law because the merchants can model them to suit their needs. The usages represent merchants’ reaction to certain situations and problems which occur in the course of their business. At the moment in which the usages are codified, such development stops. The merchants have no reason to continue being inventive, because usances contain ready-made solutions.

Even if some merchants continue improvising, their inventions would not easily become universal. A majority of merchants would probably stick to the already available and familiar usances. Finally, even if a new commercial usage emerges, it would still be necessary to persuade the courts. The burden of proof would be on the party who claims that the usances are no longer applicable (Barbić, 2005, p. 120).

Moreover, a codification requires an organisation and systematisation which might not exist in the factual conduct between merchants. It is necessary to, at least partially, modify the usages. Therefore, the very notion of codification of commercial usages is somewhat contradictory (Goldštajn, 1991, p. 159; Radanović, 1970, p. 16; Barbić, 2005, p. 90; Kranjc, 1996, p. 415; Milotić, 2022, p. 16).

To sum up, the usances incentivize merchants to stay passive, as they freeze the usages in a certain point in time. This goes against the very nature of commercial usages as a flexible, self-developing source of law.

2.2 Lack of exact criteria on what constitutes commercial usages

Scholars agree that the key feature of commercial usages is their frequency (Goldštajn, 1991, p. 152; Zubović, 2006, p. 309). However, they rarely discuss what that actually means. Is it sufficient that a certain conduct occurs in a majority of cases (50% plus one) or it has to
occur in almost all cases (100%)? The answer probably lies somewhere in between, but it is not clear exactly where and why. E.g. if 90% of the merchants engage in a certain conduct, this, at first, sounds a lot. But that also means that 10% of the merchants do not act in such a way. Considering that the basis of the commercial usages is party autonomy, it might be unfair to subject them to a usage to which they did not want.

Moreover, even if a certain conduct occurs in a vast majority of cases, this does not necessarily mean that the merchants consider it the only possible option. E.g. if merchants usually notify the non-conformity on the seventh day after they took over the building, it does not have to be the last day for such notice. Namely, it is not reasonable to assume that a prudent merchant would always give notice on the day when the time limit expires. It would make more sense that it wanted to give a notice at least a few days earlier.

On a more theoretical level, this is a question of normative vs factual. A legal norm requires a certain behaviour from its addressees. Thus, with more or less certainty, its content tells how the addressees will behave. However, it does not work the other way round. The fact that a group of people behave in a certain way does not necessarily mean that there is a legal norm. Human behaviour is not always dictated by norms, much less legal ones. Even if there is a legal norm, its exact scope and content are not easily reconstructed. E.g. a factual conduct might use only one of the options given by a legal norm and, relying only on such behaviour, one could reconstruct the legal norm too restrictively.

These are, of course, wider issues which concern all commercial usages and not just usances. Different approaches could be legitimate. No matter which approach is chosen, however, the drafter of usances should at least carefully explain the criteria which it used when codifying commercial usages. This is rarely the case, and the usances are publicised without any comments or explanatory notes.

### 2.3 Difficulties in determining the commercial usages

Furthermore, it is not easy to determine the existing commercial usages. The most important source are, naturally, the merchants themselves. The problem is how to approach the merchants, even under the assumption that they are willing to cooperate and share their, potentially confidential, business affairs.

First problem is of representation. Commercial usages develop in a decentralized way, by all merchants simultaneously. The drafter of usances would, ideally, contact all merchants. This is, of course, not possible, and the drafter has to choose a representative sample. This again presupposes drafter’s substantial prior knowledge of merchants’ activities and the drafter’s integrity. Without such knowledge and integrity, the sample could easily favour some of the merchants and their usages at the expense of the others.

Second problem is of methodology. Should the drafter of usances go from door to door, and ask each merchant to disclose everything about its business transactions? Not only that this would be laborious, but the merchants would probably not remember all legally important details. Even if they did, each account would be defined by merchant’s specific way of storytelling. Thus, it would be difficult to extract a common denominator.
The drafter of usances can prevent this by making an initial framework, e.g. a questionnaire. This, again, begs the question – how to choose the right questions? The drafter of usances might inspire itself with the law of obligations, but the commercial usages could be much more comprehensive, detailed and technical. There is a danger that such usages remain unnoticed. Naturally, it helps if the drafter of usances already has a deep knowledge about the industry. However, that is also dangerous, because the drafter will naturally be conditioned by its own experiences, on the expense of the others.

