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THE HARMONIZED DISSONANCE OF TRADE USAGES: TURKISH LAW VS. LEX MERCATORIA

The Turkish Commercial Code distinguishes between commercial customary law and trade usage. Trade usage may be defined as actual practices or habits used in the interpretation of declarations of will in commercial relations, but which have not attained the status of customary law, unless the legislator has expressly provided for their application. In judicial decisions, however, trade usage is often treated as an abstract principle of law rather than as a concrete habit or practice to be applied in a particular dispute. After examining whether trade usages may serve as a basis for judicial decisions under Turkish law, this paper highlights the erroneous approach to trade usage in Turkish case law. It then compares Turkish law with relevant international instruments and examines whether the case law of the Turkish Court of Cassation is compatible with international commercial regulations.

Key words: *Customary law. – Interpretation of will. – Lex mercatoria. – Trade usage. – Turkish commercial law.*

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1. TRADE USAGE AND ITS DIFFERENCE FROM CUSTOMARY LAW

1.1. Turkish Commercial Law

Trade usage is regulated in all three commercial codes of the Republic of Türkiye. In the Commercial Code of 1926, however, unlike in the two later codes, trade usage was not treated separately from customary law. More precisely, Code No. 865 did not regulate trade usage as a distinct category; it referred only to customary law in Article 2. By contrast, Article 2(1) of the former Turkish Commercial Code No. 6762 and Article 2(1) of the current Turkish Commercial Code No. 6102, which has been in force since 1 July 2012, expressly refer to trade usages and thereby make clear that commercial customary law is distinct from trade usage (Kaplan 1987, 46; Ulusoy 2001, 103; Kiraly 2022, 4). Under these provisions, unless otherwise provided by the Code, trade usage cannot serve as the basis for a court judgment unless it has been established that the usage has been accepted as commercial customary law. Nevertheless, trade usage may be taken into account in the interpretation of declarations of will.[1] As a rule, trade usages that are not accepted as customs can only be used in the interpretation of declarations of will. Therefore, it is not possible for trade usages, which are not accepted as customary law, to be the basis for a judgement to be rendered by a judge. From this point of view, it is possible to characterise trade usage as an actual practice or habit that has not reached the level of customary law in commercial practice (Arkan 2025, 104). However, as stated in Article 2/1 TCC, in some cases, trade usages may constitute the basis for the judgement, regardless of whether this habit or practice has reached the level of custom, solely on the grounds that there is a legal regulation by the legislator regarding the application of these usages. Indeed, some articles of the TCC[2] clearly state that trade usages should be applied directly. Therefore, based on these, it is possible to define trade usages as the actual practices or habits that are used in the interpretation of declarations of will but that have not reached the level of customary law in commercial relations, unless explicitly stated by the legislator that they apply (Poroy, Yasaman 2024, 136; Ülgen *et al.* 2019, 106–107). The general preamble of the abrogated TCC No. 6762, states that 'every trade usage is not a legal rule in principle, but only a de facto habit. Although this usage provides a great benefit in the interpretation

[1] See also Art. 12/C of International Arbitration Code No. 4686 for a similar provision stating that commercial customs and trade usages may be taken into consideration in the interpretation and conclusion of contracts.

[2] See section 2.1 below.

of clear and implied wills, it does not constitute an objective rule of law'.[3] 'Actual habit' means the same or very similar behaviour towards the same or similar situations in a region or among the members of a profession. The phrase 'de facto' means what is unwritten, put into action, converted into action or realised, and is still being or has been applied (Tekinalp 2022, 630). Since these usages count as 'de facto habits', it could be said that they blur the contours of law and contract, standing between the parties as an element of transition, a penumbra in which all strong contrasts and oppositions are toned down and distinct features become indistinguishable (Gélinas 2015, 50).

When determining whether a trade usage can applied exceeding the interpretation of the will of the parties, it is sufficient to state that trade usage may be applied in any legal regulation (positive law), not only in the narrow meaning of the code (Tekinalp 2022, 625). While defining trade usage, there is no determination in the code as to whether it must be applied between merchants or not. However, the TCC expressly stipulates that the commercial customary law shall be applied between merchants.[4] This requires special attention to determining whether the parties are merchants, in order for the trade usage to be applied between the parties. First of all, considering that trade usage has not reached the level of commercial customary law, the parties do not have to be merchants in order for the commercial custom to be applied. It is also possible to apply trade usage in business or transactions carried out between parties who do not have the status of merchant. However, it could be said that these transactions should at least have the characteristics of commercial transactions. In order to consider the existence of a commercial custom, the parties do not need to be merchants; it is sufficient that the transaction between them is a commercial transaction. From this point of view, it is possible to characterise the long-term habits that have been applied between two non-merchant parties as ordinary usage (not trade usage). In order for a trade usage to considered justified, that usage must consist of abstract rules that exceed the parties and have the potential to be applied to events or cases of a similar nature. For this purpose, the usage must be related to commercial transactions (Kaplan 1987, 49). More precisely, trade usages should be understood as habits determined by a chamber or a commodity exchange, which have been applied in commercial practice for a certain period of time and which have

[3] Translated by author.

[4] For the opposite view, see Tekinalp 2022, 628.

the potential to be applied in the event of a similar situation, case or legal relationship. It is possible to apply a trade usage without being determined by chambers or commodity exchanges.

It is explicitly regulated that commercial customary law, unlike trade usage, may be the basis of the judgement. Thus, commercial customary law should be applied even before general provisions (TCC, Art. 1/2). The difference in the case of customary law is that the moral element that evolves to comply with that practice is based on a wider audience than trade usage. In order to discuss about customary law, there must be practices that exceed a habitual practice among a few people (for example, the parties to the contract). Clarification of this issue is especially important in terms of determining whether the trade usage exceeds the level of commercial customary law, and therefore whether it may be the basis of the judgement or not. So, when will a commercial custom be deemed to exceed the level of customary law? The answer to this question depends on when the custom becomes a rule of law that will be applied even before the general provisions. More precisely, when the conditions for a custom to become a binding rule of law are met, it could be said that the boundary between commercial custom and trade usage can be defined more easily. The transformation of a custom into a rule of law depends on the coexistence of two elements, one material and the other moral (psychological). The material element expresses the continuity in the application of the custom. Indeed, the fact that a custom becomes a rule of law depends on the fact that it is based on the past, to the extent that the previous practices cannot be known (Polanski, Johnston 2002, 7–8; Işıktaç 1992, 40–41). From this point of view, it is open to debate whether only the habits (usages) that have been practised between the parties for a certain period of time fulfil the requirement of continuity (Işıktaç 1992, 40). The other condition for a custom to become a rule of law is the belief of the society or the relevant group that it is necessary to act in the way required by the custom (Watson 1984, 563; Polanski, Johnston 2002, 8; Işıktaç 1992, 42). This is precisely where the biggest difference between commercial custom and trade usage arises. That is to say, in the case of customary law, large masses (Serozan 2015, 105) of people throughout the country believe that they should behave in that way, and that this belief will lead other people to behave in the same way today and in the future. However, the moral belief in the necessity to comply with trade usages that have not reached the level of the commercial customary law and usage in the society or a group is weak, it is based on smaller groups of people, often on common habits between

