THE ROLE AND MEANING OF TRADE USAGES IN THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

by

SONIA ALEJANDRA MARIA VIEJOBUENO

submitted in part fulfilment of the requirements
for the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROFESSOR H BOOYSEN

NOVEMBER 1994

SUMMARY

The 1980 United Nations Convention on the International Sale of Goods, concluded under the auspices of UNCITRAL, creates a comprehensive statutory legal framework for international sales. Through the express incorporation of the principle of freedom of contract, the convention contains rules which the parties may freely adapt to the particular circumstances of their transaction, by filling any gaps that may arise with trade usages and other practices. In addition, the convention recognises the binding force of international trade usages in certain circumstances, in that it binds parties to usages which are so widely known and have acquired such regularity of observance in international trade as to justify an expectation that they will be observed in the particular transaction. Such acknowledgment of the changing patterns and norms of behaviour which characterise international trade law allows the CISG to be categorised as a major component of the modern *lex mercatoria*.

Key terms:

International trade; International sale of goods; Conflict of laws; Unification of law; Lex mercatoria; Trade usages; Trade terms; Standard form contracts; International definitions; Documentary sales.

ACKNOWLEDGMENTS

I should like to thank my supervisor, Professor Hercules Booysen for his invaluable guidance and constructive criticism throughout the preparation of this dissertation. I appreciate his commitment as a supervisor and the encouragement he gave me at all times.

A special word of thanks to my colleagues, in the Institute of Foreign and Comparative Law, who have always been prepared to assist where they could.

I am especially grateful to Professor Neville Botha who so kindly offered to undertake the final editing and for his helpful hints and proposals.

Lastly, my thanks to my husband, Horacio and daughters, Carolina and Nicole who had to endure my absence on many an inconvenient occasion.

I dedicate this work to the memory of my father.

TABLE OF CONTENTS

INTRODUCTION

International trade falls within the sphere of international economic relations. In today's highly sophisticated and rapidly expanding system of international trade it is no longer possible for countries wishing to achieve and sustain healthy patterns of economic growth to isolate themselves from the international circulation of goods and services. Nations share a common interest in international trade which transcends differences in their economic or legal systems. However, these differences exist, as each country enacts its own domestic legislation for commercial transactions falling under its jurisdiction. Since there is no single international commercial legal system, the legal environment for international business consists primarily of the laws and courts of the many countries of the world. As a general rule, commercial contracts are subjected to the national law of a given country - the *lex contractus* or proper law of the contract - determined in accordance with applicable conflict of laws rules. Parties normally enjoy wide autonomy to select this governing law and, in fact, an express choice of law clause is frequently used as a safeguard against unforseen legal consequences.[1] However, to be effective the selection of the proper law should normally be preceded by a thorough comparative analysis of the substantive rules of each legal system with which the particular contract has some connection. This might not be possible in a particular case, if contracting parties are unable or unwilling to compromise on the selection of the proper law. In the absence of a clear and enforceable choice of a particular legal system to govern a given transaction, the selection of the proper law of a contract containing international elements gives way to conflict of laws problems which are in most cases highly intrincate and result in uncertainty as to the legal environment of the particular transaction.[2]

Since private international law is part of the internal law of the state, its rules are restricted in their application to the territory of the state where they have been promulgated. Consequently, a factual situation containing foreign elements may be

---

[1] N Horn 'Uniformity and Diversity in the Law of International Commercial Contracts' in N Horn & C Schmitthoff (eds) *The Transnational Law of International Commercial Transactions* (Studies in Transnational Economic Law vol 2) Kluwer 1982 10; A Boggiano *International Standard Contracts* Kluwer 1991 151.

[2] H Grigera Naón *Choice-of-law Problems in International Commercial Arbitration* Mohr 1992 28.

decided differently by courts sitting in different states. Private international law rules, therefore, fail to provide the simplicity and predictability of result necessary for international transactions.[3] Moreover, these rules merely refer an international transaction to a given domestic law. By their nature, and with few exceptions, domestic laws are not well suited to international transactions, in that they are not designed to meet the specific needs which are peculiar to international trade arrangements.[4] An international sale, for example, is not merely a domestic sale with incidental foreign elements: despite similarities as to the basic obligations assumed by the buyer and the seller, it represents a totally different situation. Not only does the international transaction require that parties operate in alien legal and cultural environments, which may differ substantially from their own, but the performance of such contracts entails careful consideration and planning with regard to aspects such as communication between parties, transportation and payment of the goods, facets which require the involvement of third parties such as bankers, finance houses, insurers, carriers, freight forwarders and other parties involved in export trade activities.[5]

In an area where clarity, stability and a growing degree of uniformity are essential for

---

[3] G Parra Aranguren 'General Course on Private International Law' 210 *Hague Recueil* (Collected Courses of the Hague Academy of International Law) (1988 III) 39. Efforts to achieve a certain degree of harmonisation of private international law rules in the contractual field have been pursued with different degrees of success in terms of state participation and subsequent adoption of these rules. In particular, reference should be made to two conventions prepared by the Hague Conference on Private International Law. The first is the Convention on the Law Applicable to International Sale of Goods adopted on 15 June 1955, which entered into force on 3 May 1964 in nine – mostly Western European – countries (Belgium, Denmark, Finland, France, Italy, Norway, Sweden, Switzerland and Niger). (For the text of the convention see C Cheng (ed) *Basic Documents on International Trade Law* Martinus Nijhoff 1986 597). The second is the Convention on the Law Applicable to International Sale of Goods adopted in 1985 (see 24 *International Legal Materials* (1985) 1575) which intends to replace the 1955 convention on the same subject. This convention has not yet entered into force. Also important in the field of contract in general is the EC Convention on the Law Applicable to Contractual Obligations adopted on 19 June 1980, which is currently in force in seven states belonging to the European Communities (for the text of the convention see *OJ* 1980 (L 266) 1). Although only members of the EC may accede to the convention, its rules are international in scope, in that the convention replaces the private international law rules of the contracting states whenever the issue of the applicable law arises in their courts, even in the absence of any further connection with the EC.

[4] F Enderlein & D Maskow *International Sales Law* Oceana 1992 1.

[5] H Booysen 'The International Sale of Goods' 17 *South African Yearbook of International Law* (1991/92) 71. See also C Schmitthoff *Schmitthoff's Export Trade. The Law & Practice of International Trade* Stevens 1990 4 ff.

the functioning and further development of international commerce, it is not surprising that the law of international trade has resorted to other relevant forms of international practice, such as commercial arbitration, international mercantile custom, and the various formulations embodied in standard contracts, general conditions and uniform laws, in an attempt to escape the inadequacies and constraints which characterise domestic laws.[6] This process of elaboration and definition of uniform legal rules and patterns of international commerce shapes the modern law of international trade, a development which has been described as the emergence of a transnational law of international trade or an international *lex mercatoria*.[7]

The modern *lex mercatoria* has been described as a legal order based on international legislation and international commercial custom, as formulated in the works of recognised agencies and organisations for international trade and reflected in arbitral awards.[8] It has also been defined as an "autonomous commercial law that has grown independently of national systems of law"[9] and as "the uniform law developed by parallelism of action in the various national systems in an area of optional law in which

---

[6] A Goldstajn 'International Conventions and Standard Contracts as Means of Escaping from the Application of Municipal Law' in C Schmitthoff (ed) *The Sources of the Law of International Trade* Stevens 1964 111. Similarly Schmitthoff 'Nature and Evolution of the Transnational Law of International Commercial Transactions' in Horn n 1 22 quotes the following observation by the French Professor David:

> One has to be a lawyer not to notice that the modern world holds in derision the national systems of conflicts of laws, which usually result in the national law (*lex fori*) being applied, and which are pompously baptised private international law.

See also F Junger 'The *Lex Mercatoria* and the Conflicts of Law' in T Carbonneau (ed) *Lex Mercatoria and Arbitration* Dobbs Ferry 1990 at 213-14, where the author refers to the desire of businessmen in general to keep transnational commercial disputes out of the national courts, and thereby beyond the reach of local laws, adding that this has become a universal trend.

[7] Schmitthoff in Horn n 1 19.

[8] See O Lando 'The *Lex Mercatoria* in International Commercial Arbitration' 34 *International and Comparative Law Quarterly* (1985) 752. However, scholars and courts are divided in their opinion as to what extent this transnational order exists or whether it may be considered a legal order. Boggiano n 1 16, for example, rejects this notion by stating that "the *lex mercatoria* is not a legal system which could be referred to by the parties or the national judges as the proper law of the contract". See also F Mann 'England Rejects "Delocalised" Contracts and Arbitration' 33 *International and Comparative Law Quarterly* (1984) 196; M Mustill 'The New *Lex Mercatoria*: the First Twenty-five Years' 4 *Arbitration International* (1988) 87. As to the relationship between *lex mercatoria* and mandatory rules in the form of national limitations to party autonomy see H Grigera Naón 'The UN Convention on Contracts for the International Sale of Goods' in Horn n 1 90 ff.

[9] A Goldstajn 'The New Law Merchant' 12 *Journal of Business Law* (1961) 12.

the state is in principle disinterested".[10] In a wide sense, then, it is possible to refer to the international *lex mercatoria* as "the law proper to international economic relations".[11] Professor Lando has explained the functioning of *lex mercatoria* with regard to arbitral proceedings thus:

> The parties to an international contract sometimes agree not to have their dispute governed by national law. Instead they submit it to the customs and usages of international trade, to the rules of law which are common to all or most of the States engaged in international trade or to those States which are connected with the dispute.[12]

It is extremely difficult to categorise the nature of the *lex mercatoria* along the lines of the traditional division of the law into private and public law. In an expanding world market, transnational business activities are virtually infinite: they include the export and import of goods, the exploitation of natural resources, direct or indirect investment, licensing of processes, patents or trademarks, supply of personal services such as marketing and financial, technological, transportation or managerial expertise, as well as related activities, such as shipping and insurance.[13] Consequently, legal relations governed by the international *lex mercatoria* are complex, encompassing aspects of both public and private law. For example, a typical commercial transaction such as an international sale is subject to compliance not only with a particular domestic or uniform sales law, but also with public law aspects such as import-export controls, exchange control regulations and other industrial, health and safety standards imposed by states in pursuance of a pre-determined trade policy in accordance with legal, political and economic factors.[14]

It is the function of the transnational law of international trade or international *lex mercatoria* to develop bases for a common understanding of the obligations arising from

---

[10] Schmitthoff in Horn n 1 22.

[11] B Goldman *'Lex Mercatoria'* 3 *Forum Internationale* (1983) 5.

[12] Lando n 8 747.

[13] M Litka *International Dimensions of the Legal Environment of Business* PWS-Kent 1991 2.

[14] *Idem* 7.

international commercial transactions. This is to a large extent facilitated by the common interest of nations in participating actively in the achievement of a global integration of international trade law through the establishment of uniform substantive rules. Identical circumstances and needs have made trading nations more inclined to support international conventions aimed at global unification, particularly in the field of the international sale of goods, which constitutes the principal area of the law of international trade.[15] The reasons for this phenomenon are self-evident. Not only is it imperative to assure a more orderly and secure development of commercial life, but developing countries are playing an increasingly important role in international trade. Hence the necessity of providing rules to govern the international sale of goods which, apart from being uniform, also take into account the fact that export and import transactions are often concluded between parties enjoying unequal bargaining power and operating in different socio-economic contexts.[16] In this area, significant progress has been achieved in recent years through widespread adoption of uniform substantive rules governing international commercial sales, enacted to provide the contracting parties – either private concerns or state trading organisations – with a modern and internationally uniform legal framework within which to negotiate the specific terms of their agreement in conformity with the needs and requirements of the individual transaction.[17]

The 1980 United Nations Convention on Contracts for the International Sale of Goods, which constitutes the object of the present study, is the most notable example in this regard.[18] The convention, concluded under the auspices of the United Nations

---

[15] C Schmitthoff 'International Business Law: A New Law Merchant' *Current Law and Social Problems* (1961) 130.

[16] C Bianca & M Bonell *Commentary on the International Sales Law* Giuffré 1987 3.

[17] M Bonell 'International Uniform Law in Practice – Or Where the Real Trouble Begins' 38 *American Journal of Comparative Law* (1990) 881; J Honnold (ed) *Unification of the Law Governing International Sales of Goods* International Association of Legal Science Dalloz 1966 at xi (Introduction).

[18] United Nations Convention on Contracts for the International Sale of Goods signed in Vienna on 11 April 1980 *UN Doc A/CONF 97/18 Annex I (1980)*(hereinafter CISG) reprinted in United Nations Conference on Contracts for the International Sale of Goods, *OR 176 UN Doc A/CONF 97/19, UN sales No E 81 IV 3* (1981) and in 19 *International Legal Materials* (1980) 668. The literature on the convention is extensive. For major commentaries of the uniform sales law, see J Honnold *Uniform Law for International Sales* Kluwer 1991; P Schlechtriem *Uniform Sales Law* Manzsche 1986; Enderlein n 4 and Bianca n 16 with further references.

Commission on International Trade Law (UNCITRAL), creates a comprehensive statutory legal framework for international sales.

That a convention unifying substantive rules on a topic as technical and multi-faceted as international sales has materialised after a collective effort of interested states, and its subsequent entry into force within countries with substantially different political and legal systems, as well as degrees of economic development, certainly constitutes a step towards clearer rules for international sales.[19]

However, the achievement of a text of uniform law, even one as important as the 1980 Sales Convention, is not in itself sufficient to create a truly homogeneous legal regulation of the material concerned. For this purpose, there must be a common understanding of the rules of the convention as an essentially transnational exercise.[20] In this regard, one has to bear in mind that the object of the Sales Convention is not only to assure a uniform regime for international sales contracts, but also to offer rules which will be more responsive than traditional national laws to the effective needs of international trade.

As has been pointed out,[21] it is the flexibility of the convention's rules which constitutes its most important feature. Through the express incorporation of the party autonomy principle, the convention makes all its provisions optional, thus recognising the existence of other established rules and practices in international trade, which it supplements, acting as a body of residual rules for cases where the parties have not stipulated

---

[19] As of February 1994, 37 nations had ratified or acceded to the convention. They are: Argentina, Australia, Austria, Bulgaria, Bosnia-Herzegovina, Byelorussia, Canada, Chile, China, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Germany, Guinea, Hungary, Italy, Lesotho, Mexico, Netherlands, Norway, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States of America, Russia, Yugoslavia and Zambia. B Piltz 'Neue Entwicklungen im UN-Kaufrecht' 17 *Neue Juristische Wochenschrift* (1994) 1101.

[20] As to the problem of interpretation see in general Bonell n 17 867 and B Nicholas 'The Vienna Convention on International Sales Law' 105 *The Law Quarterly Review* (1989) 242.