Those problems are compounded by the fact that commercial usages exist on many levels. There are usages limited to a certain trade, usages which span across trades and usages shared by all trades. Moreover, a usage can be regional, national, international or truly universal (Goldštajn, 1991, pp. 155-157, Marušić, 1998, p. 92). The drafter of usances would have to treat separately and give a sufficient amount of attention to each of those levels.

2.4 Usances did not originate from commercial usages

Usances are not a universally accepted source of law. They do not exist in most of the comparative legal systems and they did not always exist in Croatian law. Instead, they are a product of a specific time period and its needs.

After the creation of socialist Yugoslavia (FNRJ) in 1946, all legal provisions that were in force before 1941 lost their legal force (Art. 2 of the Act on Non-Application of Statutes Enacted Before 6 April 1941 and During the Enemy Occupation). Those provisions could still be applied, but only subsidiarily, if they were not contrary to the Constitution of FNRJ, the constitutions of individual republics, their constitutional principles and the newly enacted laws and regulations (Art. 4).

This created a huge legal gap in the system of private law (Goldštajn, 1991, p. 160). When it became clear that the new civil code will not be soon enacted, so-called Main State Arbitration (a commercial court) issued in 1954 the General Usances. The General Usances were a digest of contract law rules that contained basic provisions of the general law of obligations and the contract of sales. They did not pretend to be a collection of the existing commercial usages and they even contained mandatory provisions (Isaković and Šurlan, 1971, p. 13, Goldštajn, 1958, p. 4).

The General Usances arose out of necessity and practicality (Goldštajn, 1958, pp. 3, 4). This was, however, enabled by the fact that the Constitution of FNRJ was based on the unitary concept of people’s sovereignty (Art. 6 of the Constitution of FNRJ), without a strict separation of powers. From the contemporary perspective, it would be unconstitutional that a commercial court engages in a quasi-legislative activity.

Soon afterwards, the federal and state commercial chambers issued a number of special usances (Port Usances from 1951, Special Usances for Certain Types and Classes of Tobacco from 1956, Special Usances for Trade with Potato from 1960, Special Usances for trade with Beans from 1960, Special Usances for Trade with Rice from 1960, Special Usances for Trade with Unpeeled Rice from 1960, Special Usances for Trade with Vegetables from 1960, Special Usances for Trade with Cereals from 1960, Special Usances
for Trade with Blocks and Plates Made of Stone, Marble and Granite from 1967, Special Usances in Construction from 1977, Special Usances in Hospitality Industry from 1995. Special Usances in Retail Sales from 1995). Although much more technical than the General Usances, the special usances also did not only reflect the existing commercial usages (Barbić, 2005, p. 91, Bukljaš, 1962, p. 3). Many of them were more of a regulatory nature, listing in detail various types of vegetables, their dimensions, allowed deviations, storage temperature etc.

Even scholars who consider usances to be a codification of commercial usages, recognize that the drafter of usances always made a selection of “good commercial usages”, with the appropriate modifications (Goldštajn, 1991, p. 159, Marušić, 1977, p. 107, Radanović, 1970, p. 16, Babić, 2004, p. 66, Pavić, 1997, p. 224). This can be hardly be justified by the fact that the commercial usages and usances cannot be contrary to the mandatory rules and morals of the society (Art. 322 (1) OA). To be specific, it is very difficult to imagine that a majority of merchants would frequently engage in a conduct which would be illegal or immoral. It is, instead, more likely that the drafter of usances simply chose only those commercial usages which it deemed appropriate, thus making the selection in lieu of the merchants themselves (Marušić, 1977, p. 107, Radanović, 1970, p. 17, Isaković and Šurlan, 1971, p. 12, Goldštajn, 1958, p. 4; Goldštajn, 1962, p. 14).

3. ARE THE SUC COMMERCIAL USAGES?

After the law of obligations was finally codified in the OA of 1978, usances fell out of favour. This is exemplified by Art. 21 (2) OA 1978, which stated that the usances are applicable only if the parties explicitly or implicitly agreed on their application. Also, even non-mandatory statutory provisions took precedence over usances, unless the parties have explicitly agreed otherwise (Art. 1107 (3) OA 1978). Thus, the usances were treated not much different from standard terms and conditions, which apply on the basis of parties’ actual, not presumed intent.

This also affected the SUC from 1977. They could apply only if the parties’ agreed on their application and they could derogate from the statutory provisions only if such agreement was explicit.