parties.[5] In other words, we would like to state that trade usages that are not supported by general and widespread opinion (*opinio necessitatis*) and which have the character of habits applied only by a certain (narrow) mass (region or professional group) do not reach the level of customary law and cannot be the basis of judgement (Serozan 2015, 107; Kaplan 1987, 47).[6]

In this context, another issue that needs to be emphasised is whether there is a need for governmental support (a sanction or a legal regulation on compliance) in order for a custom to become a rule of law. In terms of customs, it could be said that there is no such obligation on account of the moral rule that they should be followed by the majority of the society (Işıktaç 1992, 44). However, since the trade usage has not yet reached the level of customary law, the moral element that the majority of the society should act in accordance with that trade usage is low compared to customary law, it is necessary to receive governmental support (Levie 1965, 102; Kaplan 1987, 46–47; Ulusoy 2001, 104, 106). In fact, this issue is explicitly stipulated in Article 2/1 TCC, which states that 'the contrary should be expressly stipulated'. In other words, when it reaches the level of customary law, trade usage does not need governmental support since it already has both the material and moral elements; however, if it has not reached this level, governmental support is necessary for it to be the basis of the judgement: there must be a clear provision in the legal regulations that the trade usage may be applied.

As can be seen, trade usages may be the basis of judgement if they reach the level of customary law or if they are explicitly stated in a legal regulation. In these two cases, there is no doubt that trade usages are a source of law. The main problem is whether trade usages are a source of law if they have not reached the level of customary law or if it is not expressly determined in a legal regulation that trade usages may be applied. There is an opinion in the doctrine that such commercial customs shall not be considered a source of law, since they can only be used in the interpretation of declarations of will (Ülgen *et al.* 2019, 107). However, in our opinion, in such a case it is possible to consider trade usages as supplementary sources of law, just like precedent court decisions (Tekinalp 2022, 635; Işıktaç 1992, 38). This

[5] This determination, which is made in terms of the extent of the masses targeted by customary law and trade usages, can be similarly concluded in terms of administrative custom and administrative usage in the sense that administrative usage is based on the will of the administration instead of the will of the society (Yasin 2012, 35).

[6] For a comparison of the situation in different countries, see Gélinas 2015, 55.

is because, in this case, trade usages are one of the sources that 'assist' in the interpretation of the declarations of will or in filling the gaps (Tekinalp 2022, 635).

Trade usages may be categorised according to various aspects. This classification may be on a sectoral basis. For example, it is possible to talk about the existence of trade usages specific to sectors such as banking, maritime, insurance, or transport. Apart from this, trade usages specific to a region may also be mentioned. In such a case, it is our opinion that Article 2/2 TCC regarding commercial customary law may also be applied to trade usages. Pursuant to this provision, '[c]ommercial customary law specific to a region or a branch of trade shall have precedence over general customary law. If the parties concerned are not in the same region, the commercial customary law at the place of execution shall apply, unless otherwise stated in the law or in the contract.'[7]

1.2. *Lex Mercatoria* and International Commercial Law

Lex mercatoria can be defined as a body of norms specific to international trade law that develops organically from commercial relations, judicial decisions, or arbitral awards to resolve international commercial disputes independently of national legal systems (Güven 2014, 3–4; Bingöl 2017, 1956; Coetzee 2015, 244). Arising out of modern international commercial disputes, *lex mercatoria* is a term whose origins trace back to Roman law (Güven 2014, 3–4). It could be said that *lex mercatoria* has achieved widespread adoption among parties, particularly in European law. Upon the execution of an agreement, most parties prefer to utilize contracts containing clauses that reference *lex mercatoria*. This preference stems from their desire to protect themselves against both adverse outcomes and the inherent uncertainty associated with the application of an unfamiliar foreign legal system (Lando 1985, 748). With the aid of these clauses, *lex mercatoria* allows parties to avoid the technical constraints of national legal systems and rules that are incompatible with international transactions. This choice enables them to escape peculiar formal requirements, short limitation periods, and the legal hurdles of domestic laws that might be unfamiliar abroad, such as the common law doctrines of consideration and privity of contract (Lando 1985, 748). There are two main doctrines concerning the sources of *lex mercatoria*. According to the restrictive view advocated

[7] Translated by author.

by Schmitthoff, *lex mercatoria* consists solely of international conventions, model laws, and trade usages and practices (Schmitthoff 1961, 131 ff.; Schmitthoff 1964, 16; Schmitthoff 1988, 234). Conversely, the liberal view represented by Goldman and Lando – the view we agree with – adopts a broader perspective, asserting that the sources of *lex mercatoria* encompass the general principles of international contract law, commercial usages and practices, international conventions and model laws, uniform rules, standard forms and conditions, codes of conduct, and arbitral awards.[8] As can be seen, while legal doctrine lacks consensus on the precise substance of *lex mercatoria*, it is undisputed that international conventions, model laws and international trade usages form an integral part of its content (Lando 1985, 758; Schmitthoff 1988, 234). From this perspective, it can be argued that texts such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) fall within the framework of *lex mercatoria* (Lando 1985, 749–750; Oğuz 2001, 22 ff.).