[21] B Audit 'The Vienna Sales Convention and the *Lex Mercatoria*' in Carbonneau n 6 141; A Goldstajn 'Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention' in P Sarcevic & P Volken (eds) *International Sale of Goods. Dubrovnik Lectures* Oceana 1986 58.

otherwise in their contract. In this way, the convention offers a set of rules that parties may freely adapt to the particular circumstances of their transaction, for example, by filling any gaps that may arise with trade usages or particular courses of dealing. The acknowledgment of the realities and practices of international trade which CISG identifies and accommodates within its provisions, would allow this convention to be categorised as a major component of the international *lex mercatoria*.[22]

In this context, the present study will focus on trade usages as an essential element of the legal system created by the convention. The trade usage provisions were selected because of the flexibility they allow the convention in adapting to new commercial problems. As Honnold has stated:

> The world's commerce embraces an almost infinite variety of goods and transactions; a law cannot embody the special patterns that now are current let alone those that will develop in the future. Many of these patterns may be reflected in the contract but there are practical limitations on the ability of parties to envisage and answer every possible question. Many transactions must be handled quickly and informally. Even when there is time to prepare detailed documents, an attempt to anticipate and solve all conceivable problems may generate disagreements and prevent the making of a contract; moreover, the most basic patterns may not be mentioned because, for experienced parties, they "go without saying". For these reasons, one of the most important features of the Convention is the legal effect it gives to commercial usages and practices.[23]

Reference to trade usages, courses of dealing, uniform definitions of trade terms, standard contracts and general conditions are all useful mechanisms of conflict avoidance, in that they reduce the chances of contractual disputes arising between parties by providing suitable principles to address most of the problems likely to arise during the course of the relationship.[24]

In the particular case of trade usages, a casual approach to agreement planning – based on a mutual expectation of routine performance which is common in international trade – normally suffices, in that parties are likely to perform their obligations in accordance

---

[22] Audit *idem*; also Booysen n 5 86 .

[23] Honnold n 18 174.

[24] G Delaume *Law and Practice of Transnational Contracts* Oceana 1988 100.

with the written or unwritten rules of the international trading community, as reflected in the particular contract.[25] However, the main problem faced by commercial courts and arbitral tribunals is how to resolve the disputes that invariably arise when a relationship breaks down, if the parties have failed expressly to tie their contract to applicable trade usages.[26] Then, questions such as what standards must mercantile practice meet to qualify as custom or usage, and to what extent will a national court give effect to commercial usage which has not been embodied in the contract, i.e. the binding force of usages, assume particularly relevance.[27]

The legal nature of trade usages and other standard rules evolved out of commercial practice constitutes, therefore, an important aspect of the law of sales. It is generally accepted that trade usages and other common trade terms operate on a contractual basis.[28] In terms of this traditional view, trade usages constitute specific contract terms which necessarily co-exist with, and supplement whenever possible, rules of domestic or international origin.[29] Consequently, a reference to trade usages, trade terms or the incorporation of standard provisions into a contract would not completely rule out the necessity of referring to conflict of laws rules, in order to determine the proper law of the contract.

The situation becomes more complicated in the absence of an express or implied reference to trade usages in the contract. In particular, it is not clear whether there are truly international usages which would be legally binding everywhere without the support

---

[25] C Stoecker 'The *Lex Mercatoria* Today: To What Extent Does It Exist?' 7 *Journal of International Arbitration* (1990) 105. Honnold emphasises "the necessity [for a trader] to preserve his reputation for reliability and business morality" 12 J Honnold 'The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law' in Schmitthoff n 6 79. Similarly Trakman refers to "the 'rules of the game' which have traditionally bound businessmen"; L Trakman 'The Evolution of the Law Merchant: Our Commercial Heritage' 12 *Journal of Maritime Law and Commerce* (1981) at 175.

[26] Honnold *idem*.

[27] H Jokela 'The Role of Usages in the Uniform Law on International Sales' 10 *Scandinavian Studies in Law* (1966) 92.

[28] *Idem*.

[29] Delaume n 24 100.

of the contract, i.e. on normative grounds as opposed to contractual intent.[30] To a great extent, the answer to this question depends on whether one accepts the existence of an autonomous legal order – *lex mercatoria* – which is independent of municipal laws but admitted in their domain by authority of the municipal sovereign[31] and is, as such, capable of constituting the governing law to which the transaction might be subjected.[32]

The purpose of the present study is to examine whether and to what extent these and other related aspects are resolved by the CISG's approach to trade usages. To this end, it is envisaged to present a general overview of the nature and legal significance of commercial practice in international trade. This will be followed by suitable reference to the legal background and development of the CISG, including a comparison with its predecessor ULIS, and a detailed description of the convention's provisions relating to the role of trade usages in the regulation of international sales contracts falling within its sphere of application. In this process, emphasis will be placed on issues which proved to be particularly problematic during the preparation of the CISG, due to the divergent political and economic interests, as well as legal traditions, represented at Vienna. Two reasons justify this approach. First, as the legislative history of article 9 of the CISG will reveal, the scope of application and legal effect of trade usages was itself a highly political issue that generated considerable debate during the preparation of the uniform law.[33] Secondly, full understanding of the system created by the CISG presupposes

---

[30] Jokela n 27 92; Schlechtriem n 18 41 fn 117.

[31] Schmitthoff 'The Law of International Trade – its Growth, Formulation and Operation' in Schmitthoff n 6 35.

[32] See *supra* n 8. Scholars do not agree on whether a reference to the 'international trade usages' or 'the general principles of commercial law' as the governing law of the contract would constitute a valid choice of law. Boggiano, for instance, refers to the adoption of an a-national system of law such as the *lex mercatoria* to govern the transaction as "possible" (within the scope of party autonomy in international contracts) but "highly risky", in that "regard should inevitably be had to the proper law on some issues of the contract which cannot be sufficiently settled in terms of the general principles of international trade". Accordingly, trade usages – which constitute an important source of *lex mercatoria* – would only operate within the scope of a particular national law, since in the view of this author their validity and acceptance is always connected with their recognition and enforcement by national courts and practices; A Boggiano *Derecho Internacional Privado* vol 2 Depalma 1988 326. See also Grigera Naón n 2 26 ff. For the opposite view see Lando n 8.

[33] G Eörsi 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' 31 *The American Journal of Comparative Law* (1983) 341.

acknowledgement of the significant structural differences among the nations represented at UNCITRAL which affected the drafting of the text and are reflected in many of its provisions. If the need for compromise in a process of legislative unification at the international level is readily accepted, it will be easier to evaluate the uniform legal foundation laid down by the CISG in the area of the international sale of goods as an improvement on the uncertainty created by the application of private international law rules.

CHAPTER 1

THE MODERN LAW MERCHANT: ORIGIN AND DEVELOPMENT

1 The universality of international commercial practices

In international commercial dealings the intention of the parties, express or implied, is normally paramount. The principle of party autonomy implies the freedom of the parties to a contract to describe and arrange its terms in their discretion, provided that the choice is *bona fide* and does not conflict with the public policy of the forum.[1] The real, living law of international trade is based on consensual agreements developed in individual contracts or in standard formulations which the parties may adopt or modify as they choose.[2] In commodity trade transactions, for instance, where efficiency and profit depend on speed and volume, the contracting parties' rights and duties are rarely determined solely by their own stipulations. Where the applicable legal system provides rules on which to base expectations about the contract, parties do not need to include a clause addressing each and every aspect of the contract or defining every term they use. Rather, by referring expressly or by implication to trade usages, they invoke rules derived from practice in the particular trade concerned, which act as gap-filling and interpretive devices.[3]

---

[1] I Gal 'The Commercial Law of Nations and the Law of International Trade' 6 *Cornell International Law Journal* (1972) 71. This conforms to the criteria laid down in the English case of *Vita Food Products Inc v Unus Shipping Co Ltd* 1939 AC 277, and in the decision of the United States Supreme Court in *M/S Bremen v Zapata Off-Shore Co* 407 US 1 (1972) at 13. When the same dispute was litigated concurrently in the English courts, the English Court of Appeal sustained jurisdiction there under the choice of forum clause despite the fact that the transaction – a contract involving carriage from the United States to Italy entered into between an American and a German party – had no connection with England, noting that "in the absence of strong reasons to the contrary, the discretion of the English court will be exercised in favour of holding parties to their bargain" *Unterweser Reederei GmbH v Zapata Off-Shore Co* [1968] 2 Lloyd's LR 158, 163 (CA).

[2] J Honnold 'The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law' in C Schmitthoff (ed) *The Sources of the Law of International Trade* Stevens 1964 78.

[3] A Goldstajn 'Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention' in P Sarcevic & P Volken (eds) *International Sale of Goods. Dubrovnik Lectures* Oceana 1986 78.

These contract practices, and the common understanding on which they are based, are usually recognised by the law applicable to the transaction, whether domestic contract law or internationally adopted legal principles. This is particularly true with regard to export trade transactions, where international trade terms relating, for instance, to the allocation of risk of loss or damage to goods sold, bills of lading, documentary credits and other devices used in international sales are generally understood by trading enterprises throughout the world and are governed by similar legal principles in virtually all trading countries.

Such general similarities in contract law and practice are not only due to the fact that merchants involved in export trade are confronted by similar problems, but also to the fact that these merchants – buyers and sellers, shipowners, bankers and the like – form a transnational community which has been constantly generating new principles of mercantile law and further developing existing ones through various channels, mainly contract practice and the various regulations emanating from self-governing, specialised trade associations and other bodies dedicated to the study and development of international trade law.[4] In a wide sense, then, international commercial custom comprises commercial patterns and rules of behaviour emanating from commercial usages, standard clauses and other rules derived from international trade practice.[5] Commercial custom thus understood serves two main functions. First, it provides valuable guidance with regard to the interpretation of contract terms, their legal meaning and effect. Second, it may be directly applicable to a particular contract where the parties expressly embody the clauses or rules in question into their agreement, making them part

[4] A number of international organisations and institutions of varied legal status are active in the elaboration of definitions of uniform legal rules and patterns of international commerce. These activities are aimed either at the preparation of international legislation such as the UN Convention on Contracts for the International Sale of Goods, or at the promulgation of standard rules and clauses such as the widely known Incoterms and the Uniform Customs and Practice for Documentary Credits issued by the International Chamber of Commerce. For ample reference to the many so-called 'formulating agencies' operative in international trade see N Horn & C Schmitthof (eds) *The Transnational Law of International Commercial Transactions* (Studies in Transnational Economic Law vol 2) Kluwer 1982 part II 'Formulating Agencies' 35-89.

[5] N Horn 'Uniformity and Diversity in the Law of International Commercial Contracts' in Horn n 4 15.

of the *lex contractus*.[6] In addition, trade usages may apply, even in the absence of an express provision to that effect, where their existence and observance in a particular trade can be sufficiently established by the party invoking their application.[7]

2 Historical survey: the nature and evolution of the law merchant

Historically, international trade law has been fostered by merchant customs and practices, inspired by need and mutual interest, and shaped according to the realities of the business world. An historical perspective into the manner in which merchants have conducted their affairs in the past should prove useful in promoting a better understanding of business patterns as they exist today.

2.1 The medieval law merchant

The earliest form of international economic law, preceding state involvement in the regulation of transnational economic relations, was the medieval law merchant *(lex mercatoria)*, a common regime based on custom and administered by the merchants themselves, from the earliest days of trading in the Mediterranean.[8] During the eleventh and twelfth centuries, Europe experienced a commercial renaissance which was associated in part with the opening of trade with the markets of the East and in part with general political and economic developments on the Continent, including the rise of towns and cities as autonomous political units.[9] Throughout this period, the revival of

---

[6] *Idem*.

[7] A Goldstajn n 3 79:

> Commercial usages applicable in international trade do not exist to satisfy the needs of individual countries but the higher interests of the international community...[t]herefore, usages of trade will always be applied unless they are excluded in a way which discloses a contrary intention.

[8] S Zamora 'Is There Customary International Economic Law?' 32 *German Yearbook of International Law* (1989) 14.

[9] A special law for merchants started to develop in the main Italian trade centres of Venice and Genoa, and spread by means of ocean trade to Spain and France, Germany and England, among others. See generally R Lopez *The Commercial Revolution of the Middle Ages 950-1350* Prentice-Hall 1971 106 ff; C Cipolla (ed) *The Middle Ages* vol 1 Barnes & Noble 1976 274 ff; R Lopez *Medieval Trade in the Mediterranean World* Oxford 1955.

Roman law studies at medieval European universities and the development of legal principles, both ecclesiastical and secular, contributed to the emergence of this particular *lex mercatoria*. Based in the Roman law of nations - *ius gentium*[10] - the law merchant gradually progressed toward uniformity through the expansion of commerce itself.[11] Laws and customs were freely exchanged across the Continent. Of these local customs, the rules most widely adopted were those which best promoted commerce and prosperity, thereby conforming to commercial need in an adequate and functional way.[12] Despite local variations, usages of the main commercial centres tended to conform to the general practices established throughout Europe.[13] As the primary source of regulation, mercantile practice represented the crystallisation of a utilitarian ideal, in the form of a maximum benefit to all involved in commercial dealings, namely rulers, merchants and consumers alike.[14]

At this stage, the law played only a secondary role in shaping and controlling commercial transactions. Rather, by adopting the customs of the local markets and fairs and maritime

---

[10] In Rome the term *ius gentium* originally referred to legal rules applied in dealings with aliens (*peregrini*). The concept *ius gentium* appeared, however, often associated with another, *ius naturale* to describe a universal order, a set of rules which form the basis of all law and are thus not to be set aside by the law of the state. Classical jurists such as Gaius refer to *ius gentium* and *ius naturale* as being the same thing: the law which nature has instilled into all nations. Ulpian identifies *ius naturale* with instinct, while Justinian treats the views of Gaius and Ulpian as identical. W Buckland *A Textbook of Roman Law from Augustus to Justinian* Cambridge University Press 1966 52-54; also N Ponssa de la Vega de Miguens *Breve Historia del Derecho Romano* Lerner 1969 21. The Roman law as revived in medieval times dealt with various commercial transactions. In particular, the law of sale originated in the Roman *emptio venditio* as developed from a peregrine practice taken over by the *praetor peregrinus*.

[11] B Goldman *'Lex Mercatoria'* 3 *Forum Internationale* (1983) 3. For a comprehensive description of this evolution process see two articles by L Trakman 'The Evolution of the Law Merchant: Our Commercial Heritage' Parts I &II in 12 *Journal of Maritime Law and Commerce* (1980) 1 (Part I) and 12 *Journal of Maritime Law and Commerce* (1981) 153 (Part II).

[12] M Medwig 'The New Law Merchant: Legal Rhetoric and Commercial Reality' 24 *Law and Policy in International Business* (1993) 592. Trakman n 11 19 refers to the law merchant as "a system which enforced commercial standards, mercantile values and trade interests in its evolution - not merely as an ideal, but as a concern for expediency in trade".

[13] Medwig *idem* with further references.