In the next 40 years only a couple of special usances were issued. The new OA, from 2005, no longer mentioned usances. However, it stated that the commercial usages apply in commercial contracts irrespective of parties’ agreement, as long as the parties did not exclude their application (Art. 12 (2) OA). Also, in commercial contracts the usages have a precedence over non-mandatory statutory provisions (Art. 12 (3)). In other words, if the usances contained commercial usages they could apply as a default rule, before most of the statutory provisions (Barbić, 2005, pp. 122, 123).

Against that backdrop it came as a surprise that the CA from 2013 required the Croatian Chamber of Economy and the Croatian Employer’s Association to issue the SUC. First, the usances already felt like a relic, closely connected to an earlier, socialist legal regime. Second, the legislative intention was obviously that the SUC apply as a default rule.
Therefore, it remains to be carefully analysed whether the SUC are a codification of commercial usages.

The drafting of the SUC lasted six years. It was conducted by a working group of ten experts. The drafting process took around 40 meetings and 11 expert symposiums, which produced five different draft versions (Bogdan, 2021, p. 1246). This should have given the working group an opportunity to learn about the commercial usages in the construction industry.

However, apart from the general scepticism whether it is possible to “codify usages” (Chapter 2.), the text of the SUC raises very specific doubts that it is not a codification of the existing usages. Instead, it more closely resembles the text of a statute or some other public regulation.

3.1 The date of entry into force

Like other usances, the SUC purport to be a codification of the already existing commercial usages. The commercial usages apply to commercial contracts as a default rule (Art. 12 (2) OA). Hence, the commercial usages contained in usances would have to apply at least a certain period of time before they were codified. This is the reason why usances formally do not “enter into force” (Goldštajn, 1991, p. 159, Zubović, 2006, p. 311, Babić, 2004, p. 66).

Nevertheless, in their transitional and final part, the SUC contain the following two provisions:

Termination of the Applicability of Regulation

106. From the day of application of the Special Usances in Construction ceases the application of the Special Usances in Construction published in the Official Gazette SFRY, No. 18, from 1 April 1977.

The Application of Usances

107. (1) The Special Usances in Construction apply after the expiration of eight days from the day of publication in the Official Gazette.

(2) This Special Usances in Construction apply to contracts entered into after the application of the Special Usances in Construction.

There are several problems with those statements. First, they use the term “regulation” (propisi), which is an unusual choice of words for commercial usages. Second, they neglect the fact that the usages had to apply before the current SUC were even drafted. Third, those statements suggests that, at the time of the drafting, the SUC from 1977 were still applicable. If this was true, it would be impossible for new commercial usages to emerge. Fourth, such provisions are typical for statutes and state regulation. According to Art. 90 (3) of the Croatian Constitution, a statute needs to be published in the Official Gazette and it comes into force, at the earliest, eight day from its publication.
To sum up, the drafters themselves treated the SUC not as a collection of usages but as a public regulation which enters into or loses force on a certain day from the official publication.

3.2 Mandatory provisions

The application of commercial usages is based on the presumed intent of the parties. I.e. it is expected that the merchants, who are experts in their trade, know and want the usages typical for that trade. For the same reason the application of the commercial usages is not mandatory (Barbić, 2005, p. 95, Zubović, 2006, p. 315). According to Art. 12 (2) OA, the parties are always free to exclude their application.

However, it seems that the SUC contain at least several provisions which purport to be of a mandatory nature. Probably the most obvious one is found Art. 22 SUC which deals with the clause on non-adaptability of the prices – if the parties agree that the price will not adapt due to the changed circumstances (fixed price), the adaptation of the price can still be requested if the price, due to the changed circumstances, increases or decreases by more than 3%. Simply put, even if the parties agree that the price will be fixed, if certain requirements are satisfied, the price will not stay fixed. This goes against the principle of party autonomy.

It is equally clear that such provision does not originate from a commercial usage. If the merchants agreed that the price will stay fixed, the usage was obviously to have a non-adaptable price, and not to depart from such an agreement already after a price deviation of only 3%.

It seems that Art. 22 SUC was inspired by Art. 627 and 629 (2) OA which also contain mandatory provisions on the clauses on non-adaptability of the prices. The difference, however, is twofold. First, Art. 627 and 629 (2) OA are statutory provisions, which do not pretend to be a product of party autonomy but, instead, to limit such autonomy. Second, if the parties agree on non-adaptability of the prices, under Art. 627 and 629 (2) OA an adaptation can be requested if the price increases or decreases by more than 10%. I.e. even under statutory mandatory provisions the party autonomy is more than three times wider than under purportedly commercial autonomous law (10% vs 3%).