From this point of view, in contrast to Turkish law, it could be said that trade usages are regarded not as a secondary but as a primary source of law in international commercial law (Acar, Yıldırım 2008, 16; Gélinas 2015, 56). Indeed, while Turkish law requires that a trade usage either attain the status of 'commercial customary law' or be supported by an explicit statutory provision in order to serve as a basis for a judgment, the CISG explicitly[9] stipulate that parties are bound by any trade usage they have agreed upon and any practice they have established[10] between themselves.[11] However, none of these texts explicitly define what is meant by 'trade usage'. Consequently, prior to evaluating the applicability of trade usages within these provisions, it is warranted to first examine the precise meaning and scope of the concept itself. On the other hand, an explanation of the concept of 'trade usage' has been provided in the doctrine. Accordingly, the term '(trade) usage' encompasses all practices, courses of conduct, and omissions that are generally and consistently observed in commercial transactions within a specific trade sector or market centre (Ferrari 2003, 572; Coetzee 2015, 249). There is, however, no requirement for the relevant commercial

8 For a comprehensive list of the supporters of this view, see Özkan 2021, 5.

9 By explicitly including standard clauses such as FOB, CIF or EX WORKS in the contract, these trade usages effectively become binding contractual provisions (Pamboukis 2005, 112).

10 Practices are established by a course of conduct that creates an expectation that this conduct will be continued (Pamboukis 2005, 113).

11 CISG Art. 9(1). For similar regulations see PICC Art. 1.9(1), PECL Art. 1.105(1). This rule derives from the general principle of party autonomy (Pamboukis 2005, 112).

circles to believe that such usage is legally binding (Ferrari 2003, 572). In other words, 'usages' within the meaning of the CISG denote courses of conduct that are consistently observed by or have been established between the specific parties to the transaction (Ferrari 2003, 572). For a practice to be characterized as a trade usage, it must either be long-standing between the parties or have found application across many legal transactions (Ferrari 2003, 572; Schmidt-Kessel 2022, 205; Lookofsky 2022, 52). Trade usages that are widely recognized and frequently implemented take priority over general commercial customs (Coetzee 2015, 249; Mak 2016, 121; Schmidt-Kessel 2022, 202). Insofar as these usages do not necessitate an *opinio necessitatis* – i.e. the subjective belief that the practice is legally mandatory – they retain full applicability to inter-party disputes, regardless of whether they have formally attained the status of customary law. In fact, since a factual element of trust and *venire contra factum proprium* has developed between the parties, which should not be undermined, the agreed trade usages take priority over other practices between the parties and *lex mercatoria* (Ferrari 2003, 572–573; Schmidt-Kessel 2022, 201, 204; Lookofsky 2022, 52). From this perspective, practices between the parties regarding standard terms or the price can also be the subject of the usage (Schmidt-Kessel 2022, 205). Thus, it is possible to conclude that Article 9 CISG confirms that the parties to an international sale are bound not only by the express terms of their contract; they are also bound by their own prior practices, as well as the more widely observed usages within the relevant branch of trade (Lookofsky 2022, 51). The burden of proving the requisite elements of a practice falls on the party asserting it. While governed by the forum's procedural rules (*lex fori*), evidentiary restrictions cannot be so stringent as to render the proof of such practices practically impossible (Schmidt-Kessel 2022, 206).

In this regard, these regulations do not mandate that a trade usage reach the status of customary law or be explicitly sanctioned by legislation for its enforcement. On the contrary, the course of dealing established between the parties is inherently binding, and its application to legal disputes remains beyond doubt. Conversely, under Turkish law, a trade usage, even if consented to by the parties, lacks autonomous binding force and serves merely as an interpretative tool for their declarations of intent. Likewise, trade usages emerging from the parties' factual conduct, without an explicit agreement, cannot be relied upon as a legal basis for judicial decisions in the Turkish legal system.

A further point to address is Article 9(2) CISG, which provides that, unless otherwise agreed, the parties are presumed to have implicitly accepted a trade usage they knew or should have known, provided it is widely recognized (known) and regularly observed in international trade. This

provision relies on the 'knowledge' criterion – whether the parties knew or ought to have known about the usage – to determine its applicability. Consequently, the trade usage that the parties were unaware of, or were not expected to know, cannot be applied to the contract, unless there is an agreement to the contrary. In contrast, Article 1.9(2) of the International Institute for the Unification of Private Law (UNIDROIT) Principles (PICC) and 1.105(2) of the Principles of European Contract Law (PECL) state that parties are bound by widely known[12] and regularly observed trade usages, except where applying such a usage would be 'unreasonable'. Unlike the CISG, the PICC and the PECL limit the application of a trade usage based on its reasonableness rather than the parties' knowledge. This second approach is more practical: it replaces the subjective 'knowledge' test with a more objective 'reasonableness' standard that can be assessed based on the specific circumstances of each case (Bonell 1996, 31). Considering all these regulations as a whole, it can be summarized as follows:

i. Parties may explicitly stipulate the application of trade usages within their contract. For instance, if there is an explicit contractual provision stating that the fee payable to one of the parties shall be determined in accordance with trade usage, the usage shall be binding on the parties.

ii. Even in the absence of an express agreement, the consistent course of conduct established between the parties over time may attain the status of a trade usage, thereby becoming binding. From this perspective, it is essential to recognize such factual practices as primary norms of the legal relationship. Indeed, these habitual patterns of conduct should be prioritized as the fundamental basis of the contract, often prevailing over general written regulations.

iii. Unless otherwise agreed, parties are exempt from the binding effect of a widely recognized trade usage specific to their sector if they were unaware, and could not be expected to have been known, of its existence, or if the application of such a usage would be deemed unreasonable under the specific circumstances of the case.

[12] The term 'widely known' does not mean that all persons who are active in that particular branch of trade must know the usage, nor is it necessary that the usage be known throughout the world (Ferrari 2003, 574).

2. LEGAL REGULATIONS ON TRADE USAGES

2.1. Determination of Trade Usages

Code No. 5174 on the Union of Chambers and Commodity Exchanges of Türkiye and Chambers and Commodity Exchanges is one of the most fundamental regulations regarding the determination of trade usages. According to Article 12/1-(f) of this Code, it is among the duties of the chambers[13] to determine the commercial and industrial customs and trade usages within their area of operation, to submit them to the Ministry of Trade for approval and to publish them.[14] This determination and publication is carried out by the chamber assemblies consisting of members elected by the professional groups for four years (Code No. 5174, Arts. 16/1 and 17/1-(e)). Commercial customs and trade usages are determined by the decision of the Grand National Assembly by taking the opinion of the relevant professional committee and submitted to the approval of the Ministry. The commercial customs and trade usages approved by the Ministry shall be recorded in the book for their registration and shall be published by appropriate means.[15] In addition, these are notified for three months by hanging them in the announcement places of the chambers (Regulation on Chamber Procedures, Art. 46/2).[16] Commercial customs and trade usages by geographical region are determined by a separate decision of the assemblies of all chambers established within the geographical region and submitted to the Ministry for approval. Article 46/2 of the Regulation on Chamber Procedures applies for the customs and trade usages approved by the Ministry (Regulation on Chamber Procedures, Art. 46/3).[17] Furthermore, the determined wastage, loss and yield rates and the professional decisions to be complied with and the commercial customs and trade usages approved by the Ministry, and the Union of Chambers and Commodity Exchanges of Türkiye is notified by the relevant chamber (Regulation on Chamber Procedures, Art. 48).[18] It is one of

[13] What is meant by 'chambers' is the chamber of commerce and industry, chamber of commerce, chamber of industry and chamber of maritime commerce (Code No. 5174 Art. 3/1-(b)).

