



Virtual Meeting on Monday, 8 June 2020, 13.00 – 15.00 (CEST)

Virtual Meeting on Microsoft Teams

Executive Summary

Highlights and action items

- > **Next meeting - October 2020:** Date to come. Virtual meeting on Microsoft Teams.
- > **ICC papers on trade and customs barriers:** Selected trade-related advocacy on trade barriers in context of COVID-19 can be found [here](#) and new paper on customs barriers, [here](#)
- > **Competition and online sales:** International Distribution Institute (IDI) delegation met with EU regulators to discuss competition issues related to the sale of goods online.
- > **Chinese law updates:** Briefing on FM and Hardship provisions and application in context of COVID-19 + the newly passed Chinese Civil Code.
- > **Revised Model Turnkey Contract:** Plans for promotion of newly-released updated model to be explored with ICC Austria and the ICC Academy.
- > Policy Department briefing on AI: CLP and Digital Economy Commission to collaborate on monitoring of and input to EU and other bodies regarding AI regulation and policymaking.
- > **New CLP topics:** Members are invited to send ideas for new work projects, with a focus on SMEs.

1. Welcome and introductory remarks

Ercüment Erdem (Chair of the CLP Commission) welcomed the c. 50 participants to the second virtual CLP Commission meeting, applauding the broad range of countries represented (c. 22) and wishing everyone good health.

2. Competition and online sales

Fabio Bortolotti (Chair, ICC Italy CLP Committee; Founder of IDI) and Silvia Bortolotti (Secretary General of IDI) reported on meeting of International Distribution Institute (IDI) delegation with EU regulators on competition issues related to the sale of goods online.



- > [Slides](#)
- > [IDI submission to EU Commission](#)

Highlights:

- On 24 January, IDI delegation met with EU Commission regulators revising the Vertical Block Exemption Regulation (VBER 330/2010) to inform them on practical issues and problems companies face when dealing with distribution and competition.
- The meeting was a relationship-building exchange of views, to give practical perspective on current problems arising from particular rules and decisions, and to pave the way for future collaboration and discussion. The EU team was open-minded and willing to listen.
- Main issues discussed:
 - **Active and passive sales on the internet:** Distinction should be revised.
 - Issues on **selective distribution** especially important now, as selling only to selected outlets is a way to better organize distribution, control prices, and fight unacceptable internet sales.
 - Companies – particularly SMEs – typically appoint distributors in various countries, and the members of this network organize the distribution and can protect each other against active sales. This mechanism is essential to allow smaller companies to develop a distribution network across countries, But this is impossible now because the EU has decided everyone must be free to sell to everybody – IDI provided regulators practical examples of the problems this raises.
 - Current rules not appropriate for **franchising**: EU applies selective distribution rules to franchising, which are not a good fit.
 - Application of Article 101 of the guidelines to **agency contracts**, which would render most agency contracts irrelevant.
 - Rules applicable to **internet platforms**.
- By the time of the IDI conference in 2021, we expect there will be a draft EU paper that can be discussed.



3. **China: Commercial law updates**

Commission Chair Ercument Erdem noted that ICC China's relatively new CLP Commission hosted the global CLP Commission in Beijing in 2017 for a Commission meeting and a preparatory workshop on the Incoterms® 2020 rules, which were extremely well organized and fruitful. We are very happy now to host the Executive Chair of the ICC China CLP Commission and his academic colleague.

Force Majeure - recent developments in China

Prof. Gao Xiang (Executive Chair of ICC China CLP Commission; Professor, China University of Political Science and Law) updated the group.