[14] As a predominant rule, the agreement of the parties remained an overriding force in regulating mercantile conduct. Trakman n 11 7 states:

> As a general rule "merchant law" embodied a respect for "merchant" practice as a primary source of regulation and the "law" as a secondary control over commerce.

customs relating to trade, the law merchant reflected the ultimate move away from local legislation towards a universal system of law based on mercantile interests.[15] As Trakman explains:

> [P]eremptory rules were undesirable where international merchants were able to govern their own business affairs by their own customary means. Law, of necessity, had to be permissive in nature allowing merchants to regulate their own affairs wherever possible. Only failing such self-control would the law intervene as a mandatory *ius cogens* imposed upon merchants.[16]

While statutes in medieval times were modelled on the actual courses of dealing among merchants,[17] merchant courts followed the dictates of trade practice in their deliberations. They administered the international usages and legal rules of the medieval community of merchants in special mercantile courts, known as the courts of the piepowder, and later in the courts of the staple.[18]

Several characteristics may be abstracted from the medieval law merchant. It was a body of rules designed to govern a special class of persons - the merchants. Through the liberal use of local customs and practices, it created a transnational regime based on mercantile custom. The law was administered not by professional judges but by merchants themselves through procedures characterised as speedy and informal. Reciprocity in trade, enforced in terms of rules of consent, good faith and equity, in the

---

[15] H Berman & C Kaufman 'The Law of International Economic Transactions (*Lex Mercatoria*)' 19 *Harvard International Law Journal* (1978) 225.

[16] Trakman n 11 19. Similarly, Medwig n 12 593:

> [G]overnments best contributed to the growth of trade, at this time, merely by keeping the peace at fairs and markets and by protecting the trade routes.

[17] Regulatory codes such as the Consulato del Mare, the Rolls of Olerón and the Laws of Wisby exemplify the localisation of mercantile custom throughout the medieval world. See Trakman n 11 4.

[18] These courts were an adjunct of the great fairs and trading centres of medieval Europe, established by royal prerogative and administered by royal officers, in conjunction with merchants. The courts attached to the fairs gradually gave way to other commercial courts having specialised jurisdiction over specified 'staple' commodities. Scholars have compared the law merchant system and the special merchants' courts to modern arbitration procedures. See generally G Radcliffe & R Cross *The English Legal System* Butterworths 1964 242 ff; also Honnold n 2 70.

medieval sense of fairness, stood out as overriding principles.[19]

Such universalisation of merchant practice into a uniform, efficient system of trade law, offered the law merchant its most solid foundation. More significantly perhaps, its persistence and growth throughout this period reveals the ability of the merchant community to develop sound regulatory principles and adequate adjudicatory institutions within the broad framework of a supplementary legal order.[20]

2.2 The nationalisation of commercial law

In post-medieval times, the increased complexity associated with transregional trade led to a proliferation of laws for the regulation of merchant transactions. Cultural diversities became more prevalent as communities evolved into nation states, thereby undermining the uniformity which had characterised the law merchant period. The gradual centralisation of power in the hands of monarchs led to the creation of national states and to centralised systems of law and law adjudication. As a result, the uniformity and unimpeded continuity of the law merchant as a universal institution for the regulation of trade succumbed to principles of law peculiar to domestic laws and court systems. However, the process developed somewhat differently in England than in Continental Europe.[21]

2.2.1 England

Originally considered a special law for merchants, the *lex mercatoria* was gradually absorbed by the English common law. In the seventeenth century, the common law courts of King's Bench and Common Pleas succeeded in taking over jurisdiction on

---

[19] Berman & Kaufman n 15 225.

[20] Trakman n 11 (Part I) 18; Honnold n 2 70; C Croff 'The Applicable Law in International Commercial Arbitration: Is It Still a Conflict of Laws Problem?' 23 *The International Lawyer* (1989) 634.

[21] Goldstajn n 3 90. See also 'Progressive Development of the Law of International Trade: Report of the Secretary General of the United Nations, 1966' in C Cheng (ed) *Basic Documents on International Trade Law* Martinus Nijhoff 1986 9.

commercial cases from the special courts of Admiralty and of Chancery which had been active in the past.[22] The increasingly limited role of the law merchant as a flexible mechanism for the creation of specialised merchant rules in post-medieval England became apparent as merchants engaged in transnational trade were subjected to the ordinary law of the land. Of this period Radcliffe comments that:

> The victory of the common law courts was by no means a blessing for the merchant litigants of the seventeenth century, for the common lawyers were for the most part profoundly ignorant of commercial practice.

The practical relevance of mercantile custom as a source of law in commercial matters was considerably narrowed, as every mercantile usage which differed from the common law rules had to be specially pleaded and proved as such to the satisfaction of the jury, according to stringent procedure and complex rules of evidence. Custom had to be ancient in its origin and consistently practised in order to qualify as an applicable rule of law.[23] In addition, judges were often hostile to, or ignorant of, the customs of merchants.[24]

Not until Lord Mansfield's tenure as Chief Justice of the King's Bench - from 1756 - were the rules of the law merchant fully incorporated into the common law.[25] Aware of the need to establish a better working relationship between both systems, Lord Mansfield argued for a system of commercial law which gave due regard to business custom and trade usage, for, in his view, commercial law was to evolve alongside

---

[22] Radcliffe n 18 250 ff.

[23] Trakman n 11 (Part II) 158. Berman & Kaufman n 15 at 227 observe:

> British jurists did not think of the common law - now including the law merchant - as a highly flexible set of principles to be continually reinterpreted in the light of new customs. Once the court declared a custom, it was not generally to be disturbed by inconsistent practices and understandings of merchants. Indeed, in English law it became, and still is, extremely difficult to prove a new commercial custom which contradicts what English judges in previous cases have declared to be the law.

[24] Honnold n 2 72.

[25] Described as "a judge who could look beyond the particular to the general and [could thereby] lay down principles of commercial law" Lord Mansfield "built the commanding fabric of our commercial law. The law relating to shipping, commercial transactions and insurance was practically remade by Mansfield, who never lost sight of the fact that international commerce requires the law of each country to be based in the same principles; the practice of honesty and fair dealing among prudent and honourable merchants"; T Plucknett *A Concise History of the Common Law* Butterworths 1956 250 (quoting Lord Birkenhead).

commercial practice.[26] In the case of *Pillans v van Mierop*[27] it was held that the rules of the law merchant were questions of law to be decided by the courts rather than matters of custom to be proved by the parties, and further, that such rules applied not only to merchants but to all persons. In this way, a body of judicially declared rules of commercial law came into being as a result of case law which incorporated and refined rules developed in earlier times throughout Europe. Later, in the nineteenth century, the most important aspects of this commercial law were embodied in legal enactments dealing *inter alia* with the sale of goods, bills of exchange, maritime transport and marine insurance.[28] As is the case in every process of codification, the national character of these rules was thereby strengthened.[29]

2.2.2 Continental law countries

On the Continent, the desire for a more formalised system of commercial law led to national codification movements. Beginning in the nineteenth century, the appearance of national legislation in the commercial sphere effectively promoted the distinction between commercial law and civil law which is characteristic of many Romano-Germanic countries.[30] The most famous examples were the French regulations known as the legislation of Colbert on land-based commerce (*Ordonnance sur le commerce de terre*) of 1673 and on maritime trade (*Ordonnance sur le commerce de mer*) of 1681, which were primarily enacted to unify commercial law. These regulations responded to commercial practice by reflecting the customs and usages of merchants.[31] State intervention also

---

[26] Trakman n 11 159. Mansfield's technique was the systematic use in commercial cases of a special jury of merchants who both knew and received testimony concerning commercial usage. Verdicts on specific questions of commercial practice were secured as precedents for future cases, thereby contributing to an enduring body of commercial law. Honnold n 2 72.

[27] 3 Burr 1664, 97 Eng Rep 1035.

[28] E.g. Sale of Goods Act of 1893 (56 & 57 Vict, c 71), Bills of Exchange Act of 1882 (45 & 46 Vict, c 61), Bills of Lading Act of 1855 (18 & 19 Vict, c 111), among others.

[29] Trakman n 11 127.

[30] D Tallon 'Civil Law and Commercial Law' in K Zweigert (ed) *International Encyclopedia of Comparative Law* vol VIII (Specific Contracts) Martinus Nijhoff 1983 6.

[31] Trakman n 11 154.

took place in Spain through the enactment of the Regulations of Bilbao of 1737, a comprehensive commercial codification which greatly influenced the development of commercial law in the Latin American countries.[32] The codification movement culminated in the enactment of the French Civil Code of 1804 and the Commercial Code of 1807, which formalised the distinction between civil law and commercial law. The French Code of Commerce was the pattern for commercial legislation in numerous Romanic countries, e.g. the Spanish Commercial Code of 1885, the Portuguese Code of 1833, the Dutch Code of 1838, the Italian Commercial Codes of 1865/1883 and the German commercial codification process which started with the enactment of the General German Commercial Code (*Allgemeines Deutsches Handelsgesetzbuch*) of 1861 and culminated in the adoption of the German Commercial Code (*Handelsgesetzbuch*) of 1897.[33]

More recently, two important codifications in the civil law sphere, the Swiss Code of Obligations (*Obligationenrecht*) and the Italian Civil Code of 1942 unified the law of obligations through the incorporation of commercial law into general private law. But even in those countries where the distinction between civil and commercial matters subsists, the existence of separate codes for civil and commercial law seems to be more a matter of statutory technique than of substance. In the particular case of the law of sale, the general private law principles contained in civil codes find subsidiary application in commercial sales, in so far as commercial codes include only fragmentary provisions

---

[32] R Etcheverry *Derecho Comercial y Económico* Depalma 1987 39.

[33] Generally, the principal differences which exist among countries where codified legal rules apply in commercial matters refer to the criterion adopted to determine commerciality, i.e. to whom or to what type of acts commercial law shall apply. Under a subjective approach, commercial law is the law of a particular class of persons – the merchants – defined with reference to the exercise of activities considered relevant to this effect. In Germany, the definition of merchant (*Kaufmann*) is the basis of application of commercial law in terms of the German *Handelsgesetzbuch* (HGB); S 1 *et seq* of the HGB. See E von Caemmerer 'The Influence of the Law of International Trade on the Development and Character of the Commercial Law in the Civil Law Countries' in Schmitthoff n 2 91. An objective approach, followed *inter alia* by the Spanish Code, classifies commercial law with reference to certain transactions qualified as commercial acts, whatever the qualifications of those who carry them out. A third model, which may be labelled 'mixed' uses the two criteria described without one being clearly more important than the other. The French Commercial Code, although traditionally based on the subjective approach, received the influence of the revolutionary principles of equality between citizens and of the freedom of commerce and industry, thus incorporating a powerful dose of objectivism into its commercial law. See Tallon n 30 11.

in this regard.[34]

2.3 The modern lex mercatoria

In this century, the general trend of commercial law has been to move away from the restrictions imposed by national laws. Recognising that the expansion of international trade and growing economic interdependence demand a privatisation of commercial regulation, the merchant community has redeveloped its own adjudicatory institutions and its own rules. International organisations and trade associations have formulated a great number of general conditions, standard contract forms and standard trade terms which, based on commercial practice, intend to regulate in detail, and if possible in a uniform manner, the various forms of commercial transactions.[35]

These efforts have enabled the law merchant to experience a strong revival in the past decades, a process characterised by many scholars as the emergence of a "new *lex mercatoria*" which operates on a transnational scale. An essentially international body of law, the modern *lex mercatoria* is founded on the commercial understandings and contract practices of an international merchant community composed principally of mercantile, shipping, insurance and banking enterprises of all countries.[36]

It is particularly within the ambit of modern commercial arbitration that the *lex mercatoria* has been acknowledged as an autonomous legal system. In contrast to national courts, international arbitrators consider it at times unnecessary – or even impossible – to define the law governing the contract and found their award on international

---

[34] Von Caemmerer *idem*.

[35] M Bonell 'The Relevance of Courses of Dealing, Usages and Customs in the Interpretation of International Commercial Contracts' in *New Directions in International Trade Law* Acts and Proceedings of the 2nd Congress on Private Law, UNIDROIT, vol 1 Oceana 1977 109.

[36] Berman & Kaufman n 15 273.

commercial custom, including the contract practices in international trade.[37] The peculiarities of the arbitral process and the provisions of modern arbitration laws have facilitated this development. Most arbitration laws and private arbitration rules enacted in the past few decades require that the arbitrator take into account the relevant trade usages, regardless of the law applicable to the substance of the dispute.[38] In considering the usages and practices of international commerce, the arbitrator is in a better position to give effect to the parties' reasonable expectations, as reflected in their common understanding of the commercial usages applicable to the trade concerned.[39] Furthermore, by allowing the arbitral tribunal to decide the conflict according to "the rules of law which it considers appropriate",[40] many of these modern enactments now expressly recognise the possibility of application of a non-national legal system such as the *lex mercatoria* as the law applicable to the substance of the dispute.[41]

---

[37] See Medwig n 12 603 ff; H Berman & F Dasser 'The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy' in T Carbonneau *Lex Mercatoria and Arbitration* Dobbs Ferry 1990 33; O Lando 'The *Lex Mercatoria* in International Commercial Arbitration' 34 *International and Comparative Law Quarterly* (1985) 747.

[38] Article VII(1) of the European Convention on International Commercial Arbitration (484 UNTS 364) concluded in Geneva in 1961, provides that "the parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take into account the terms of the contract and trade usages". Similarly, art 28 s 4 (Rules applicable to substance of dispute) of the 1985 UNCITRAL Model Law on International Commercial Arbitration and art 33 s 3 of the UNCITRAL Arbitration Rules direct the arbitral tribunal to "take into account the usages of trade applicable to the transaction". See Cheng n 21 711 and K Berger *International Economic Arbitration* (Studies in Transnational Economic Law vol 9) Kluwer 1993 875.

[39] Berman n 37 33.

[40] The French arbitration rules enacted in 1981 in the *Nouveau Code de Procédure Civile* direct that in the absence of choice of law, the arbitrator shall apply the rules which he considers appropriate (*celles qu'il estime approprietées*). The Netherlands Arbitration Act of 1986, art 1054(2) and the Swiss Federal Law on Private International Law of 1987 (in force since 1 January 1989) art 187 s(1), follow the same approach. See Berger n 38 2, 556.

[41] *Idem* 499. The enforcement of foreign arbitral awards internationally has been facilitated by the adoption of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 *UNTS* 38) concluded in New York on 10 June 1958, which as of 1 May 1992, has been ratified by 113 states; Berger n 38 925. The New York Convention applies to awards made in a foreign contracting state. The courts of a contracting state must recognise and enforce such award unless there is a ground for refusal as provided in article V of the convention. The mere fact that the arbitrator has relied on the *lex mercatoria* to decide the substance of the dispute is not one of the reasons for refusal listed in the article; (but see Lando n 37 756 and further considerations).