Furthermore, Art. 44 SUC provides that a maximum contractual penalty is 5% of the overall price. It seems that such penalty cap purports to be a mandatory provision. Although it could be understood that this applies only in the absence of an agreement to the contrary, the imperative wording at least deters the parties from making such an agreement.

Similarly, Art. 58 SUC provides that the client (employer) has a right to withhold a proportionate amount of the price for the purposes of remedying mutually recognised non-conformities, but not more than 5% of the value of the construction works, unless the parties agreed on some other guarantee. The purportedly mandatory nature of 5% cap is highlighted by the fact that the parties are allowed to agree on some other guarantee, but not, it seems, on a higher cap or no cap at all.
3.3 The SUC resemble the Obligations Act

Not only that the SUC contain the date of entry into force and purportedly mandatory provisions, but they are overall written to resemble a statute. Consequently, they do not so much complement but compete with the OA as a source of law.

First, the SUC contain many general provisions which already exist in the OA. Art. 3 SUC states that a party cannot require the other party to perform the contract unless it performed or is ready to perform its own obligation. Art. 4 (1) SUC provides that the parties are bound to perform their obligations within the agreed time limits. This is an expression of the principle *pacta sunt servanda*. Art. 7 (1) SUC states that the contract has to contain all necessary elements required by the statute which regulates the law of obligations. Art. 65 (2) and Art. 102 SUC provide that the damages also include loss of profits (*lucrum cessans*), which is again a general rule of the law of obligations (Art. 346 (1), Art. 1046 OA).

Second, the SUC contains provisions which superficially resemble the provisions of OA, but, on a closer look, contain significantly diverge. E.g., Art. 18 SUC regulates the adaptation of the price due to changed circumstances, which were unforeseeable and unavoidable. The same requirements are also contained in Art. 369 OA, which regulates hardship (*clausula rebus sic stantibus*). Art. 369 OA, however, requires that, due to changed circumstances, the performance of an obligation became excessively difficult or would result in a disproportionate loss. Art. 18 SUC does not contain corresponding requirements.

This raises several questions. Does this mean that, under Art. 18 SUC, an adaptation can be required even if changed circumstances affect the price only slightly, e.g. 1% or even 1‰? Also, is it possible that this is a commercial usage? Even without conducting an independent research, it is difficult to imagine that a majority of merchants would agree to such a flexible price adaptation.

Furthermore, Art. 19 SUC states that the contractor can require an increase of a unit price if it performed the construction works within the agreed time limit and if, between the time of the offer and the performance, and without its influence, there was an increase of prices of individual elements, which were the basis of the unit price of an individual item in the bill of quantities, so that such price would be higher by 2%. Art. 626 (1) OA contains a very similar provision, however, without limiting the contractor’s claim to unit price. Also, the price increase of 2% does not refer to an individual item in the bill of quantities, but to the total price of construction works. In other words, the contractor would not have a claim if the price of some items increased by more than 2%, but price of other items decreased so that the overall difference was below 2%.

Having in mind the current volatility of the prices of construction materials, even a slight change in wording can have a profound impact on the final outcome. Again, few things are clear. Was such change deliberate or can it be attributed to a mistake? If it was deliberate was it indeed a reflection of an existing commercial usage?

Moreover, Art. 629 OA gives the client (employer) a mirror right to claim a price decrease if the prices of individual elements decrease so that the total price would decrease by more than 2%. The SUC do not contain a similar provision. Does this mean that the client, unlike the contractor, is not allowed to claim a price decrease? Or, on the contrary, it can claim
even the slightest price decrease according to the general provision on price adaptation from Art. 18 SUC?

In any case, the said provisions of the SUC look more like a subpar statutory regime than a codification of the existing usages.

Third, although the SUC claim to apply only to the relationship between the client and the contractor (Art. 1), their scope is much broader as they regulate other relationships between the parties and the third persons.