> [Slides](#)

Highlights:

- FM and Hardship are recent developments in Chinese law. Although China is an old country, its formal legal system started only in the late 1970s. In 1986 the first civil code was promulgated, covering general principles of civil law in only 156 articles.
- The current FM clause is found in 3 articles of the March 1999 Contract law, which will be effective until the new Civil Code takes effect in January 2021.
- Hardship was fairly controversial in China and so was not previously codified in civil law. The Supreme People's Court is, however, empowered to issue judicial interpretations on hardship, which are not law, but are abiding across the nation. Hardship is now codified in article 533 of the new Civil Code.
- Regarding FM and COVID-19, on 23 January, Wuhan was locked down and people didn't have access to their offices. On 30 January, CCPIT (China Council for the Promotion of International Trade) issued a notice that companies whose ability to carry out business had been affected by the lockdown could be issued a certificate that an FM event had occurred because of the epidemic/pandemic. The first such certificate was issued in early February.
- In mid-February the Commission for Legal Affairs of the National People's Congress – which can legislate and interpret law – announced that COVID-19 was an unforeseeable event and because the government lockdown response was unforeseeable and unavoidable, it constituted a FM event.



Focusing on the newly passed Chinese Civil Code

Prof. Liu Bin (Associate Professor, China University of Political Science and Law; Fulbright Scholar) updated the group.

> [Slides and English translation of new Civil Code](#)

Highlights:

- Several great civil codes – German, French, i.a. – have served as a basis for codes around the world, including the newly passed Chinese Civil Code, which encompasses both civil and commercial law matters. The new code, which comes into force in January 2021, aims to improve the environment for doing business in China by providing a better experience for the international business community and investors.
- The new Civil Code has 7 chapters, of which the first 3 are particularly relevant to international commercial matters:
 - 1 - General provisions, including principles regarding civil codes, natural persons, civil liabilities.
 - 2 – Property, relating to protecting investors’ real and security rights (mortgage, pledge, lien), which will reduce likelihood of conflicts.
 - 3 – Contracts, very important focus of the Code, including improvements such as increased protection for creditors’ rights (modification, assignment). Provisions that may influence business contracts include factoring contracts recognized as new legal form; expansion of law on electronic contracts; liability for breach; clarification of rules on guarantees, such as fiduciary transfer and bank guarantees.
- China’s legal system is a family of the civil law system, in which companies are regulated both by the Civil Code and a separate code. The CISG is largely incorporated in the Civil Code, and some other non-Code laws also apply to private international law matters. Likewise, maritime issues are covered partly by the Code and partly by a separate maritime law.

4. Revised ICC Model Turnkey Contract – Promotion plans

Eric Eggink (Chair of Turnkey WG) reported on plans for promoting the updated ICC Model Turnkey Contract for Major Projects.

> [Slides](#)



Highlights:

- Revision of the 2007 model Turnkey (a project led by the esteemed late Robert Knutson) focused on improving the climate surrounding construction projects. The construction industry is the most conflict-prone industry, because projects become a sort of chess game where Employer and Contractor try to outsmart each other - a waste of money and time. Discussions with Dutch contractors revealed that they were reluctant to use existing turnkey models, including the ICC 2007 model and the FIDIC Silver Book, because 'turnkey' typically means that all the risks go to the Contractor. In the revised model we define 'turnkey' to have a broad scope, so that not all risks go to the Contractor.
- The updated model works well with the ICC model Joint Venture and Consortium contracts. Both sides in a project need to be accommodated in ICC model contracts, which are designed to be balanced and internationally applicable. For example, Employer's requirements include information about the site, what Employers really want. The updated model introduces Assumptions: the Contractor states in writing what it assumes to be the case (e.g., subsoil conditions, looks like a greenfield but who knows, maybe there was a building there 100 years ago and foundations remain that will disrupt current project). The model aims to create a fair situation where everyone knows as much as possible. Conflicts under the contract are ideally only related to non-performance or non-payment.
- To promote the updated model: A number of working group members are available to give presentations in collaboration with ICC national committees or the ICC Academy, in addition to efforts through their own networks (e.g., the European Contractors Association). The model represents an evolution of what is currently available and provides the construction industry a new option with the potential to relieve the frequency of conflicts.
- Noting the important relationship between ICC and FIDIC, the best strategy to promote the new Turnkey model may be to present it as part of a package of ICC model, along with the ICC Model Joint Venture Contract and the ICC Model Consortium Contract, the latter two of which are innovative and aim to fill gaps in the market for international models. The audience for promotion could usefully include governments, given the volume of public-private projects and government contracting generally.