This approach corresponds to everyday commercial practice, where commercial arbitration has become the most frequently used mechanism to settle contractual disputes.[42] Businessmen are usually interested in the possible gains and losses connected with their business transactions, whereas the law is somewhere in the background and outweighed by a growing body of commercial practices. Very often, the proper function of choice of law clauses contained in international contracts is not so much to designate the applicable legal system, as to avoid the application of a foreign legal system which is designated by some unpredictable, impracticable an sometimes even artificial conflict of laws rules.[43] Because accepted trade usages have a greater impact on international contracts than domestic laws,[44] they increasingly serve the function of the *lex contractus* when they are expressly incorporated into the contract.[45]

3 Standardisation of terms in international trade

The articulation of the law merchant in international conventions, model laws and other documents issued by trade organisations has been more successful in some commercial fields than others. International transportation by sea, air and road, for instance, can hardly be conducted without established uniform rules. Likewise, in new areas of business transactions such as the regulation of major construction and management contracts (so-called turn-key contracts), where little experience is available, the inclination to copy a model contract or any model rule appears to be stronger.[46] The international sales contract has been subjected, with varying degrees of success, to several

---

[42] C Gertz 'The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual *Depeçage*' 12 *Northwestern Journal of International Law and Business* (1991) 163.

[43] Berger n 38 528.

[44] B Audit 'The Vienna Sales Convention and the *Lex Mercatoria*' in Carbonneau n 37 142.

[45] Berger n 38 577; Horn n 4 15; Goldstajn n 3 97.

[46] A model contract form dealing with the erection of works and installations abroad, the Conditions of Contract for Works of Civil Engineering Construction (4th ed 1987) sponsored by the Fédération Internationale des Ingénieurs-Counseils (FIDIC), has gained generalised application. See Horn n 4 9 with further references.

attempts aimed at unifying the substantive rules applicable to such contracts.[47] An equally significant development in this area has been the standardisation of trade terms on which export and import businesses are transacted. Here, the resulting elaboration of standard definitions for the most important trade terms has simplified, and to a certain extent standardised, the sale of goods abroad.

Generally, but with the important exception of mandatory rules enacted in terms of international conventions, the reception of these texts in contractual practice depends upon the will of the parties.[48] This reception will vary according to a number of factors, mainly whether the rules themselves respond to practical needs and whether they are perceived to reflect a fair balance of the interests and risks involved in the transaction.[49] In assessing the degree of uniformity which already exists in the regulation of international commerce, therefore, it is particularly important to analyse, not only the applicable domestic laws, but also the substance of the contractual arrangements concluded by the parties, i.e. the freely agreed *lex contractus*.[50]

A number of international organisations are active in the elaboration and definition of uniform legal rules and patterns of international commerce. Following Schmitthoff's classification,[51] it is possible to differentiate between uniform rules of general character and standard contract forms which apply to specified international transactions. The second category applies mainly in the commodity trade and in the trade in capital goods, which are at present almost exclusively conducted on the basis of these standard contract forms.[52]

---

[47] See *infra* ch 3.

[48] C Schmitthoff 'Nature and Evolution of the Transnational Law of Commercial Transactions' in Horn n 4 24.

[49] Horn n 4 8.

[50] *Idem* 12.

[51] C Schmitthoff *Schmitthoff's Export Trade. The Law & Practice of International Trade* Stevens 1990 63 ff.

[52] P Benjamin 'The ECE General Conditions of Sale and Standard Forms of Contracts' *Journal of Business Law* (1961) 131; Schmitthoff *idem* 72.

3.1 Uniform rules of general character: the formulating agencies

International trade organisations known as the formulating agencies of the law of international trade vary in their origin, aim and composition. Some are intergovernmental, like the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law, others are non-governmental, such as the International Chamber of Commerce (ICC) and the International Law Association (ILA). There are also agencies which work on a regional basis, like the four Economic Commissions of the United Nations (Europe, Asia, Africa and Latin America) and the Council for Mutual Economic Assistance (CMEA) of Eastern European and other former socialist countries.[53] These organisations prepare international conventions, formulate rules for adoption by the parties in their contracts, or engage in other harmonising activities.

3.1.1 UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL)[54] has finalised several texts relating to the international contract for the sale of goods. Apart from the Convention on Contracts for the International Sale of Goods (CISG) adopted in 1980, a Convention on the Limitation Period in the International Sale of Goods was signed in New York in 1974[55]. In the field of dispute settlement, UNCITRAL has

---

[53] The Council for Mutual Economic Assistance ceased to exist in 1991.

[54] The United Nations Commission on International Trade Law was created by the General Assembly in 1966 with the object of promoting "the progressive harmonization and unification of the law of international trade" GA Res 2205 (XXI), 21 UN GAOR Annex at 2, UN Doc A/6396 (1966). The Commission became operative on January 1, 1968 and originally comprised 29 member states. Membership was subsequently increased to 36 states, arranged in five groups: 9 African states, 7 Asian states, 5 Eastern European states, 6 Latin American states and 9 Western European and other states 9 (including, e.g. the United States of America). For an introduction to the work of the Commission see H Herrmann 'The Contribution of UNCITRAL to the Development of International Trade Law' in Horn n 4 35; also J Honnold 'The United Nations Commission on International Trade Law: Mission and Methods' 27 *American Journal of Comparative Law* (1979) 201.

[55] The convention was subsequently amended by a Protocol adopted at the UN Conference convened in Vienna on April 11, 1980, the same day that the CISG was finalised. The purpose of the Protocol is to align the provisions of the Limitation Convention with those of the CISG, and to establish a uniform time limit

sponsored several measures which have made a notable contribution to the unification of the law of international arbitration. Among them, the UNCITRAL Arbitration Rules,[56] adopted in 1976, provide a comprehensive framework for international commercial arbitration. They are used mainly in *ad hoc* arbitrations, and are applied where the parties expressly refer to them in their arbitration agreement. The UNCITRAL Conciliation Rules of 1980[57] also apply where parties adopt them, and provide a procedure for the amicable settlement of contractual disputes. A Model Law on International Commercial Arbitration was adopted in 1985 by UNCITRAL[58] and recommended by the UN General Assembly for adoption by its member countries.

Another area of substantive law addressed by UNCITRAL concerns the rules governing maritime transport. The United Nations Convention on the Carriage of Goods by Sea of 1978 (also known as the Hamburg Rules) is intended to replace the Hague Rules of 1924 and the Hague-Visby Rules of 1968 relating to Bills of Lading. In the field of intermodal transportation system, a Convention on International Multimodal Transport was adopted in 1980. The Convention on International Bills of Exchange and International Promissory Notes of 1988 addresses legal issues of international payment.

Other recent projects aimed at the global harmonisation of new patterns of international trade law include the UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works of 1988 and the Legal Guide on Electronic Funds Transfers of 1987.

---

for the pressing of claims arising from sales contracts.

[56] UN Doc A/CN 9/IX/CRP 1 as amended by A/CN 9/SR 176 and A/CN /SR 177; see Cheng n 21 723.

[57] UNCITRAL Conciliation Rules, UN Publication 1981, E 81 V 6. See Cheng *idem* at 644.

[58] UN Doc a/40/17 para 332. Without imposing a treaty obligation on the member countries, the Model Law is aimed at fostering the unification of the law of international commercial arbitration. The provisions of the UNCITRAL Model Law have been adopted, *inter alia*, in Scotland, Canada, Hong Kong, Cyprus and Egypt (with minor amendments); see Berger n 38 2, 285.

3.1.2 The International Chamber of Commerce

Since its foundation in 1919, the International Chamber of Commerce[59] has been active in promoting a generalised standardisation of trade terms frequently used in the export trade. It has long been a practice in international trade[60] to use abbreviated expressions to fix, among others, the conditions for the delivery of goods and the calculation of the price.

The use of trade terms such as FOB (Free on Board) and CIF (Cost, Insurance, Freight) are the most common in international sales, but there are many other variations of clauses which may be used. Even though these commercial terms are universally employed, the terms themselves are sometimes interpreted differently in the various countries. Variation in the interpretation of trade terms may originate in the agreement of the parties, the custom of a particular trade, the local usage prevailing in a particular port or the provisions of local contract laws.[61]

3.1.3 Standardisation of trade terms: the Incoterms

Incoterms,[62] sponsored by the International Chamber of Commerce, are elaborate

---

[59] The International Chamber of Commerce (ICC) was founded as a private organisation under French law. It represents a union of the major economic groupings of the co-operating countries, which at present comprise 110 states. According to its statute, the ICC serves, among other purposes, the promotion of international economic relations. In pursuing this aim, the ICC has worked together with virtually all United Nations specialised agencies in a variety of projects designed to unify international commercial law, either in a consultative capacity or under a more informal working relationship. As a specialised agency interested in the development of international trade, the ICC occupies a unique position in that it has been equally effective in both formulating trade standards and in exercising influence upon governmental and other non-governmental agencies engaged in harmonising international commercial law. H Schneider 'Incoterms 1990' *Recht der Internationalen Wirtschaft* (1991) 91.

[60] For the origin of the abbreviations FOB, CIF and C&F which developed within the ambit of maritime trade at the beginning of the nineteenth century see F Eisemann *Die Incoterms im Internationalen Warenkauf* Ferdinand Enke 1967 7.

[61] Schmitthoff n 51 9; K Ryan *International Trade Law* The Law Book Company Limited 1975 291.

[62] International Chamber of Commerce, Rules for the Interpretation of Trade Terms (ICC Publication N° 460, Incoterms 1990). Incoterms were first published in 1936. They were amended by subsequent editions in 1953, 1967, 1976 and 1980. The latest edition, which came into operation on 1 July 1990, includes 13 terms which are identified by a three-letter abbreviation. They are: Ex works (EXW), Free Carrier (FCA), Free

definitions of common trade terms. They are designed to achieve greater standardisation of trade terms used in international sales contracts. Broadly speaking, the Incoterms deal only with those aspects which require clarification during the normal course of the contractual relationship, in particular the obligations of the parties as to the performance of the contract. Their scope is, accordingly, limited to a few typical aspects of the sales contract, such as the supply and delivery of the goods, the passing of risk, the allocation of costs, the procurement of the necessary documents for transportation, the regulation of insurance and other obligations incidental to the export and import of goods. Thus, unlike standard contracts and general conditions of sale, Incoterms regulate only a defined part of the sale contract, and do not represent a comprehensive regulation of all common aspects of international sales.[63]

The formulation of trade terms contained in the Incoterms was not intended to serve as a codification of national trade customs in the sense of a body of self-operating legal rules. In the view of the ICC, the successive editions of the Incoterms were designed solely to provide a uniform interpretation of the main trade terms operative in the international sphere.[64] These rules are neither statute law, nor do they automatically govern the international sales contract. Normally, their application in a particular situation is the consequence of the parties' express reference to them in their contract, e.g. by stipulating that the contract is governed by the Incoterms 1990.[65] However, this does not necessarily mean that Incoterms will only apply in those situations where the

---

Alongside (FAS), Free on Board (FOB), Cost and Freight (CFR), Cost, Insurance and Freight (CIF), Carriage Paid to (CPT), Carriage and Insurance Paid to (CIP), Delivered at Frontier (DAF), Delivered ex ship (DES), Delivered ex quay (DEQ), Delivered Duty Unpaid (DOU) and Delivered Duty Paid (DDP). Although the substance of the trade term definitions in the latest version is substantially the same as in the previous (1980) edition, the term FOR/FOT (Free on Rail/Free on Truck) of the 1980 edition is omitted in the newest version, since it is covered by the new wording of the term FCA (Free Carrier). The new edition contemplates in particular the increasing importance of electronic data interchange (EDI) in international trade, as well as new transport techniques such as container transport and all forms of multimodal traffic, including roll on-roll off operations by trailers and ferries. See Schneider n 59 91; Schmitthoff *idem* at 10; also D Murray 'Risk of Loss of Goods in Transit: A Comparison of the 1990 Incoterms with Terms From Other Voices' 23 *Inter-American Law Review* (1991) 93.

[63] F Eisemann 'Incoterms and the British Export Trade' *Journal of Business Law* (1965) 117.

[64] Schneider n 59 92.

[65] Schmitthoff n 51 66; Schneider *idem*.

parties expressly refer to them in their agreement. Given the worldwide acceptance and practical significance achieved by the ICC Incoterms in transnational trade, a valid question arises as to the extent to which Incoterms may have binding force, even in the absence of actual agreement on the terms concerned by the parties, where their application could reasonably be expected, on the basis that they reflect or crystallise international commercial custom.[66] This is a difficult question, to which no generalised answer is available at the present stage of the process of harmonisation of international trade practice. On the one hand, it seems that Incoterms are at present occupying the grey area between normative and contractual trade usage.[67] On the other hand, however, whether they have in fact crossed the border is unclear from an international perspective. Where Incoterms have been given statutory force, i.e. in countries like Spain, Iraq and, to a certain extent, Italy, their legal position is more certain.[68] But in most countries, the prevailing view seems to be that Incoterms qualify as contractual usages,[69] even when many scholars consider them as being an incipient normative usage and think they will assume this character fully in due course.

---

[66] R Dolzer 'International Agencies for the Formulation of Transnational Economic Law' in Horn n 4 74; Eisemann n 63 122 ("it is also increasingly recognised that rules based on consistent business practices may gradually acquire binding force as international commercial custom. Therefore it is suggested that the more those engaged in international trade make a habit of contracting according to Incoterms the sooner these rules will acquire the force of international commercial custom"). The same author stated in an further publication:

> [A]t present, a middle course between the objective and subjective approach must be found. In so far as the Incoterms undoubtedly reflect commercial practices, they generate legal consequences independently from any agreement of the parties, even if they do not constitute statutory law.

Eisemann n 60 at 56 (original in German).Schneider n 59 93, for instance, speaks of "soft law" to refer to the legal nature of the Incoterms; similarly Horn n 4 15 ("one can speculate whether such publications sometimes reflect or help to create international customary law"). See also *infra* chapter 5.

[67] C Schmitthoff *International Trade Usages* Institute of International Business Law and Practice 1987 (ICC Publication N° 440/4) 37.

[68] Schmitthoff n 51 66.

[69] J Honnold *Uniform Law for International Sales* Kluwer 1991 at 120 ("worldwide legal effect for some details in definitions of trade terms and forms of contract must await the wider homogenization of international practice than has yet been achieved"). Similarly Dasser ("all customary law of trade is part of the trade usages, but not all trade usages are part of customary law"); referring to Incoterms, he maintains that:

> [T]hey cannot come into conflict with mandatory or dispositive rules of statutory law, since they constitute only an explication or description (*eine blosse Auslegung*) of the main terms used in international trade.

F Dasser *Internationale Schiedsgerichte und Lex Mercatoria* Schulthess 1989 90-91; also Schmitthoff n 67 38.