[14] See also Art. 46/1 of the Regulation on Chamber Procedures, issued to regulate the procedures and principles related to commercial customs and trade usages.

[15] Similarly, see Art. 38/2 of the Regulation on Commodity Exchange Procedures.

[16] Similarly, see Art. 38/2 of the Regulation on Commodity Exchange Procedures.

[17] Similarly, see Art. 38/3 of the Regulation on Commodity Exchange Procedures.

[18] Similarly, see Art. 40 of the Regulation on Commodity Exchange Procedures.

the duties of the commodity exchange[19] to determine the commercial customs and trade usages related to the commodity exchange within its territory, to submit them for the approval of the Ministry and to publish them, and this duty is fulfilled by the commodity exchange assembly consisting of members to be elected by the professional groups for four years (Code No. 5174, Arts. 38/1 and 39/1-(d)).[20] As can be seen, the determination and publication of trade usages are among the duties of chambers and commodity exchanges. In practice, it is noted that the Union of Chambers and Commodity Exchanges of Türkiye, chambers of commerce and commodity exchanges determine and publish commercial customs and trade usages periodically and publish them on their websites.[21]

In this framework, we would like to emphasise that for a usage to become a trade usage, it does not necessarily have to be determined or published by the Union of Chambers and Commodity Exchanges of Türkiye, the relevant chamber of commerce, commodity exchange or chamber of industry. Such determinations only enable the trade usage to be easily identified. It is also possible that practices or habits that are not determined or published by these organisations may also constitute trade usages. However, it is not necessary for the parties to be merchants in order for such practices between the parties to be accepted as trade usages instead of ordinary usages, but we are of the opinion that the transaction should be a commercial transaction.

In our opinion, what should be understood as trade usages should be the common trade practices between parties or in the specific professional group or region. Therefore, although not determined by a chamber or a commodity exchange, common practices that have become a de facto habit should also be considered as trade usages. This depends on the commercial transaction characteristic of that usage. Commercial transactions are regulated under Article 3 and Article 19 of the TCC. Pursuant to Article 3 TCC, all transactions and acts concerning a commercial enterprise and the matters regulated under the TCC constitute commercial transactions. Pursuant to Article 19/1 TCC, the obligations of a merchant are commercial. However, if a natural person merchant clearly informs the other party that the transaction is not

[19] Commodity exchange refers to commodity exchanges bearing the title of commodity exchange and commodity specialised exchange (Code No. 5174, Art. 3/1-(c)).

[20] See also Art. 38/1 of the Regulation on Exchange Procedures, issued to regulate the procedures and principles regarding commercial customs and trade usages.

[21] For an up-to-date list of commercial customs and trade usages published by the Union of Chambers and Commodity Exchanges of Türkiye, see *https://tobb.org.tr/HukukMusavirligi/Documents/orf.xls*, last visited May 27, 2026.

related to their commercial enterprise at the time of the transaction, or if the situation is not favourable for the transaction to be deemed commercial, the debt is deemed ordinary and not commercial. Pursuant to Article 19/2 TCC, contracts that are commercial transactions for only one of the parties are deemed commercial transactions for the other party, unless otherwise stated by the Code. Therefore, there is no doubt that the matters regulated under the TCC constitute commercial transactions. For this reason, in cases where the relationship between the parties is related to one of the matters regulated under the TCC, it is possible to accept the common actual habits of the parties as trade usages and use them in the interpretation of the declarations of will. The same applies to the activities carried out by legal person merchants (trade companies). In the case of natural person merchants, the same conclusion should be reached in the event that the transaction is deemed commercial for both parties, and the common actual habits practised between the parties should be considered as trade usages and should be used in the interpretation of the declarations of will. In the event that a transaction is deemed to be commercial due to its regulation under the TCC, it does not matter whether the parties to the transaction are merchants or not. For example, a cheque, as a bill of exchange, is regulated under Article 780 *et seq*. in Book 4 of the TCC on negotiable instruments. Cheques are not necessarily issued by merchants; it is also possible for non-merchants to issue cheques. Accordingly, the actual habits regarding the cheques issued over time, due to ordinary or commercial transactions between the parties, should be considered as trade usage, since the issuance of cheques is regulated under the TCC.[22] Similarly, since a contract that is deemed to be a commercial transaction for a merchant will also constitute a commercial transaction for the artisans on the other side of the relationship, the common actual practices regarding this relationship between merchant and artisans should also be considered as trade usage, which is an indication that the parties do not necessarily need to have the title of merchant in order for the trade usage to be in issue.

On the other hand, the consumer transactions[23] regulated by the Turkish Consumer Protection Code (CPC) No. 6502, may be given as an example of cases where a contract that constitutes a commercial transaction for one

[22] It states that post-dated cheques given by one party to the other are in accordance with trade usage, see 11th Civil Chamber of the Court of Cassation, No. 825/9047, 2024/5533–9317. All decisions of the Court of Cassation used in this article have been accessed through the Court of Cassation website: *https://kararama.yargitay.gov.tr*, last visited May 27, 2026.

[23] Art. 3/1-(l) of the CPC: 'Consumer transaction [means] all contracts and legal transactions including independent contract, shipping, brokerage, insurance, proxy, banking and similar contracts, established between consumer and natural

party may not be considered a commercial transaction for the other party. Since a contract that constitutes a consumer transaction for one party can no longer be considered a commercial transaction due to the provisions of the Consumer Protection Code, the application of trade usage to this transaction is also not applicable. This situation is one of the cases specified in Article 19/2 TCC, where the law provides otherwise.