Art. 40, 41 and 42 SUC regulate the relationship between the contractor and the subcontractor - subcontractor’s obligations, contractor’s termination of the contract with a subcontractor, contractor’s acquisition of possession from the subcontractor and entrusting subcontractor’s obligations to another subcontractor. The wording of the SUC is particularly poor. It states that the contractor “transfers its contractual obligations” (prenosi obveze iz ugovora) to a subcontractor, “without transferring the liability” (ne prenosi odgovornost za provedbu) (Art. 40 (2) SUC). However, it is not possible to transfer an obligation without a liability, since the liability is a necessary consequence of an obligation (Art. 9 OA). The SUC probably wanted to say that the contractor can perform its obligations towards the client by hiring a subcontractor, without transferring its obligation or liability to such a subcontractor (cf. Art. 600 OA).

Furthermore, Art. 76 (3, 4, 5) SUC regulate the relationship between the client and a person who secures client’s warranty claims, usually a bank. It is presumed that a bank guarantee amounts to 5% of the value of the performed works, and that it lasts for two years. It is also presumed that a bank guarantee is a guarantee on a justified and documented payment demand. If there is a disagreement as to the basis or the amount of payment, the guarantee shall not be paid until the resolution of the disagreement. This seems to go against the widespread practice that the bank guarantees are paid on the first demand – without waiting for the resolution of the dispute from the underlying contract (Art. 5 ICC Uniform Rules for Demand Guarantees, Miladin, 2006 , p. 377).

According to Art. 78 (1) SUC, the equipment installed in a building is covered by the warranty certificate issued by the producer of the equipment. Also, according to Art. 82 SUC, the client’s rights arising out of non-conformity of the building are transferred to the future owners of the building. This is a variation of the rule from Art. 632 and 633 (5) OA.

Fourth, certain provisions of the SUC simply make no sense. A party cannot claim a price adaptation or an extension of the time for performance if the changed circumstances occurred after the claiming party was late with the performance of its obligations (Art. 21(1), 34 (1) SUC). This is a fairly standard provision, resembling Art. 369 (3) and Art. 626 (4) OA. However, the SUC also contain an exception to that rule. A party retains those claims if the changed circumstances would occur even if the party had performed its obligations on time (Art. 21(2), 34 (2) SUC). Such an exception fails to observe that, had the party performed its obligations on time, it would not have been affected by the changed circumstances, which occurred after the obligations were due.
3.4 Permanent Arbitration Court and the Croatian law

Art. 105 SUC states:

For the resolution of their disputes, the parties can provide for the jurisdiction of the Permanent Arbitration Court at the Croatian Chamber of Economy, the applicability of the Croatian law and language, mediation and the other methods of the dispute resolution.

This provision does not even pretend to be a codification of a commercial usage. It does not say what merchants usually choose, but only that they are allowed to choose a dispute resolution mechanism and the applicable law (“can provide”). Having in mind the principle of party autonomy, such permission is superfluous.

However, not all dispute resolution mechanisms and the applicable laws are placed on the same footing. The SUC highlight the Permanent Arbitration Court at the Croatian Chamber of Economy and the Croatian law.

The reference to Croatian law is especially puzzling. It obviously has in mind contracts with an international element, where the parties are free to choose the applicable law. However, the SUC can at best purport to codify commercial usages between Croatian merchants. The Croatian Chamber of Economy and the Croatian Employer’s Association have neither authority nor expertise to collect the international usages in construction industry. Considering that the commercial usages apply because merchants should have been aware of their existence, the foreign merchants cannot be bound by purely Croatian usages.

Even if the SUC had the ambition to collect the usages which exist between Croatian parties and foreigners, they should have differentiated those usages from purely domestic usages. Needless to say, this did not happen.

Consequently, it seems that the only purpose of Art. 105 SUC is to promote the Permanent Arbitration Court at the Croatian Chamber of Economy and the Croatian Law. From that perspective, it is especially problematic that the Croatian Chamber of Economy is also the drafter of the usances and, thus, in an obvious conflict of interest.

3.5 The drafters do not consider the SUC as commercial usages

Finally, the drafters themselves, when talking about the SUC, do not treat them as the existing commercial usages. At a meeting in which the SUC were formally signed and promulgated, the president of the Croatian Employer’s Association – Construction Industry Association stated: “Before us is further activity in order to include the SUC, as much as possible, in the public procurement contracts, so that, instead of foreign FIDIC and VOB, Croatian commercial usages, gathered in the SUC, at last come to life in the business practice” (Croatian Chamber of Economy, 2021, also Bogdan, 2021, p. 1246).