3.1.4 The Uniform Customs and Practice for Documentary Credits

The Uniform Customs and Practice for Commercial Documentary Credits,[70] issued by the ICC represent a standardisation of the banking practice relating to letters of credit. Essentially a creation of the law merchant as a financial complement of trade in tangible goods, the letter of credit is now regularly employed to facilitate financial, as well as mercantile, transactions, whenever assurance is required that a payment obligation will be discharged.[71] Article 1 of the 1983 Revision clearly reflected the contractual character of the rules by stating that they are only applicable if expressly incorporated into the contract by the parties.[72] In practice, the UCP are routinely incorporated in the relevant standard conditions issued by banks and banking associations in virtually every nation involved in international trade.[73] As in the case of the Incoterms, the universal acceptance of the UCP has led eminent authorities to advocate the view that these rules should be recognised as universally accepted trade usage.[74] If so, their normative character as customary rules should be recognised, and they would apply – even if not expressly agreed upon – where their application could justifiably be expected in the

---

[70] International Chamber of Commerce, Uniform Customs and Practice for Documentary Credits 1993 Revision (ICC Publication N° 500). The first edition of the UCP dates from 1933. The rules were subsequently revised in 1951, 1962, 1974 and 1983. The latest revision of the UCP came into effect on 1 January 1994. See D Petkovic 'UCP 500: Evolution not Revolution' 2 *Journal of International Business Law* (1994) 39; E Ellinger 'The Uniform Customs and Practice for Documentary Credits – the 1993 Revision' *Lloyd's Maritime and Commercial Law Quarterly* (1994) 377; M Wayne 'The Uniform Customs and Practice As a Source of Documentary Credit Law in the United States, Canada and Great Britain: A Comparison of Application and Interpretation' 7 *Arizona Journal of International and Comparative Law* (1989) 149.

[71] H Harfield *Letters of Credit* American Bar Association 1979 (preface).

[72] Article 1 s 2 of the 1983 revision stated:

> These articles apply to all documentary credits, including, to the extent to which they may be applicable, standby letters of credit, and are binding on all parties thereto unless otherwise expressly agreed. They shall be incorporated into each documentary credit by wording in the credit indicating that such credit is issued subject to Uniform Customs and Practice for Documentary Credits 1983 Revision, ICC Publication N° 400.

The general provisions of the UCP, comprising articles 1 to 5, have not been modified to any substantial extent in the 1993 Revision. Article 1 continues to treat the UCP as a set of standard terms and conditions applicable to documentary credits and standby credits by incorporation. Ellinger n 70 382.

[73] Schmitthoff n 51 402; Wayne n 70 149.

[74] F Eisemann & R Ebert *Das Dokumentenakkreditiv im Internationalen Handelsverkehr* Verlagsgesellschaft Recht und Wirtschaft 1979 46. Further authority for this point of view, particularly in Germany, may be found in the third edition of the same book, which was revised by Prof Schütze in 1989; F Eisemann & R Schütze *Das Dokumentenakkreditiv im Internationalem Handelsverkehr* 1989 54 n 62-64. The author of the revision, however, does not share this view (at 54).

particular transaction. This view has been accepted in a decision of the French Cour de Cassation of 14 October 1981, *SA Discount Bank v Teboul*[75] and in a 1978 decision of the Belgian Tribunal de Commerce, which held that the UCP rules applied, even without express agreement, on the ground that they constitute universal trade usage.[76] Nevertheless, the issue is by no means settled, and there are equally strong arguments for the two opposing points of view.[77]

3.1.5 Other ICC publications

Other important texts prepared by the International Chamber of Commerce include the Uniform Rules for Collections 1978 which standardise the practice relating to collection procedures,[78] the Problem of Clean Bills of Lading 1974,[79] the ICC Rules of Conciliation and Arbitration, in force since 1988,[80] a Guide for the Drawing Up of Contracts between Parties residing in Different Countries, concluded in 1983, [81] and the Uniform Rules for a Combined Transport Document, adopted in 1975, which deal with the problem of multimodal transportation.[82]

---

[75] Recueil Dalloz 1982, where the court considered article 3 of the UCP as "*source du droit*". See Berger n 38 at 526 n 261.

[76] *Idem*. A recent comparative analysis of relevant case law in the U.S., Canada and Great Britain concludes thus:

> [i]t appears from the above cases that the United States, Canada and Great Britain are all increasingly applying UCP as formal customary law. [T]his trend is significant because common law jurisdictions are not naturally inclined to treat a customary source of law almost as if it were a statute.

Wayne n 70 167.

[77] A Kassis *Théorie Générale des Usages du Commerce* Paris 1984 329 (not objective law but merely part of the parties' contractual agreement); also Eisemann & Schütze n 74 54 ff.

[78] ICC Publication N° 322.

[79] ICC Publication N° 283.

[80] ICC Publication N° 447. These rules apply in arbitration conducted under the ICC Court of Arbitration, which is the most important institution for the arbitral settlement of international trade disputes worldwide. Schmitthoff n 51 676.

[81] ICC Publication N° 410.

[82] ICC Publication N° 298.

3.1.6 UNIDROIT

The International Institute for the Unification of Private Law (UNIDROIT) was established by a multilateral treaty in 1926 within the framework of the League of Nations. Since 1940 UNIDROIT has operated as an inter-governmental organisation comprising forty member states.[83]

The organisation has concentrated its work in the past decades on the rules governing the sale of goods. Its most important contribution in this field has been the preparation of the Uniform Laws of International Sales which culminated in the two Hague Sales Conventions of 1964.[84] Supplementing these conventions, a Convention on Agency in the International Sale of Goods was adopted in 1983.[85] Two further conventions were finalised in 1988, one on International Factoring and the other on International Financial Leasing.[86] These three conventions are aligned with the provisions of the CISG. An attempt to codify rules of international trade law progressively was initiated in 1974.[87]

3.2 Standard contract forms

Standard conditions and clauses are generally made up of substantive rules incorporated by the parties into their contracts.[88] Model contracts aim at complete standardisation,

---

[83] C Schmitthoff *Commercial law in a Changing Economic Climate* Sweet & Maxwell 1981 26. Also M Monaco 'L' Activité Scientifique d'Unidroit' 1 *Revue du Droit Uniforme/Uniform Law Review* (1976) 34.

[84] Uniform Law on the International Sale of Goods (ULIS) and Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). The official text of the conventions appears in 834 UNTS 107 (1972) and in 834 UNTS 169 (1972). The two Hague Conventions constitute the immediate antecedent of the 1980 UN Convention on Contracts for the International Sale of Goods (CISG).

[85] Convention on Agency in the International Sale of Goods, 22 *International Legal Materials* (1983) 246.

[86] Conventions on International Factoring and on International Financial Leasing 27 *International Legal Materials* (1988) 291.

[87] See M Bonell 'The Unidroit Initiative for the Progressive Codification of International Trade Law' 27 *International and Comparative Law Quarterly* (1978) 413.

[88] A Boggiano *International Standard Contracts* Martinus Nijhoff 1991 6.

in that they deal with all or most relevant terms of the contract between the parties.[89] The international trade in many commodities and capital goods is conducted on the basis of standard contract forms. These forms are issued by individual enterprises, international trade associations and international organisations. In adopting them, business parties create the law of the contract, inasmuch as this law is expressly or implicitly accepted by the parties as the *lex contractus*.[90]

The actual importance of these considerations to the present study lies in the fact that the United Nations Convention on Contracts for the International Sale of Goods of 1980 provides that "the parties may exclude the application of this Convention, derogate from or vary the effect of any of its provisions".[91] Thus, printed terms acting as general conditions and specific trade terms addressing particular aspects of the contract's performance, when they are incorporated by the parties in accordance with the contract, may operate perfectly within the general framework of the CISG.

3.2.1 Standard conditions issued by trade associations

Standard form contracts sponsored by trade associations are particularly important. In particular, those of the United Kingdom have gained a worldwide reputation.[92] Some of the best known associations include the Grain and Feed Trade Association (GAFTA), the Federation of Oil, Seed and Fats Associations (FOSFA), the International Wool and Textile Association, the Warenverein der Hamburger Börse e V, the Assoziazione del Commercio dei Cereali e Semi, the Bremer Baumwollbörse, and the Comité van

---

[89] An international standard contract has been defined as:

> [a] model contract or set of standard conditions in the written form, the terms of which have been formulated in advance by an international agency in harmony with international commercial practice or usage, and which has been accepted by the contracting parties after having been adjusted to the requirements of the transaction at hand.

C Schmitthoff 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' 17 *International and Comparative Law Quarterly* (1968) 553.

[90] *Idem* at 3.

[91] Art 6 CISG.

[92] Schmitthoff n 51 71.

Graanhandelaren, among others.[93]

3.2.2 Model contracts sponsored by international organisations

The United Nations Economic Commission for Europe has sponsored a large number of model contract forms. The most important are the general conditions of sale and standard form contracts for the supply of plants and machinery for export (Forms 188 and 574), for the supply and erection of plant and machinery for import and export (Forms 188A and 574A), forms listing additional clauses for supervision of erection of engineering plant and machinery abroad (Forms 188B and 574B), for the complete erection of engineering plants and machinery abroad (Form 188D), and standard terms for the export of durable consumer goods and engineering articles (Form 730). In addition to these sets of standard rules, the ECE has sponsored model contracts designed for the commodity trade, e.g. for the sale of cereals, citrus fruit, potatoes, sawn softwood, solid fuels and steel products. It has also published a series of interconnected guides dealing with major international contracts for the construction of works and installations.[94]

---

[93] The full reference to existing trade associations is contained in the Arbitration (Commodity Contracts) Order 1979 (SI 1979 N° 754); Schmitthoff *idem* at 73. Also Boggiano n 88 3.

[94] Guide for Use in Drawing Up Contracts Relating to the International Transfer of Know-how in the Engineering Industry (ECE/Trade/222/Rev 1); Guide for Drawing Up Contracts for Large Industrial Works (ECE/Trade/117); Guide on Drawing Up International Contracts on Industrial Co-operation (ECE/Trade/124); Guide for Drawing Up International Contracts Between Parties Associated with the Purpose of Executing a Specific Project (ECE/Trade/131); Guide for Drawing Up Contracts on Consulting Engineering, Including Some Related Aspects of Technical Assistance (ECE/Trade/ 145); Guide for Drawing Up International Contracts for Services Relating to Maintenance, Repair and Operation of Industrial and Other Works (E 87 II E 2); Guide on New Forms of Industrial Co-operation (1988); and Juridical Guide for the Creation of East-West Joint Ventures on the Territory of Socialist Countries (1988). Schmitthoff n 51 74 n 70.

CHAPTER 2
TRADE USAGES IN INTERNATIONAL AND DOMESTIC LAW

1 Trade usages in international law

Broadly speaking, trade usages are customary creations which have developed more or less spontaneously within a particular trade.[1] Most of the rules, practices and usages presently employed in international trade originated as rules adopted in trade operations conducted in the territory of specific countries or in particular localities, such as designated ports.

In modern times, many of these rules have been universalised or have, at least, been extended beyond the bounds of national frontiers through the work of the formulating agencies. These agencies represent the involvement of the international business community in the elaboration of international trade patterns and rules. In the area of international sales, several international enactments, *inter alia*, the CISG and the Incoterms, govern many commercial transactions, thereby reinforcing the law merchant's traditionally international character. This approach rests on the assumption that there are international relations which, by their very nature, require a special legal regime which is different from that provided by individual domestic laws for similar, but purely internal or domestic situations.

International commercial custom has been defined as consisting of "commercial practices, usages or standards which are so widely used that businessmen engaged in international trade expect their contracting parties to conform to them".[2] It must be pointed out, however, that there is wide divergence in the terminology employed to refer to trade usages and other commercial practices which are customary in their origin as opposed

---

[1] M Bonell 'The Relevance of Courses of dealing, Usages and Customs in the Interpretation of International Commercial Contracts' in *New Directions in International Trade Law* Acts and Proceedings of the 2nd Congress on Private Law, UNIDROIT, vol 1 Oceana 1977 109.

[2] C Schmitthoff 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' 17 *International and Comparative Law Quarterly* (1968) 554.

to statutory rules of law.[3] Schmitthoff draws attention to the lack of clarity regarding the transition from practice, custom and customary law which has made it difficult to determine the legal nature of trade usages often employed in international transactions.[4] He describes the development of international custom thus:

> The development of international custom is a gradual process. It often starts as the business procedure of a few leading enterprises; then becomes a general practice in a particular trade, founded on parallelism of action; later grows into a trade usage (*usance*) and eventually acquires the certainty and legal status of custom. It may not only develop on a national level but become international in character.[5]

A further distinction may be drawn between practices which constitute international customary rules and other commercial practices. According to Schmitthoff, only practices which are formulated by international trade agencies such as the International Chamber of Commerce, the United Nations specialised agencies and other trade associations have the potential of developing into commercial custom through general and constant use; commercial practices not so formulated may be referred to as commercial usage or practice.[6] At the same time, some commercial practices constitute commercial custom in *"statu nascendi"* i.e. in a preliminary, experimental stage leading eventually to the formulation of commercial custom.[7] In judicial and international arbitration practice

---

[3] A closer look at legal texts and scholarly writings reveals that, in practice, the terms usage and custom are often used interchangeably in a commercial context. K Berger *International Economic Arbitration* (Studies in Transnational Economic Law vol 9) Kluwer 1993 527 n 263 with further references. Chen comments:

> A crisp semantic distinction between custom and usage is elusive. Although we often speak of both obligatory custom and non-obligatory usage within the category of customary law, usage is really the broader category: the set of objectively observed trade practices includes those that the practitioners subjectively consider obligatory. As a possible catch-all phrase, [the term] practice fails to recognise that the law can give binding effect to certain customs and usages.

J Chen 'Code, Custom and Contract: the Uniform Commercial Code as Law Merchant' 27 *Texas International Law Journal* (1992) 92.

[4] C Schmitthoff 'Das Neue Recht des Welthandels' 28 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* (1964) 75.

[5] Schmitthoff n 2 554.

[6] C Schmitthoff 'The Law of International Trade, Its Growth, Formulation and Operation' in C Schmitthoff (ed) *The Sources of the Law of International Trade* Stevens 1964 16.

[7] Schmitthoff n 6 16. In the view of Schmitthoff, this would be the case, for instance, of the ICC Uniform Customs and Practice of Documentary Credits, which "are at present in the transitional stage from usage to custom" on account of their worldwide acceptance and use in documentary transactions. The ICC Incoterms, on the other hand, "are still truly usage and in the nature of standard contract terms" since they have to be

these distinctions are sometimes referred to as *questio facti* and sometimes as a "fruitful area of research".[8]

In international commercial law there is an inclination to refer to trade usages without clearly defining what must be understood under this term. In chapter 1 mention has been made of the provisions included in modern arbitration laws such as the European Convention on International Commercial Arbitration and the UNCITRAL Model Law on International Commercial Arbitration, which require that the arbitrator take into account the relevant trade usages applicable to the dispute.[9] Although the reference to "trade usages applicable to the transaction" in these documents is not defined, it has been interpreted as to support an objective approach to trade usages. Accordingly, it is not necessary that a party to a contract be aware of the existence of the trade usage; it is sufficient that the practice in question is seen by the arbitral tribunal as "applicable to the transaction" in the particular case.[10]

The United Nations Convention on Contracts for the International Sale of Goods (CISG) also takes an objective approach to trade usages. The formulation in article 9(2) of the CISG, while not directly defining the term, offers a useful description of such practices which are binding on the parties in the absence of a contrary intention. This article stipulates that "the parties are considered, unless otherwise agreed, to have implicitly made applicable to their contract or its formation a usage which is widely known to, and regularly observed by, parties to contracts of the type involved in the

---

embodied by the parties into a particular contract in order to become operative.