2.2. Trade Usages as a Basis for the Decision

As stated before, in order for trade usages to be the basis of a decision, they must either have reached the level of commercial customary law or there must be a provision in the current legal regulations stipulating that trade usages may be applied to a subject matter. Some of these provisions are regulated by the TCC. The first of these provisions is given in Article 90/1-(e) of the TCC, which stipulates that interest shall accrue for the amounts written in the receivable column of the current account from the date they are recorded, in accordance with the contract or trade usages. The same applies to the determination of the difference between the credit and debit items by closing the current account at the end of certain accounting periods (TCC, Art. 94/1). Therefore, if there is a trade usage regarding the transfer of the current account, there is no doubt that this usage may be the basis of the judgement.

Article 115 of the TCC, which stipulates that the amount of remuneration to be paid to the commercial agent should be determined according to the trade usage, in cases where the amount of remuneration to be paid to the agent is not determined by the contract, is one of such provisions, and it shows that the trade usage, if any, may be the basis of the decision in a dispute regarding the amount of remuneration to be paid to the commercial agent. Other provisions of the TCC where trade usage may be the basis for the decision are as follows: Article 711/2 on the determination of the value of money without legal value in bill of exchanges payable in foreign currency; Article 802/2 on the determination of the value of foreign currency in cheques payable in

persons or legal entities, including the public legal entities, acting with commercial or professional purposes or on behalf or on account of such, in the goods and service markets.' Also according to Art. 83/2 CPC: 'A regulation made in other laws for transactions where the consumer is one of the parties, does not prevent such transaction from being a consumer transaction and does not hinder the implementation of the provisions of this law related to duty and authority.' CPC English language version: *https://ticaret.gov.tr/data/5d42a9b313b87632542a2dae/LAW%20ON%20CONSUMER%20PROTECTION.pdf*, last visited May 27, 2026.

foreign currency; Article 863/1 on the obligation of the consignor to load the goods by placing, stacking, tying, fastening and fixing them in the vehicle in a manner suitable for the safety of carriage, and to discharge them in the same manner, unless it is otherwise understood from the contract, the necessity of the situation or the trade usage; Article 878/1-(a) on the release of the carrier from liability if the loss, damage or delay in delivery is attributable to the use of an open-top vehicle or loading on deck in accordance with the contract or trade usage; Article 1143 on who bears the costs of transporting and discharging the goods to the ship; Article 1151/2 on that the carrier may carry the goods on deck if it is in accordance with trade usage; Article 1153/2 on the calculation of the loading time; Article 1167 on the calculation of the discharge expenses; Article 1169/2 on the calculation of the discharge time; Article 1176/1 on that in the event that the consignee, who is obliged to take delivery of the goods in the cash and cargo contract, is not known, the notification will be made by publication according to the trade usage; Article 1178/3-(b) regarding the duration of the liability of the carrier; and Article 1410/1 regarding the determination of the insurance period.

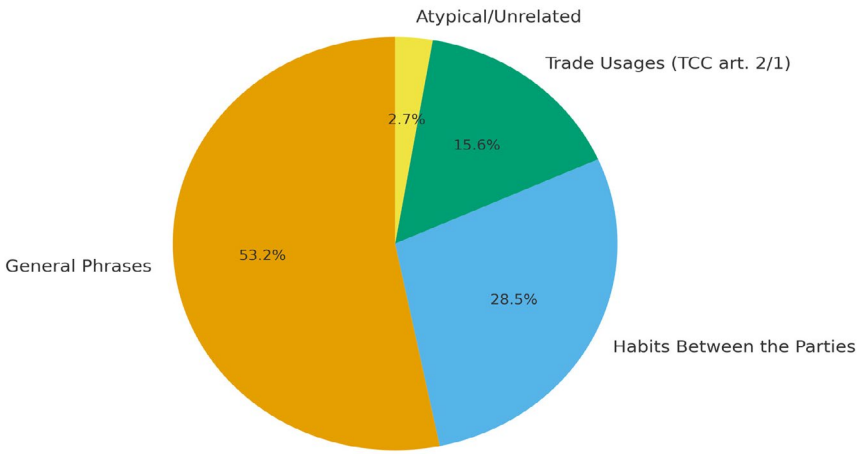
Apart from these provisions of the TCC, other trade usages that may be the basis for the judgement include: Article 13/3 of By-law No. 6/5176 on the Inspection of Exported Goods and Their Compliance with the Sales Agreement regarding the procedures for sampling and the determination of the quantity; Article 4/1-(g) of the Price Label Regulation regarding the determination of the unit price of the good and Article 4/1-(b) of the Communiqué on the Use of Domestic Production Logo on Price Labels; Articles 5 and 6 of the Regulation on Commodities Subject to Commodity Exchanges and the Registration of the Purchase or Sale of These Commodities regarding the determination of the minimum commodities and the commodities that are not subject to purchase and sale in the commodity exchange and are not among the fresh fruits and vegetables within the wholesale market; Article 5/2 of the Regulation on Purchase and Sale of Chambers of Agriculture and Union of Chambers of Agriculture of Türkiye regarding the determination of when the purchase of goods and services will be made; Article 7/2 of the Communiqué No. 2018–32/48 on Decree No. 32 on the Protection of the Value of the Turkish Currency regarding whether there is a requirement for weighing and analysing at the destination in the sales contract or letters of credit; Rule (1) of the 2004 York Antwerp Rules, which provides that the throwing overboard of cargo not carried in accordance with established trade usage is not regarded as common average; Article 536 of the Turkish Code of Obligations (TCO), which provides that the commissioner may sell the goods on credit according to the trade usage at the place of sale, unless the principal prohibits it; Article 537/1 of the TCO, which determines whether the commissioner will be liable in the event of a guarantee; Article

233/3 of the TCO on whether the price can be determined on the basis of gross weight in the sale of commercial goods; Article 522 of the TCO on the determination of the brokerage fee; Article 21/4 of the Regulation on Licensed Agricultural Products Warehousing regarding the determination of the net weight of packaged products; Article 11/1 of the Regulation No. 87/11549 on the Determination of the Measures of Agricultural Income regarding the determination of the average sales price.