ACTION:

- ICC Secretariat to liaise with the Working Group, ICC Austria and the ICC Academy to explore possible Turnkey model promotion events/webinars in concert with promotion of the ICC Model Joint Venture Contract and the ICC Model Consortium Contract.

5. Reports from Policy Department: Artificial intelligence

Timea Suto (Innovation for All team (ICC)) briefed the group on work of the Digital Economy Commission and BASIS project on AI, in particular in relation to the EU Digital Strategy.

> [Slides](#)

Highlights:

- Background on Digital Economy Commission (DEC) and variety of work underway, including on cybersecurity, set out in the slides.
- Project to be launched soon on AI. There are many initiatives looking at this 'emerging' technology, and many different definitions of what AI is. The volume of data now available, and the increasing power to use data for a range of objectives, has inspired the creation of a host of guidance and policy and regulatory approaches on AI. ICC has done a mapping and found c. 150 schema on how AI should be governed, developed, etc. from a range of organizations.
- The ICC Digital Economy Commission is looking at 3 of these entities most closely and aiming to engage with them to provide business perspectives, define the role of the private sector in these processes:
 - OECD - looking at economic and social impact of AI against evidence-based background, has launched an OECD observatory
 - UNESCO - facilitating World Summit on the Information Society (WSIS) 2005 action line mandate, leading on ethics and AI, want multidisciplinary dialogues
 - EU – taking a regulatory approach. Now moving from high-level guidance to industry-specific regulatory frameworks.
- The DEC is looking to partner with an academic institution that would create a foundational piece looking at the many burgeoning AI initiatives and seeing what they have in common regarding the role and responsibilities of the



private sector. What are commonalities in guidelines and principles? How are they already being implemented in pockets around the world? How are business activities already in practice being showcased? Our partner will start the process with a literature review, then involve the DEC to refine analysis and share case studies - we are happy to have CLP Commission involvement at that point.

- CLP Vice Chair Christian Steinberger strongly welcomed the offer to collaborate and explained the CLP Commission's longstanding monitoring of EU activities that might impinge on freedom of B2B contracts and newer concern regarding AI regulation and the implications for product liability, which seems to be at a critical point in the EU regulatory landscape – a consultation and White Paper on safety and liability involving both the EU Commission and Parliament.
- Mr Steinberger has spoken in the last few weeks to Dirk Staudenmayer at the EU Commission and Parliament member Axel Voss. Significant and concerning how AI is currently defined by the EU; we need to avoid a scheme under which every piece of smart software is regarded and regulated as AI. Simple machine-machine communication should not necessarily be treated as a high-risk issue, which might trigger higher and stricter standards of liability. CLP and DEC should combine forces and efforts on analysis on this important and complicated issue.
- Ms Suto agreed. DEC is engaging with EU Commission's DG CONNECT and good marriage with CLP's contacts with DG JUST. DEC and CLP will stay in touch and exchange views. This family of issues is also a priority of the French government and many ICC France members will be interested to participate in any AI collaboration.

ACTION:

- CLP Vice Chair/Secretariat to continue to monitor EU developments on free flow of data, AI, product liability and to stay in touch with relevant DGs.
- CLP Vice Chair/Secretariat to collaborate with Digital Economy Commission and any other ICC stakeholders as needed.



6. CLP Projects – Areas to explore, focus on SMEs

Emily O'Connor (Director, Trade and Investment (ICC)) updated the group on work of ICC's Save Our SMEs (SOS) campaign and invited proposals for CLP future projects, based on market need with a focus on helping MSMEs.

ACTION:

- Members are invited to submit proposals for concrete CLP projects, with a focus on SMEs.

7. AOB + Next meetings

October 2020 – Date to be confirmed. In light of pandemic and associated travel difficulties, meeting will be virtual rather than physical.

May 2021 – Exploring possibility of physical meeting in Rome and associated conference with Unidroit on force majeure and hardship. To be evaluated at October virtual meeting in light of evolving constraints.