[8] A Goldstajn 'Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention' in P Sarcevic & P Volken (eds) *International Sale of Goods. Dubrovnik Lectures* Oceana 1986 73.

[9] Article VII(1) of the European Convention on International Commercial Arbitration; article 28 s 4 of the 1985 UNCITRAL Model Law on International Commercial Arbitration and article 33 s 3 of the UNCITRAL Arbitration Rules in chapter 1 n 38.

[10] C Schmitthoff *International Trade Usages* Institute of International Business Law and Practice 1987 (ICC Publication N°440/4) 17.

particular trade concerned".[11] The Hague Uniform Law on Sales (ULIS) takes a more liberal approach in binding parties to trade usages "which reasonable persons in the same situation as the parties usually consider applicable to their contract" in article 9(2). In addition, ULIS refers to the interpretation of standard forms, general conditions and other self-regulatory rules commonly used in international trade. Article 9(3) states that terms, clauses or forms that are used in international trade should be interpreted according to their usual meaning in the trade concerned. These provisions are meant to stress the particular nature of international sales practices, which should be interpreted in an international context rather than construed solely according to notions of domestic law.[12]

Apart from the international sales conventions, mention may be made to article 17 of the European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters[13] which contains a provision on international usages. Originally, the 1968 Brussels Convention required that a jurisdiction clause be in writing or be evidenced in writing. Article 11 of the first Accession Convention[14] modified article 17 to allow jurisdiction agreements in such form which in international trade accords with usage of which the parties are or ought to have been aware. Schmitthoff is of the opinion that this provision admits a derogation by the parties of the forum normally provided by the convention in terms of "practices" of the trade in which the parties are engaged, even when these practices have not yet acquired the character of trade usages.[15]

---

[11] CISG article 9(1) states that "the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves". This provision gives force to the parties' freedom under article 6 of the Convention to opt out of the CISG or to modify its provisions.

[12] F De Ly *International Business Law and Lex Mercatoria* North-Holland 1992 159.

[13] EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters concluded in Brussels on September 27, 1968 (in force since 1 February 1973); *EC Bull* Supp 2/1969 17.

[14] Convention on the Accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice, signed on 9 October 1978 (entered into force on 1 November 1986); *OJ* 1978 L304/1.

[15] Schmitthoff n 10 13.

The main principles of the European Convention have been adopted in relations between the EC countries and the EFTA countries[16] with regard to jurisdiction and the enforcement of civil and commercial matters. The aim of the 1988 Lugano Convention,[17] also known as the Parallel Convention, is to make the recognition and enforcement mechanisms of the Brussels Convention available to the EFTA countries. With regard to the application of trade usages to determine the form of jurisdiction clauses, article 17 of the Lugano Convention refers to clauses of jurisdiction concluded in a form "which accords with practices which the parties have established between themselves". Following the wording of article 9 of the CISG, the Lugano Convention adds that these forms should be "widely known to and regularly observed by parties to contracts of the type involved in the particular trade or commerce concerned".[18]

The international formulations mentioned focus on usage rather than custom. Despite the lack of precision in the terminology used to describe the various forms of spontaneous rule formation in international commercial law, it has been said that the reference to usage in modern formulations serves to emphasise that trade usages are not generally qualified as sources of law, but operate exclusively on a contractual basis. As part of the contractual agreement, they become binding by virtue of party consent.[19]

These theoretical observations are not sufficient to determine the character of trade usages in international sales law. As will be seen later, a trade usage may have normative character, in the sense that it will apply independently from the parties' intention – or even knowledge – if, in the circumstances, the parties may reasonably be expected to

---

[16] Austria, Finland, Iceland, Norway, Sweden and Switzerland.

[17] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Lugano on 16 September 1988; *OJ* 1988 L319/9.

[18] See De Ly n 12 162; J Fawcett 'The Lugano Convention' 14 *European Law Review* (1989) 105. Differences between the Brussels Convention and the Lugano Convention were abolished at the time of the accession of Spain and Portugal to the EC Jurisdiction Convention in terms of the San Sebastián Agreement concluded on 26 May 1989 (entered into force on 1 February 1991); *OJ* 1989 L285 1. Article 7 of the Agreement has modified article 17 of the EC Brussels Convention, which is now identical to its counterpart from the Lugano Convention.

[19] De Ly *idem* at 163.

adjust their behaviour to a particular form of conduct which is widely known and regularly observed in international trade.[20] As elements of contract interpretation, furthermore, trade usages can sometimes be referred to, to clarify ambiguous contract terms or to fill gaps in the contractual regulation even where the parties have not embodied the formulation into their contract.[21]

2 Trade usages in domestic law

National commercial law plays an important role in transboundary contractual disputes relating to the application of trade usages. In the context of international business transactions, recourse to a given national law might be necessary in order to decide which usages apply to a particular situation.[22] This is particularly true with regard to the criteria to be followed when parties fail expressly to tie their contracts to applicable trade usages. The following comment is relevant in this context:

> There is no need to emphasise the fact that no problems arise whenever the application of the practices or usages has been expressly agreed to by the parties: it is in fact a universally recognised principle that they may, within the limits of their party autonomy, instead of

---

[20] See *infra* p 43. Schmitthoff n 10 10 states:

> [A] trade usage may have normative character, like a rule of positive law. But the difference is this. A rule of law, whether founded on the common law or statute, is of general application and has acquired a high degree of abstraction; it is thus independent of and dissociated from its origin. A trade usage, on the other hand, is only of special application and has not yet cut the umbilical cord with its origin. In other words, the distinction between an abstract rule of law and a trade usage is not the normative or non-normative effect of the prescript in question, but it is its inherent character and quality. The concept of the trade usage is thus not restricted to non-normative prescripts. If the character indicated here can be discerned, normative legal rules and contractual arrangements of the parties qualify as trade usages.

[21] According to a study on the interpretation and application of international trade usages prepared by Prof Schmitthoff, in many countries the ICC Incoterms are used as independent devices for contract interpretation, although they are categorised as "contractual" trade usages. According to Schmitthoff, this was the case in the former German Democratic Republic, in (West) Germany, Italy, Switzerland and in the former Yugoslavia. In Finland it has been held that even if no specific reference is made to Incoterms the parties should be considered as having referred to them, when using trade terms defined by Incoterms, unless there are specific indications to the contrary; n 10 34.

[22] For example, under article 4 of the CISG, the validity of trade usages is to be determined according to the domestic law applicable in terms of the relevant rules of private international law. See also Chen n 3 93; similarly Grigera Naón: "that ability [of choosing the application of specific usages or customs] is limited by the fact that the validity of usages will depend on the mandatory provisions of the internal law indicated by national conflicts rules"; H Grigera Naón 'The UN Convention on Contracts for the International Sale of Goods' in N Horn & C Schmitthoff (eds) *The Transnational Law of International Commercial Transactions* (Studies in Transnational Economic Law vol 2) Kluwer 1982 101; and Bonell n 1 109.

> expressly drafting the contractual terms themselves, refer in whole or in part to rules deriving from different sources.
>
> Clearly the situation is much more delicate when, in a given case, such express reference is absent. In all such cases, in fact, since we cannot accept that the rules in question enjoy the status of veritable norms of positive customary law, their relevance can only depend on the interpretation of the contract on the basis of objective and normative criteria.[23]

It seems appropriate, therefore, to examine some of the various positive legal systems, in order to determine the principles and criteria generally followed and applied in connection with the legal relevance of trade usages in commercial contracts.

2.1 Definition of trade usages

A first glance at commercial law as regulated in national legislation shows that many national systems take note of trade usages without defining them. French law,[24] for example, stipulates in article 1135 of the Civil Code that "agreements are binding not only as to what is expressed, but also as to all the consequences which equity, usage or statute impose upon an obligation according to its nature". Similarly, the French Civil Code provided in article 1873 - before this provision was repealed by new legislation relating to partnerships and companies - that the "provisions of the present title do not apply to commercial enterprises insofar as their provisions contradict legal rules and usages of commerce (*usages du commerce*)".

German law also refers to commercial practices in paragraph 346 of the *Handelsgesetzbuch*[25] by stipulating that "the customs and usages which obtain in commerce shall be taken into consideration among merchants in respect of the meaning and effects of acts or omissions". Similarly, article 2 of the Spanish Code of Commerce[26]

---

[23] Bonell *idem* at 126.

[24] See *Commercial Laws of the World* vol VIII 'France' Foreign Tax Law Association 1992 191; Dalloz *Code Civil* 1990-91.

[25] A Baumbach, K Duden, H Hopt *Handelsgesetzbuch* Beck 1989 and the English translation in S Goren & I Forrester *The German Commercial Code* Rothman 1979.

[26] *Commercial Laws of the World* vol XX 'Spain' Foreign Tax Law Association 1992 1; J López & C Melon Infante *Código Civil* Instituto Nacional de Estudios Jurídicos 1979.

provides that commercial acts in general are governed by the provisions of the Code. Failing this, they will be "controlled by the commercial practice generally observed in each field".

A further reference to the normative character of recognised usages in commercial contracts may also be found in article 1374 of the Italian Civil Code[27] in the following terms: "A contract binds the parties not only as to what it expressly provides, but also to all the consequences deriving from it by law or, in its absence, according to usage and equity".

As opposed to the national systems previously surveyed, the United States Uniform Commercial Code[28] contains a positive definition of trade usages. Section 1-205 of the UCC adopts regularly observed trade usage as the expression of commercial custom in defining the term as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question".[29]

In other legal systems there seems to be general consensus in either case law or legal literature on what a trade usage is, although the term is not defined by statute. In England, for example, a trade usage may be defined as "a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life".[30]

In accordance with the above considerations, it may be concluded that there is a

---

[27] *Commercial Laws of the World* vol XI 'Italy' Foreign Tax Law Association 1993 1; M Beltramo *The Italian Civil Code* Dobbs Ferry 1993.

[28] Hereinafter UCC; see *infra* n 84.

[29] J White & R Summers *Uniform Commercial Code* West Publishing Co 1988 121. In adopting this definition, the UCC favours the term "usages of trade" over the more traditional and narrower term "custom". It abandons the long established common law tests of custom, by loosening many of the traditional requirements, in particular the aspect of universality and the need to prove *opinio necessitatis*. See Chen n 3 111 with further references.

[30] J Wellwood 'Custom and Usage' in 12 *Halsbury's Laws of England* (1975) 28.

considerable degree of understanding of the meaning of the term trade usage in the various jurisdictions, as a method of dealing or a manner of conduct generally observed in a particular line of business with such regularity that it is accepted as binding by those engaged in that line of business.[31]

3 The nature and legal effects of trade usages in national legal systems

Most of the general rules of the law of contract may be varied by the parties in their exercise of the principle of party autonomy, most commonly referred to in common law jurisdictions as the principle of freedom of contract.[32]

Legal systems have terms of art to distinguish between rules of law that parties can vary by express provision and rules of law that are beyond their power to modify. The first are normally referred to as optional or supplementary rules; the second as mandatory rules. In the field of contract law, most rules are supplementary rather than mandatory.

Essentially, contracts are instruments of self-regulation, in the sense that many rules of contract law are honoured in their exception rather than in their effective application. To the extent that contract law rules allow for variation, the exercise by the parties of their freedom of will in contractual matters has plainly undermined the significance of the rules themselves. Many courts have therefore approved and applied some general propositions of contract law explaining that, had the parties not desired their application, they could have so provided. An important result of the combination of the supplementary character of most contract law rules and the clear tendency of parties to vary them by agreement, is the heightened importance of the process of interpretation and construction of contractual provisions, in order to determine the scope of the parties' agreement.[33]

---

[31] Schmitthoff n 10 14.

[32] Schmitthoff n 22 20.

[33] E Farnsworth *United States Contract Law* Transnational Juris Publications 1991 61.

Practices adopted by individuals and groups in business transactions may lead to certain legal results which do not flow from statute, established case law or express provisions in the contract. From a legal point of view, then, the repeated use of contract forms and contract terms, or repeated courses of action, may generate a normative effect. In the process of interpretation of the words of any contract, evidence of such practices is not only admissible, but also extremely helpful, since "the law requires the court to put itself as nearly as possible in the position of the parties, with their knowledge and their ignorance, with their language and their usage. It is the meaning of one or both of the parties, thus determined, that must be given legal effect".[34]

It is thought that trade usages, i.e. repeated practices or methods of dealing, may fulfil two main functions. As interpretive and construction devices, usages incorporated by the parties in the exercise of their party autonomy, either expressly or by implication, serve to clarify the intention of the parties and supplement contract terms.[35] A second possible category of usages, normative trade usages, comprises those usages which may, like any other rule of law, be considered a source of law in a national jurisdiction.[36]

Sometimes these two situations are referred to in a different manner, e.g. certain commentators distinguish between "custom" and "trade usage". They explain that custom has the force of law and is binding on all who know or should have known of it. It is, therefore, essentially non-consensual. Trade usage, on the other hand, refers to the use of a trade or local practice as evidence of the parties' probable intent in interpreting the terms of an agreement, and is thus entirely consensual.[37]

---

[34] A Corbin *Corbin on Contracts* vol 3 West Publishing Co 1960 229.

[35] H Jokela 'The Role of Usages in the Uniform Law on International Sales' 10 Scandinavian Studies in Law (1966) 85; De Ly n 12 158.

[36] Schmitthoff n 10 10; Jokela refers to normative trade usages as "being on the same level as non-mandatory legal rules proper (*jus positivum*)" *idem* at 85.

[37] J Levie 'Trade Usage and Custom Under the Common Law and the Uniform Commercial Code' 40 *New York University Law Review* (1965) 1102. Similarly, Honnold refers to two kinds of custom when assessing the judicial applicability of mercantile practices to contractual situations. He states:

> The law in this area in both England and the United States is far from clear, with some of the awkwardness associated with growth. But some of the difficulty seems to reflect the confusion of two different types of "custom". Judicial language occasionally requiring that a "custom" be "long-established" or even "ancient" is, for the most part, a reaction to attempts to establish a "custom" which has a general normative impact on third

There is a principal conceptual difference between the two categories. As a general rule, normative usages can be invoked and applied to clarify ambiguous contract terms or to fill gaps in the contractual regulation even without the parties' actual knowledge of the terms in question, i.e. on an objective basis. On the other hand, a contractual usage cannot be used to aid interpretation, unless it has been clearly incorporated into the agreement by the contracting parties either expressly or by implication.[38]

However, there is a middle zone between the application of trade usages as normative rules and as contract terms based on the intention of the parties. Very often parties leave gaps in their expressions of agreement, either because they had no thought or intention on a particular point at the time of contracting, or because such gaps would need filling at a later stage, in accordance with subsequent events that could not have been foreseen at the beginning of the contractual relationship.[39] In such cases, a court would be required to fill those gaps by examining all the circumstances surrounding the contract and drawing, among others, on applicable usages or previous courses of dealing established between the parties.[40]

While it is true that "the law makes no requirement that parties shall use words in accordance with common and ordinary usage",[41] it appears to be equally true that, by invoking the application of trade usages to a contract – in particular when such contract is absolutely silent on this point – the court is "really making a contract for the parties,

---

persons. Ascertaining the expectations of the parties to a contract is, of course, a different matter.
J Honnold 'The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law' in Schmitthoff n 6 79. See also J Honnold *Uniform Law for International Sales* Kluwer 1991 175 (the same distinction between "custom" or "customary law" as a source of law invoked without regard to the intent of the parties, and trade usages in a contractual context).