3. TRADE USAGES IN JUDICIAL DECISIONS

A search for 'trade usage' in the official online database of the Court of Cassation decisions reveals that this term appears in 295 decisions of the commercial chamber (11th Civil Chamber). After each of these decisions was examined individually, it was additionally verified from the Union of Chambers and Commodity Exchanges of Türkiye website[24] whether the trade usages mentioned in the decisions were only valid between the parties or whether they were among the trade usages declared by the Union of Chambers and Commodity Exchanges of Türkiye. The distribution and the conclusions following the examination of all of these decisions are as follows:

Figure 1



Source: Prepared by the author on the basis of the analysed decisions of the Court of Cassation.

[24] Available at *https://tobb.org.tr/HukukMusavirligi/Documents/orf.xls,* last visited May 27, 2026.

1. In a significant number of the decisions of the Court of Cassation, it is observed that trade usage is not used in the meaning specified in Article 2 of the Turkish Commercial Code (84 decisions, 28.5%). In these decisions, it is seen that the habits applied only between the parties to the case and had not become a commercial customary law applied by a large section of society, are taken as the basis for the judgment. While it is clear that such cases are incompatible with the principle of legal certainty, there is a danger that habits applied solely between the parties may take precedence over legal regulations and be applied before them. Therefore, in these decisions, the application of customary customs between the parties, even before legal provisions, is clearly contrary to the law and the hierarchy of norms. An example of this situation is a decision stating that issuing 73 cheques in one day is contrary to trade usage.[25] There is no legal regulation stipulating that 73 cheques cannot be issued in a single day, nor is there a limit on the number of bills of exchange that can be issued in a single day between the parties. However, it is contrary to law to argue that such conduct is contrary to trade usage and that the cheques in question were issued in bad faith.

Similarly, the decisions stating that according to trade usage, trademark licence agreements are valid for one year are not accurate,[26] as they limit the duration of trademark licence agreements despite the absence of any such limitation in the law.

In some cases, the use of trade usage as a basis for the judgment may clearly constitute a violation of the law if it does not reach the level of customary law or if there is no legal regulation on which it can be based. For example, under Turkish law, a cheque is considered payable when presented (TCC, Art. 795/1).[27] However, it is possible to argue that some decisions stating that the issuance of post-dated cheques is a trade usage[28] do not comply with the principle of the rule of law, given the risk that clearly unlawful practices or usages between the parties could replace mandatory provisions.

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[25] 11th Civil Chamber of the Court of Cassation, No. 2009/5233–2010/11450.

[26] 11th Civil Chamber of the Court of Cassation, Nos. 2013/4103–2014/10174, 2014/17037–2015/4775.

[27] However, according to Provisional Article 3/5 of the Cheque Code, until 31 December 2028, the presentation of a cheque to the drawee bank prior to the date of issue stated on it is invalid, thus enabling post-dated cheques in practice.

[28] 11th Civil Chamber of the Court of Cassation, No. 2024/5533–9317, 2024/825–9047.

Similarly, decisions regarding the trade usage of single-signed bills of exchange in commercial relations between parties,[29] where it is stipulated that bills of exchange shall be drawn up with dual signatures, and the fact that the drafter did not previously object to this situation, are also contrary to law. This is because the power of representation may be restricted by granting joint power of representation (Turkish Civil Code, Art. 549/2), and in the case of unauthorised representation when drawing up a bill of exchange, the unauthorised representative is personally responsible (TCC, Art. 678). When these provisions are considered together, even though it is stated that a bill of exchange shall be drawn up with two signatures, the unauthorised representative who drew up the bill of exchange alone, and not the one represented without authorisation, should be liable for bills of exchange drawn up with a single signature. The trade usages other than those listed in the 84 decisions falling into this category are generally not contrary to law, but they are not accepted as usages by a chamber of commerce or industry, there is no legal regulation regarding their use as a basis for a judgement, and these practices have gone beyond the actual habits between the parties and reached the level of commercial customary law. According to a view that we also agree with, these practices, while not contrary to law, can only be taken into account when interpreting the parties' intentions and cannot form the basis of a ruling (Smythe 2016, 8). In light of the aforementioned provisions of the CISG, the PICC, and the PECL, it is evident that the rulings of the Turkish Court of Cassation are consistent with these international frameworks. Although the Court interprets trade usage quite broadly, exceeding the principles set out in Article 2 TCC and adopting a view that arguably transcends statutory boundaries, this approach remains fundamentally aligned with the international principle that 'parties are bound by any usage to which they have agreed and by any practices which they have established between themselves' (CISG, Art. 9; PICC, Art 1.9). Indeed, by ruling that factual practices between the parties must be implemented as trade usage, the Court has explicitly affirmed their binding nature.

Within the scope of Article 2 of the Turkish Commercial Code, the trade usages that may be taken as a basis for the judgement must be concrete practices relating to the dispute in question. More specifically, there must be a clear usage relating to that dispute and that usage must form the basis of the judgement. However, in most decisions, it is stated that trade usage must be applied, without clearly set out what that usage is. For example,

[29] 11th Civil Chamber of the Court of Cassation, Nos: 2012/3686–2013/19994, 2016/729–8239, 2017/4404–2019/1112.

a decision concerning a financial leasing agreement[30] states that the legal regulations and trade usages relating to financial leasing should be applied, but it does not clearly set out what these usages are. The reasons for acting in accordance with the trade usage or what this trade usage entails are not included in the decisions rendered on the grounds that the parties acted contrary to the trade usage. However, considering that usage is a practical behaviour, when it is taken as the basis for the judgement, what this usage entails must also be clearly stated. This determination requires that the trade usage be clearly established by inquiring with the relevant chambers and exchanges, or by obtaining an expert opinion, whereas the examination of these decisions shows that they merely state in abstract terms that the behaviour between the parties was contrary to usage.

2. The examination of the decisions of the Court of Cassation shows that there are no decisions in which the term trade usage is defined or its distinction from commercial customary law is clarified. In the decisions of the Court of Cassation referring to trade usage, it is apparent that the term is used in a manner that refers to a general or abstract rule or practice rather than what should be understood by usage. Of the 295 decisions analysed in our study, 157 (53.2%) mention that the parties did not act in good faith, did not comply with the principle of honesty and commercial practices, or did not act in accordance with the prohibition of competition.[31] In other words, in these decisions, trade usage, good faith, and honesty are characterised as fundamental principles of civil law, and acting in accordance with trade usage is considered equivalent to acting in good faith, acting in accordance with the law, acting in accordance with the ordinary course of life, or acting in accordance with the principle of fairness.[32] Also, in some decisions, acting in accordance with trade usages has been considered equivalent to the obligation to act prudently, and reference has been made to the expectation of acting in accordance with trade usages in cases where the trader is required to act prudently.[33] It is clear that the trade usage referred

[30] 11th Civil Chamber of the Court of Cassation, No. 2008/12814–2010/4510.