Two things are worth noting. First, the idea that the commercial usages still need to “come to life” in the business practice is both comical and absurd.
Second, the SUC are compared to FIDIC and VOB, which are not codifications of commercial usages, but contract templates, containing standard terms and conditions. This is not just a matter of terminology. The difference is that FIDIC and VOB templates are applicable only if the parties incorporate them by reference, i.e. demonstrate their intent to apply them. The SUC, instead, purport to apply as a default rule.

4. THE CONCLUSION – ARE THE SUC A SOURCE OF LAW?

The remaining question is whether the SUC can be used as a source of law and on which basis.

The SUC themselves proclaim to apply to contractual relationships between the clients and contractors, unless the parties excluded their application (Art. 1, 2 SUC). Literally understood, they would apply not only to commercial, but to all contracts, even the consumer ones (Milotić, 2022, pp. 14, 15). However, the SUC cannot bootstrap their scope of application. They can apply only as much as it is allowed by the statutes and the Constitution (Barbić, 2005, p. 117).

The main codification of the law of obligations, the OA, no longer mentions usances, only commercial usages (Art. 12). Thus, the SUC could apply only if they contain commercial usages.

The analysis demonstrated that neither the usances in general nor the SUC are a codification of commercial usages. Instead, they much more closely resemble a statute. Naturally, it is quite likely that a number of provisions in the SUC were at least inspired by commercial usages. After all, the SUC were enacted after a long drafting process which included many experts in the industry.

The problem is, however, that from the text of the SUC it cannot be concluded which provisions contain commercial usages. Considering that the drafters of the SUC demonstrated the ambition akin to a legislator, even the provisions that resemble a usage might be a product of the drafters’ activism. The problem is compounded by the fact that the drafters did not accompany the SUC with the methodology or publish the results of their research.

Consequently, there should not even be a presumption that the SUC reflect commercial usages (Barbić, 2005, p. 120). The courts are allowed to take the SUC into account when freely evaluating the evidence, but they should not give them too much weight. Any concrete evidence of a commercial usage, e.g. experts’ or witnesses’ statement, should have a priority. The institution in charge with determining the individual commercial usages is, again, the Croatian Chamber of Economy (Art. 12 (2) Articles of Association of the Croatian Chamber of Economy). The Croatian Chamber of Economy should not decline a request for determining the commercial usages just because the issue is “already settled” in the SUC. Instead, it should contact a representative sample of the merchants in the construction industry.
The SUC are explicitly mentioned by the CA. However, this is not sufficient for their unequivocal application. Art. 199 CA requires the SUC to reflect the “business usages and practice” and provides that the SUC will apply “in accordance with the special regulation on the law of obligations”. In other words, if the SUC do not reflect the commercial usages and would not be applicable according to the provisions of the OA, they should also not apply according to the CA.

Moreover, it is questionable whether Art. 199 CA is constitutional. Of course, there is nothing wrong with determining the existing commercial usages. However, as already stated, the usances were never a codification of the usages, but a quasi-legislative instrument. This left a mark in Art. 199 CA when it “authorises” the Croatian Chamber of Economy and the Croatian Employer’s Association to issue and publish the SUC, “with a prior approval of the Ministry”. If the SUC were indeed a collection of usages, there would be no need for a statutory authorization, much less a Ministry approval. The power of usances should derive from their nature as commercial usages and from the expertise of the organization which collects them. Statutory authorisation to enact a quasi-legislative instrument resembles a delegation of the legislative power, which is not allowed outside of the strict constitutional confines (Art. 88 Constitution of the Republic of Croatia).

It follows that the SUC, as such, have no legal power, and should not be used as a source of law. Naturally, the parties could agree on their application, usually by a reference in their contract. If that happens, the SUC would apply as standard terms and conditions, similar to FIDIC or VOB contract templates.

It is, of course, possible that the merchants will apply the SUC and, thus, with the passage of time, they will indeed become commercial usages. It is, however, important to differentiate between two scenarios. If this happens because the merchants recognise the SUC as a best solution for their contractual relationship, there is nothing to complain about.

The problem is if the merchants apply the SUC only because they think that the SUC already govern their contract. In that way the SUC would become usages not as an expression of party autonomy but of a top-down dictate. This would frustrate the whole point of commercial usages as a source of law.

In order to prevent that, it is important to spread the word that the SUC are not a codification of the commercial usages. It is equally important that the courts recognise that and that they do not blindly apply their provisions.

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