[38] Schmitthoff n 10 34.

[39] Corbin n 34 243.

[40] *Idem*. Similarly White & Summers n 29 121 refer to terms supplied by course of dealing, usage of trade and course of performance under the US Uniform Commercial Code, explaining that "these sources are relevant not only to the interpretation of express contract terms, but may themselves constitute contract terms".

[41] *Idem* 242.

even though it says it only consulted trade usage to find the parties' probable intent".[42]

The following dictum quoted by Corbin[43] illustrates the point. The contract in issue was for the production and sale of sugar beets. It contained no express provisions as to price, time and place of delivery, and no express promise by the buyer to pay. Reversing an earlier ruling, the court held that these gaps could be filled by proof of the usage of sugar beet growers and processors and the previous dealings between the parties. The court said:

> It is the general rule that, when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference of the usage, unless the contrary appears; that the usage forms part of the contract, and that evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract.[44]

On the possible application of trade usages as normative, objective rules, independently of the parties' intentions, the relationship between trade usages and the prescripts of the applicable national law requires some attention. In what follows, reference will be made to the legal nature and effect of trade usages in several domestic jurisdictions so that their practical relevance for international commercial transactions can be evaluated.

3.1 England

The English common law comprises principles and doctrines which have not been laid down in any written statute or ordinance, but depend only upon custom or immemorial usage for support. Custom, therefore, may be said to form the basis of the most

---

[42] Levie n 37 1102. But cf Corbin who denies such conclusion in saying that "the court is not making a contract for the parties; it is causing the contract that the parties themselves made to work justly under circumstances that they did not foresee". He nevertheless admits that "proof of usage and custom for this purpose is not 'interpretation' as that term is defined herein"; n 34 244.

[43] *California Lettuce Growers v Union Sugar Co* 289 P 2d 785, 45 Cal 2d 474, 49 ALR 2d 496 (1955) quoted in Corbin *idem* 244.

[44] *Idem.*

fundamental principles of common law.[45]

Custom relates to particular rules which have existed either actually or presumptively from time immemorial and which have obtained the force of law in a particular locality.[46] Common law custom binds persons who have not consented to it, for it is not concerned with the intention of the parties.[47] Once custom has been established by litigation, judicial notice will be taken of its existence.[48] However, stringent tests must be met before a custom will be given judicial sanction. Following Allen, it may be stated that a custom must fulfil the following requirements in order to become binding: legality, antiquity, continuance, peaceable enjoyment, obligatory force, certainty, consistency and reasonableness.[49] Only when these requirements have been satisfied and the existence and operation of the custom sufficiently proved will English courts allow custom to modify legal rights.

As an independent source of law, custom can be distinguished from trade usages, which are contractual in nature,[50] i.e. they operate within the ambit of an agreement entered

---

[45] See C Allen *Law in the Making* Clarendon Press 1964 71 with further references; also Schmitthoff n 10 9.

[46] Wellwood n 30 2.

[47] Note: Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law 55 *Columbia Law Review* (1955) 1203.

[48] Levie n 37 1102 n 8.

[49] Allen n 45 129-142. In a similar vein, Wellwood points to the following four essential characteristics of custom at common law: 1) it must be immemorial; 2) it must be reasonable; 3) it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect; and 4) it must have continued without interruption since its immemorial origin; n 30 5.

[50] Wellwood describes usage as "a particular course of dealing or line of conduct which has acquired such notoriety, that, where persons enter into contractual relationships in matters respecting the particular branch of business life where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary; that is to say that a rule of conduct amounts to a usage if so generally known in the particular department of business life in which the case occurs that, unless expressly or impliedly excluded, it must be considered as forming part of the contract" *idem* at 28.

into between parties, to complete and explain contractual terms.[51] By so doing, a usage can also add a term to a contract, although it cannot contradict what is plain, according to English rules of contract interpretation.[52]

Usages reflect factual patterns of behaviour which are generally followed in a particular trade, occupation, profession or branch of commercial or mercantile life. If it can be proved that a usage is, "in fact, notorious, peaceable, and not anarchical in tendency; that it is predictable in that it is certain, reasonable, and is regarded generally as legally binding, the court will accept it as a valid custom".[53]

Few English authors have attempted to distinguish between custom and usage.[54] Allen refers to "usages of a particular trade" to identify mercantile customs based on contract, either expressly or by implication. Although the rule of immemorial antiquity would not apply in this case, usages must nevertheless be supported by long-established use and wide notoriety.[55]

The policy in favour of the admission of trade usages is based on the desire to satisfy the reasonable expectations of the parties. Evidence of usage is admitted to explain the meaning of terms used in a particular context, such as a particular trade or business, on application of the well-known rule of contract interpretation which seeks to establish the

---

[51] The contractual character of trade usages is emphasised by Wellwood in the following terms: "Where persons enter into contractual obligations with one another under circumstances governed by a particular usage, then that usage, when proved, must be considered part of the agreement" *idem* at 30.

[52] *Idem* 147.

[53] B Wortley 'The Relevance of Courses of Dealing, Usages and Customs in the Interpretation of International Commercial Contracts' in *New Directions* n 1 142. In this case, the usage will become a proved custom.

[54] Levie points to the fact that "the law of trade usage has never really been worked out, and the courts tend to refer to the stringent tests for custom in difficult cases falling into the intermediate zone" n 37 1103. Similarly Wellwood n 30 4 and Honnold n 6 79.

[55] Allen n 45 135. The author emphasises that "the courts must be satisfied of notoriety and acceptance among merchants, and this will not avail if the custom, even if proved, conflicts with a rule of law".

intention of the parties and the nature of the case. On this point Allen comments:[56]

> Mercantile contracts are very commonly framed in a language peculiar to merchants; the intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large. Although extrinsic evidence is not admissible to contradict a document the terms of which have no other meaning than their ordinary meaning and acceptation, yet if the parties have used terms which bear not only an ordinary meaning, but also one peculiar to the department of trade or business to which the contract relates, it is obvious that due effect would not be given to the intention if the terms were interpreted according to their ordinary and not according to their peculiar signification.

As a general rule, a usage, unlike custom, cannot prevail against a party who did not know, could not be expected to know, and was under no duty to know of its existence.[57] Courts have attempted to establish a clear intention to contract according to trade usages, in order to avoid the insinuation of usages into contracts for the undue benefit of one party only. In *Robinson v Mollett*[58] the court stated:

> When considerable numbers of men of business carry on one side of a particular business, they are apt to set up a custom which acts very much in favour of their side of the business. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom; but if, on dispute before a legal forum, it is found that they are endeavouring to enforce some rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the courts have always determined that such a custom, if sought to be enforced against a person ignorant of it, is unreasonable, contrary to law, and void.

However, this does not mean that trade usages will only be applied when expressly referred to by parties to a contract. A usage may be imputed objectively on the ground that a person may be presumed - notwithstanding an allegation of his ignorance - to have known of it when he entered into the contract. For this purpose, the principle that a usage must be "notorious" becomes directly relevant. This is particularly so where a person undertakes to perform a duty with reference to a particular trade as he is then necessarily obliged, in order to perform that duty with a reasonable degree of care and

---

[56] *Idem* at 142.

[57] *Idem*; Wellwood n 30 44.

[58] LJ Rep NS 1875 (HL) 362.

skill, to acquaint himself by due inquiry with the usages of that trade.[59]

The degree of notoriety which a usage has acquired will determine whether a court will resort to the use of a presumption in order to give effect to usage.[60] If a usage has become so general and notorious within a particular market or trade that all persons dealing within its sphere can easily ascertain it, then it is very probable that a court would consider that those persons were presumed to have been aware of it when they entered into the contract, and will be deemed to have submitted to be bound by it. In *Lord Forres v Scottish Flax Co Ltd*[61] the court said:

> When a stranger comes in from outside, asking a member of the market to act as his agent, he must of necessity authorize that agent to do the particular deal in the manner in which all deals in that market are done by members of the market. There must be an implied authority from the principal to the agent to act in accordance with its rules.

Similar principles have been applied to usages of ports and maritime usages often established in litigation.[62] In *Pyrene Co v Scindia Steam Navigation Co*[63] it was said:

> The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo.

The objective application of usages in the contractual context, based on notoriety and regularity of observance in a place, vocation or trade seems to be the prevailing view in England.[64] In other words, one party to an agreement will not be allowed to deny what is reasonably understood to be the meaning of that agreement when it is considered in its commercial context. However, the application of usages on an objective basis encounters a great obstacle in the fact that, because the terms usage and custom are

---

[59] *Russian Steam-Navigation Trading Co v Silva* (1863) 143 Eng Rep 342, *per* Willes J.

[60] Note n 47 1201.

[61] (1943) 2 All ER 366 at 368.

[62] Allen n 45 56 with further references.

[63] (1954) 2 QB 402 at 418.

[64] Bonell n 1 111; Wortley n 53 145.

often used interchangeable by English courts, in practice, evidence that a usage in fact amounts to a custom is often needed before a court will recognise the usage as binding.[65]

In the past, commercial usages have been denied application in England on purely formalistic grounds, where they were reputedly not well established in fact, contravened rules of positive law, were unclear in nature or were of comparatively recent origin.[66] This has led some authors to suggest that it is easier to invoke a previous course of dealing or a particular practice between the parties as an implied contract term, than to attempt to prove the existence of a general usage which binds parties in the absence of a clear intention to the contrary.[67]

Examples of conflicts between law and business practices may be found in case law. In maintaining that only formal bills of lading suffice as a means of passing title to goods, for instance, English courts have refused to recognise the legal validity of a document of title which falls short of qualifying as a bill of lading but is used constantly in practice by merchants.[68] This was the case in *Comptoir d'Achat et de vente du Boerenbond Belge*

---

[65] The following quote taken from the case of *Nelson v Dahl* (1879) 12 Ch D 568 (dealing with an alleged custom in the shipping trade) is an example in this regard:

> ...like all other customs, it must be strictly proved. It must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself.

[66] L Trakman 'The Evolution of the Law Merchant: Our Commercial Heritage' (part II) 12 *Journal of Maritime Law and Commerce* (1981) 163.

[67] Wortley n 53 141. By dealing together merchants may habitually use certain expressions or give ceratin terms of credit, as between themselves, without intending to create a general usage. The term "course of dealing between parties" appears in the English Sale of Goods Act 1893 S 55 (which deals with the exclusion of implied terms and conditions) states:

> Where any right, duty or liability would arise under a contract of sale, by implication of the law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

[68] *Idem*. Berman & Kaufman explain that in some trades where fungible goods are sold while they are in transit, it has become regular practice that the shipper retains the bill of lading and sells the various portions of the goods covered by it to various buyers, by transfer of separate delivery orders. Such delivery orders instruct the carrier to deliver the unspecified goods upon presentation of the document. In spite of an established practice to this effect, English courts have refused to treat the delivery order as a document of title; H Berman & C Kaufman 'The Law of International Economic Transactions (*Lex Mercatoria*)' 19 *Harvard International Law Journal* (1978) 258.

SA v Luis de Ridder Limitada (The Julia),[69] where the issue at stake was the nature of a document termed, in French, *delivery-ordre*. The document had been issued by the seller's general agent in Antwerp to the order of a Belgian wholesaler, but had not been signed by the carrier. The *delivery-ordre* in question, which had been endorsed by the cargo superintendent in Antwerp, instructed him to release to the order of the buyer, or to the bearer, 500 tons of rye in bulk *ex* bill of lading for 1120 tons shipped, to be delivered in accordance with the clauses and conditions of the bill of lading. The endorsement further assured the bearer of the document that he had all the rights and obligations of the original bill of lading. When the transaction was dishonoured,[70] the case went to arbitration in London and, subsequently, to the English courts.

The court declared that the bearer of the document did not have a right to immediate possession of the goods, since the delivery order was, in its view, "merely an instruction by one agent of the sellers to another".[71] The transfer of the delivery order did not pass title in the goods, and, consequently, the risk had not passed either.

In equating the nature of the *delivery-ordre* used in the Belgian grain trade with the English delivery order - and thereby concluding that it was defective because it had not been signed by the carrier - the decision in *The Julia* has been criticised on the ground that the court failed to examine and accept foreign trade usages which differed from those with which it was familiar.[72]

Similar consequences have resulted from insurance documents. In a CIF contract,[73] one of the main obligations of the seller is to tender to the buyer a marine insurance policy

---

[69] [1949] 1 All ER 269 (HL).

[70] The vessel was diverted to Lisbon as a consequence of Germany's invasion of Belgium. The cargo was subsequently sold to a further buyer for less than the original Belgian buyer had paid. The Belgian buyer refused a refund in the lesser amount actually paid, and the case went to arbitration in terms of the London Corn Trade Association.

[71] *Per* Lord Porter at 275.

[72] Berman & Kaufman n 68 260.

[73] Documentary sale subject to the term 'Cost, Insurance and Freight'.

which should provide cover against the risks which it is customary in the particular trade to cover with respect to the cargo and the voyage in question.[74] In modern export practice, it is common to resort to documents which, while lacking the characteristics of a formal insurance policy, acknowledge that insurance cover has been obtained. The most important of these documents is the certificate of insurance, normally issued by an insurance broker, which entitles the holder to demand the issue of a policy in the terms contained in the certificate.[75]

Where a CIF contract expressly authorises the seller to tender an "insurance policy or certificate" the tender of a proper certificate should be valid. However, where the contract contains only the expression that the contract is "CIF", a question may arise as to whether the certificate satisfies the insurance requirements. In this regard, some English decisions have held that the buyer under a CIF contract is not obliged, under English law, to accept a certificate of insurance in the place of an insurance policy unless he has agreed to do so.

In *Diamond Alkali Export Corporation v Bourgeois*[76] the tender of a marine insurance certificate was held inadequate to fulfil the insurance obligation under a CIF contract. In concluding that such a certificate is in law not equivalent to an insurance policy, the court relied on earlier decisions which had defined the term CIF as requiring, specifically, the tender of a marine policy. A certificate of insurance, by contrast, was found to be an "ambiguous thing, unclassified and undefined by the law".[77]

Another example of this formalistic approach may be found in *Biddell Brothers v Clemens Horst Co.*[78] Here, the court had to construe the meaning of the contractual term "terms

---

[74] C Schmitthoff *Schmitthoff's Export Trade. The Law & Practice of International Trade* Stevens 1990 38.