[31] It is widely acknowledged that this approach is characterized as the 'homeward trend', which is fundamentally incompatible with uniform instruments such as the CISG, PICC, and PECL, as it results in the prioritization of domestic law over these international rules (Dimatteo, Janssen 2014, 80).

[32] For examples of such decisions, see the decisions of the 11th Civil Chamber of the Court of Cassation, Nos. 2023/2067–2024/4401, 2023/6932–2024/8210, 2024/ 421–8715, 2023/6928–2024/8207, 2022/6246–2024/2735.

[33] These decisions, like the decisions above, mention an abstract wish to act in accordance with the trade usage, instead of determining what is understood to be the trade usage or whether there is a trade usage that applies to the specific dispute

to in these decisions does not express the same matter as the trade usage mentioned above and in Article 2/1 TCC. This is because these decisions refer to a principle abstracted from trade usage as a general aspiration, and compliance with trade usage is considered equivalent to compliance with the contract, the principle of good faith, honesty, the ordinary course of life, and the duty to act prudently. However, in such cases, there is a violation of a provision, the contract between the parties, the duty to act prudently, the principle of good faith, or honesty, and the applicable provisions are already clear; there is no need for trade usage. We would like to emphasize that the Turkish Court of Cassation's approach – viewing trade usage as a general principle of law rather than a mere factual practice between parties – is compatible with the provisions of the CISG, the PICC, and the PECL, despite its inconsistency with Article 2 TCC. Specifically, unless otherwise agreed, parties are bound by practices that are widely recognized and regularly observed within a particular trade in international commerce, except where the application of such usage would be unreasonable or where the parties lack actual or constructive knowledge thereof. Consequently, international trade usages – such as acting in accordance with the ordinary course of events, the principle of good faith, the obligation to act as a prudent merchant, and non-competition requirements – undoubtedly find application in the parties' relationship, provided there is no contrary agreement or reasonable justification for their exclusion. In this regard, it is possible to conclude that this category of rulings, which forms the core of jurisprudence of the Court of Cassation on trade usage, aligns with the international commercial regulations.

3. We would also like to note that, apart from the general approach mentioned above, the Court of Cassation has issued a small number of decisions (46 decisions, 15.6%) in which trade usage is considered within the scope of Article 2/1 of the Turkish Commercial Code. The decisions stating that a closed invoice constitutes *prima facie* evidence that the alleged debt has been paid[34] can be cited as examples of trade usages that can be used in the interpretation of declarations of intent, considering the trade usage of the İstanbul Chamber of Commerce dated 3 April 2009. On the other hand, it could be said that trade usage within the meaning of Article 2/1 of the Turkish Commercial Code is referred to in decisions stating that the

(or used in the interpretation of the declarations of will). See the decisions of the 11th Civil Chamber of the Court of Cassation, Nos. 2023/3050–2024/5805, 2023/581–2024/4192, 2023/5728–2024/783, 2023/3328–2024/5743, 2021/5214–2023/4224.

[34] In this respect, see the decisions of the 11th Civil Chamber of the Court of Cassation Nos. 2022/508–2023/4069, 2016/11336–2018/4018.

wastage rates in products must be determined according to trade usage.[35] Similarly, the decision of the Isparta Chamber of Commerce and Industry dated 23 January 2013, stating that commission fees shall be determined by commission agents in the region, and the decision of the Izmir Chamber of Commerce dated 13 April 1950, stating that commission fees are earned as a matter of custom for brokerage activities, should be considered as trade usages that can be used as a basis for judgement within the scope of Article 2/1 TCC. However, since the provisions of the previously discussed Chamber and Stock Exchange Transactions Regulations clearly state that trade usage must be applied, there is no legal obstacle to trade usage being taken as the basis for determining wastage rates.[36] It should also be noted that 26 of the 46 decisions in this category relate to early closure commissions, and there is no doubt that there is a legal ground for the application of trade usage when the Central Bank decides that a commission must be paid to the bank in the event of early closure of loans.

4. TRADE USAGES IN TERMS OF THE OBLIGATION OF THE JUDGE TO CLARIFY THE LAWSUIT AND TO APPLY THE LAW EX OFFICIO

One of the issues to be emphasised in relation to trade usages is the status of these usages vis-à-vis the principles of the duty of the judge to clarify the lawsuit (Code of Civil Procedure (CCP), Art. 31) and the enforcement of the law (CCP, Art. 33). Pursuant to Article 31 CCP, in cases where the clarification of the dispute is mandatory, the judge may require the parties to provide explanations, ask questions, and request the presentation of evidence on matters that he/she deems to be materially or legally unclear or contradictory. From this point of view, trade usages, which may be the basis of the judgement, should be taken into consideration by the judge ex officio, since they have reached the level of commercial customary law, or

[35] For example, the type of waste rates that may occur during the crushing process of shelled walnuts and shelled almonds see *https://www.atonet.org.tr/Uploads/Birimler/Internet/Hizmetlerimiz/Fire_Zayiat_Oranlari/fire_ve_zayiat_oranlari_%2010_09_2024.pdf*, last visited May 27, 2026, p. 2. In this respect, see the decisions of the 11th Civil Chamber of the Court of Cassation Nos. 2017/4828–2019/1515, 2017/3–7377, 2010/4773–2011/15474.

[36] For sample wastage, loss and yield rates determined by Ankara Chamber of Commerce, see *https://www.atonet.org.tr/Uploads/Birimler/Internet/Bilgi%20Bankasi/F%C4%B0RE%20ZAY%C4%B0AT%20VE%20RANDIMAN%20ORANLARI_23.06.2017_pdf.pdf*, last visited May 27, 2026.

since a legal regulation includes a provision stipulating that trade usages may be applied. According to Article 33 CCP, the judge shall apply Turkish law ex officio. Pursuant to Article 1/2 TCC, in commercial transactions for which there is no commercial provision, the court shall decide according to commercial customary law, and in the absence thereof, according to general provisions. As can be seen, commercial customary law should be applied before general provisions. Therefore, the judge should apply the trade usages that can be the basis of the judgement ex officio, and should be able to ask the parties to give explanations about them, to ask questions, and to ask for evidence to be presented (Edis 1997, 109–110). However, expecting the judge to know these trade usages does not conform to the ordinary course of life, as it would require the judge to know the practices of a profession or a region, or the practices at the level of de facto habit that are valid between the parties to the relationship (Umar, Yılmaz 1980, 22–23). In such cases, the judge, who must apply the trade usages ex officio, applies expert examination together with other means of obtaining information in order to determine the trade usages applicable to the concrete dispute (Tanverdi 1991, 68 ff). The experts may determine the trade usages from the lists published by the relevant chambers or commodity exchanges, or they may also benefit from the judicial decisions previously issued in this regard (Tekinalp 2022, 631; Kaplan 1987, 50).

In cases that do not reach the level of commercial customary law or where a legal regulation does not expressly provide that trade usages may constitute the basis of a judgement, the trade usage must be claimed by the parties in order to be utilised in the explanation of the will of the parties. In the event that a trade usage is not asserted by the parties, it is not possible for the judge to take it into consideration ex officio (Ulusoy 2001, 66; Ayoğlu 2011, 166). Therefore, the judge should not be able to ask the parties to give explanations, ask questions, or request evidence about a trade usage that has not been put forward by the parties. The party claiming that there is a trade usage that can be taken into consideration by the judge in the interpretation of the will of the parties may support their claim with the trade usages published by the chambers or commodity exchanges (Işıktaç 1992, 71 ff; Ulusoy 2001, 103) as well as the practices of the local authorities, village council of aldermen and similar organisations, associations related to merchants, foundations related to merchants, opinions, as evidence of the existence of a trade usage (Tekinalp 2022, 628). It may even base the existence of a trade usage that can be used in the explanation of declarations of will on the opinions and conclusions based on scientific evaluations (Kaplan 1987, 51; Tekinalp 2022, 628). However, although it is stated in the doctrine that it may be possible to witness acknowledgement regarding the existence of actual habits between the parties (Tekinalp 2022, 628), we would like to

point out that according to the decision of the General Assembly of the Court of Cassation dated 11 July 2007 No. 553–547, a written document regarding the usage is required.

5. CONCLUDING REMARKS

The Turkish Commercial Code stipulates that commercial customary law and trade usage are different matters. In the absence of a contrary provision in the code, trade usages cannot be the basis of the court judgement, unless it is determined that it is accepted as commercial customary law. However, trade usage are also taken into consideration in the interpretation of declarations of will. As can be seen, in order for a trade usage to form the basis of a judgement, either there must be an explicit provision in a legal regulation stipulating that the usage may be taken as the basis of the judgement, or the trade usage must reach the level of commercial customary law. For a practice to attain the status of commercial customary law, there must be a general belief that the custom is legally binding. In other words, trade usage applies to a narrower circle of persons than commercial custom; in some cases, even the established practices between the parties themselves may qualify as trade usage. Similarly, unlike commercial customary law, in order for trade usage to be used in the interpretation of declarations of will, the parties do not have to be merchants, but the transaction between the parties must be a commercial transaction. Trade usage may be defined as actual practices or habits used to interpret declarations of will in commercial transactions, but which have not attained the status of commercial customary law, unless the legislator expressly provides for their application. In judicial decisions, however, trade usage is sometimes treated as an abstract principle of law rather than as a concrete habit or practice to be applied in a particular dispute. A judge is obliged to clarify the case and to apply the law ex officio. Yet, for this obligation to arise in relation to trade usage, the usage must either have attained the status of commercial customary law or its application must be expressly prescribed by statute. In the absence of either of these conditions, trade usage must be invoked and brought before the court by the parties if it is to be used in interpreting declarations of will. Even then, the judge is not required to investigate ex officio whether such usage exists. Where trade usage may be applied, the judge cannot be expected to know all actual practices prevailing in a particular sector or region; an expert should therefore be consulted. The expert may establish the relevant usage by relying on trade usages periodically identified by chambers of commerce and commodity exchanges, or published by the Union of Chambers and Commodity Exchanges of Türkiye.

On the other hand, this domestic framework stands in stark contrast to the CISG. According to the CISG, trade usages and established practices between parties are regarded as primary sources of law. While Turkish law requires statutory sanction for a trade usage to be binding, international regulations stipulate that parties are inherently bound by any trade usage they have agreed upon and any practices established between them. Furthermore, while the CISG utilizes a subjective 'knowledge' test for the application of usages, the PICC and the PECL adopt a more objective 'reasonableness' standard, prioritizing the practical realities of international trade over rigid statutory requirements.

The analysis of Turkish Court of Cassation jurisprudence reveals a significant 'harmonized dissonance' between Turkish legislation and judicial practice. Although the Court often treats trade usage as an abstract principle of law (equating it with good faith or prudence) rather than a concrete factual practice, its broad interpretive approach frequently exceeds the boundaries of Article 2 of the Turkish Commercial Code. Interestingly, while the Court's tendency to grant binding force to factual habits between parties may technically contradict the hierarchy of norms and the principle of legal certainty, it remains fundamentally aligned with the international principles of *lex mercatoria*. By ruling that such usages are binding, the Court's jurisprudence – perhaps unintentionally – bridges the gap between the restrictive Turkish legislation and the more flexible international commercial regulations. Ultimately, for a trade usage to be properly applied as a basis for judgment under Turkish law, it must either be explicitly grounded in the legislation or meet the high threshold of commercial customary law. In all other instances, trade usages serve only as interpretive tools and must be asserted by the parties, as the judge is not obliged to investigate them ex officio unless they reach the level of a primary legal source. Despite these domestic constraints, the Turkish judiciary's practical application of trade usages demonstrates a clear, albeit doctrinally inconsistent, movement toward alignment with the global standards of international commercial law.

Ultimately, it may be concluded that where a trade usage has attained the status of customary law, or where an explicit statutory provision provides for its application, such usage may apply, subject to mandatory rules, and may have the same legal force as statutory provisions within the hierarchy of norms. The same applies to provisions on trade usage contained in international instruments governing trade matters that have been incorporated into Turkish law, such as the CISG.

By contrast, actual practices and usages established between the parties may, under the lex mercatoria, be relevant even before the conclusion of the contract. However, provisions on trade usage contained in international

instruments to which Türkiye is not a party, and which have not been incorporated into domestic law, as well as trade usages that have neither crystallised into commercial customary law nor been expressly made applicable by statute, do not have a formal place in the hierarchy of norms under Turkish law. They may be relied upon only for the interpretation of declarations of intent.

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