[75] *Idem* 501.

[76] [1921] All ER 283; also *Phoenix Insurance Co of Harfort v De Monchy* (1929) 45 TLR 543.

[77] *Idem.*

[78] [1911] 1 KB 934 (CA). See however, the dissent of Kennedy J, whose argument, based upon considerations of business efficacy, was later upheld in the House of Lords [1912] AC 18 (HL).

net cash" inserted in a CIF contract. Although according to practice a construction of these terms would normally have been "net cash against documents" - meaning that title in the goods sold would pass from the seller to the buyer upon payment of the contract price and on the receipt of the documents representing the goods - the majority of the court preferred to stick to a formal view. Accordingly, title in the goods sold could only pass upon physical delivery of the goods and not upon payment of cash against documents. The fact that constructive delivery was "commercially reasonable" was, in itself, an insufficient ground to establish a valid transfer of title in law. The court was of the view that a trade usage supporting such practice would have to be proved by "clear evidence and not by personal judgment" and emphasised that the incorporation of such usage would have to be established by "necessity", and not by reading it as implied in the term CIF.[79]

While these examples taken from case law expose a positivist and rather formalistic attitude towards the acceptance of new commercial practices and understandings, legal formalism has not been accepted in an absolute form by all English courts, and some common law judges seem to have recognised the spirit of the law merchant as reflected in practical utility of practices which regulate business affairs.[80] In the *Biddell* case already mentioned, for example, there was significant support for the commercial efficacy ideal implied in the law merchant in the dissent of Kennedy J, who emphatically rejected the legalistic construction of the term "net cash" adopted by the majority, for, in his view, the document had to be interpreted in terms of what is "mercantilely reasonable".[81]

Similarly, with regard to the problem of certificates of insurance in CIF contracts already mentioned, Schmitthoff is of the opinion that the position has changed in modern English practice, with the result that such a certificate (or any other document entitling the insured to demand the issue of a policy) would be regarded as equivalent to a formal policy, on the assumption that an implied agreement of the parties exists, unless

---

[79] Trakman n 66 164.

[80] *Idem* at 165.

[81] [1911] KB 934, 954, 958.

otherwise provided, i.e. where the contract stipulates that the seller shall tender a formal policy.[82]

3.2 United States of America

In contrast to the situation in England, mercantile behaviour as reflected in trade usage has acquired stronger recognition in United States judicial precedent as a means for achieving greater flexibility in the regulation of commercial life.[83]

Two cases preceding the adoption of the Uniform Commercial Code[84] illustrate the issue. In *Kunglig Jarnsvägsstyrelsen v Dexter & Carpenter*[85] the court had to consider a situation similar to that in the English *Diamond Alkali* insurance certificate case. In contrast to the arguments advanced in the *Diamond* case, Judge Hand held that an insurance certificate not signed by the insurer, but issued by a New York broker, nevertheless satisfied the requirement that a seller provide insurance on a CIF contract, on application of the following principles:

> When a usage... has become uniform in an actively commercial community, that should be warrant enough for supposing that it answers the needs of those who are dealing upon the faith of it. I cannot see why judges should not hold men to understandings which are the tacit presupposition on which they deal.[86]

---

[82] Schmitthoff n 74 39.

[83] See Chen n 3 108; Berman & Kaufman n 68 261.

[84] The UCC was the culmination of several attempts to create a uniform commercial law in the US. Between 1896 and 1933 the National Conference of Commissioners on Uniform State Laws promulgated seven uniform commercial statutes, which included the Negotiable Instruments Act and the Uniform Sales Act. After the Second World War, the Commissioners worked together with the American Law Institute in preparing a comprehensive Uniform Commercial Code to replace not only the Uniform Sales Act but also other uniform acts dealing with commercial matters. After several amendments, the UCC has been enacted in every state of the American Union except Louisiana, which because of its French civil law tradition has adopted only a part of the Code, not including that on sales. The UCC is divided into eleven substantive articles and is, in the words of Honnold, "of imposing length and breadth" n 37 83. See also Farnsworth n 33 56 and R Braucher 'The Legislative History of the Uniform Commercial Code' 58 *Columbia Law Review* (1958) 798.

[85] 299 F 991 (SDNY 1924).

[86] At 994; cf *Hostetter v Park* 137 US 30 (1890) ("[P]arties who contract on a subject-matter concerning which known usages prevail, incorporate such usages by implication into their agreements."). The UCC has adopted *Kunglig's* rule in § 2-320(2)(c) which provides that a CIF seller may "obtain a policy or certificate

To give the usage binding force, the court dismissed the "plain meaning rule", declaring that courts should look to practice over language as the basis of commercial understandings.[87] A similar practice-oriented result was achieved by the judgment in the *Dixon* case,[88] where the Second Circuit Court of Appeals - reversing a previous ruling - accepted the practice of New York banks which honoured a seller's draft even though the seller had delivered less than a "full set" of bills of lading.[89]

The court held that, since the expert witnesses for the defendant were unable to testify to any previous instances in which a discretion of a bank was exercised to refuse an offer of indemnity, a uniform usage had been established which constituted a tacit presupposition in all contracts involving letters of credit. Consequently, the court held that the confirming bank was bound by this practice.[90]

Reflecting these principles, the UCC contains a simplified approach towards acceptance of trade usages and courses of dealing in commercial transactions. It is particularly significant, in this regard, that the UCC declares as one of its purposes "the continued expansion of commercial practices through custom, usage and agreement of the parties"[91] and that it adopts the principles of "law and equity, including the law

---

of insurance".

[87] At 995.

[88] *Dixon, Irmaos & Cia v Chase Nat Bank of City of New York* 144 F 2d 759, 762 (2d Cir 1944), *cert denied*, 324 US 850 (1944).

[89] In this case, the beneficiary of a letter of credit was unable to tender to the confirming bank all the required documents, because one part of the required "full sets" of bills of lading, having been sent, had not arrived in time. The confirming bank refused to accept, in lieu of the missing part, an offer of indemnity from another prime bank. In a suit by the beneficiary against the confirming bank, the trial court found that it was a universal practice of New York banks to honour such offers of indemnity against losses that may arise from non-compliance of the documents with the strict requirements of a letter of credit. However, because the court also found that banks considered this practice to be entirely "discretionary", i.e. they followed it each time as a matter of grace, it decided to give judgment to the confirming bank (53 F Supp 933 (SDNY 1943)). In the case under comment, the Second Circuit Court of Appeals subsequently reversed the previous ruling. See J Honnold 'Letters of Credit, Custom, Missing Documents and the *Dixon* Case' 52 *Columbia Law Review* (1953) 504.

[90] 144 F 2d at 761-762.

[91] UCC § 1-102(2)(b).

merchant" as a supplementary source of law.[92]

The UCC has abandoned the traditional common law tests for custom, replacing the term with the more neutral expression "usage of trade".[93] The provisions of § 1-205 view usages of trade as a way of determining the parties' probable intent, and in so doing, adopt regularly observed trade usage as the statutory incarnation of commercial custom.[94] In other words, the authors of the UCC have eliminated the word "custom" altogether, and have raised usage - in the sense of trade practice - to a normative position without reference to whether or not businessmen attribute normative character to it.[95]

The Code stipulates that a trade usage is:

> Any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.[96]

The usage, therefore, need not be "ancient or immemorial" or "universal". It is enough that it be "currently observed by the great majority of decent dealers".[97] The common

---

[92] UCC § 1-103. The code lays down special rules for the sale of goods, as opposed to other kinds of contracts. In addition, it contains rules which impose higher standards on merchants than on non-merchant parties. Some of these rules apply if "there is a transaction between merchants" (see e.g. UCC 2-201(b)), and others apply if only one party is a "merchant" (see e.g. UCC 2-205). Under § 2-104(1) a "merchant" is:

> A person who deals in goods of the kind or otherwise by his occupation holds himself out as having the knowledge or skill peculiar to the practice or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent ...or other intermediary who by his occupation holds himself out as having such knowledge or skill.

[93] Levie n 37 1106; De Ly n 12 137. The only reference to "custom" is found in § 1-102(2)(b) which contains a general declaration that the purposes of the Code are, among others, "to permit the continued expansion of the commercial practices through custom, usage and agreement of the parties". All other references in the Code are to trade usages.

[94] Chen n 3 110.

[95] Berman & Kaufman n 68 263.

[96] UCC § 1-205.

[97] UCC §1-201 Comment 5.

law test of reasonableness is also abolished,[98] for it is assumed that "the very fact of commercial acceptance makes out a *prima facie* case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable".[99]

In binding parties to usages of which they "are or should be aware",[100] the UCC recognises that agreements implicitly incorporate usages which have such "regularity of observance" as to create "an expectation that [they] will be observed with respect to the transaction in question".[101] In terms of these provisions, a usage of trade is part of the contract whether or not the parties have consented to its incorporation, on the assumption that, in the absence of contrary proof, parties who are engaged in a particular trade act with reference to its usages.[102]

Apart from the definition of trade usage described, the Code defines other terms such as "course of dealing" and "course of performance". A course of dealing is described as:

> A sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.[103]

---

[98] Although it is not necessary to prove a trade usage to be "reasonable", it cannot be "unconscionable" under § 2-302. In other words, the usage must be lawful. A trade usage that second hand automobile dealers always set odometers back, for instance, was rejected as unconscionable in *Boise Dodge Inc v Clark* 92 Idaho 902, 453 P 2d 551 (1969).

[99] UCC § 1-205 Comment 6 refers to the provisions controlling unconscionable contracts and clauses to review unconscionable or dishonest standard practices.

[100] UCC § 1-205(3).

[101] Levie points to the requirement of "regularity of observance" as the true test to prove whether the usage really exists. Accordingly, the practice must be "common enough to be a true usage and precise enough to have a reasonably accurate definition"; n 37 1108.

[102] Levie *idem* at 1108; White & Summers n 29 122. In *Heggblade-Marguleas-Tenneco Inc v Sunshine Biscuit Inc* 59 Cal App 3d 948, 956-57, 131 Cal Rptr 183, 189 (1976), the court held that "persons carrying on a particular trade are deemed to be aware of prominent trade customs applicable to their industry. The knowledge may be actual or constructive, and it is constructive if the custom is of such general and universal application that the party must be presumed to know of it". In *Ambassador Steel Co v Ewald Steel Co* 33 Mich App 495, 190 NW 2d 275 (1971), the court held that if a trade usage defined "commercial steel" as containing some set carbon content, that usage was applicable to interpret a contract calling for commercial steel.

[103] UCC § 1-205(1). In the wording of the Code, the concept of a course of dealing is relevant only when the parties to an agreement have dealt with each other in similar transactions on previous occasions.

Course of performance is described in the following terms:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.[104]

Under the UCC, the agreement of the parties includes that part of the bargain that may be found in course of dealing, usage of trade and course of performance. Consequently, in the process of contract interpretation, these sources not only supplement or qualify express terms, but may themselves constitute contract terms.[105]

The use of the words "supplement" or "qualify" suggests that either conduct or trade usage must have an effect beyond the mere interpretation of the contract's express terms. Farnsworth refers to the fact that reliance on usages to supplement the terms of an agreement has sometimes been criticised as an unwarranted encroachment on the general rules of law that would otherwise be used to perform this task. He emphasises, however, that the Code commentary rejects evidence of custom as representing an effort to displace or negate established rules of law, and asserts that usages are the framework of common understanding controlling any general rules of law which hold only where there is no such understanding.[106]

Trade usages, once proved, give particular meaning to the language of the agreement. They may supersede or contradict the ordinary lay meaning of words used in an agreement. This interpretive function is reflected in section 1-205 of the UCC in the following terms:

---

[104] UCC § 2-208(1). Course of performance differs from usage of trade. A usage is binding on an objective basis, i.e. independently of the parties' actual knowledge of its terms, as long as the necessary requirements are met, whereas a party cannot be charged with a course of performance unless he knew of it. It also differs from course of dealing, in that a course of dealing is described as a sequence of conduct between the parties prior to the entering into a particular agreement, whereas course of performance arises subsequent to entry into an agreement. White & Summers n 29 121 with further references.

[105] *Idem.*

[106] Farnsworth n 33 127 referring to UCC § 1-205 Comment 4.

> This Act rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of the commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.[107]

Therefore, where the parties have used a term carrying one meaning in lay terms, but a different meaning under an applicable trade usage, courts would generally admit the trade usage.[108] It is not necessary that the language of the contract be unambiguous on its face, even where the contract is a written one.[109] Under the UCC's formulation of the so-called "parol evidence rule",[110] even if the writing is a "complete and exclusive" statement of the terms of the agreement, parties may still introduce course of dealing, usage of trade or course of performance to explain, supplement, or add to the agreement, although not to contradict it.[111] For example, it was held that the words "delivery June-August" could be shown to have acquired a special meaning in the retail clothing trade that rules out delivery of the entire lot in August.[112]

Similarly, in another case, the court held that the words "thirty-six inch steel" could be shown to have acquired a special meaning by trade usage with the result that delivery

---

[107] UCC § 1-205 Comment 1; § 2-202 Comment 1 further rejects the premise that the language used has the meaning attributable to it by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used.

[108] For example, if the contract requires the seller to deliver a chicken and trade usage defines "chicken" as young chickens, the usage would be admitted into evidence if the seller delivered old chickens. See *Frigaliment Importing Co v B N S International Sales Corp Ltd* 190 F Supp 116 (SDNY) 1960, and also the *Ambassador* case *supra* n 102.

[109] White & Summers n 29 122.

[110] The parol evidence rule operates to give preference to the written version of contract terms. The version adopted by § 2-202 of the UCC reads as follows:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> a) by course of dealing or usage of trade (section 1-205) or by course of performance (section 2-208) and
>
> b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

[111] White & Summers n 29 105.

[112] *Warren's Kiddie Shoppe Inc v Casual Slacks Inc* 120 Ga App 578, 171 SE 2d 643, 7 UCC 166 (1969).

of thirty-seven inch steel constituted performance.[113]

However, not all evidence of trade usages or courses of dealing can be admitted in the presence of a written contract. In particular, § 1-205 of the UCC only admits evidence in order to show a course of dealing and usage which is "consistent" with the terms of the contract. Failing this, the express terms will control.[114] In its decision in the case of *Nanakuli Paving & Rock Co v Shell Oil Co Inc,*[115] the Federal Court of Appeals for the Ninth Circuit defined "consistency" as allowing evidence of trade usage, as long as the application of such usage does not "totally negate" a written term.

In the particular case, the court said:

> A total negation of that term [price protection] would be that the buyer was to set the price. It is a less than complete negation of the term that an unstated exception exists at times of price increases, at which times the old price is to be charged, for a certain period or for specified tonnage, on work already committed at a lower price on nonescalating contracts. Such a usage forms a broad and important exception to the express term, but does not swallow it entirely.[116]

In this way, a usage may "qualify" an agreement and may even subtract terms from the parties' express agreement. A "total negation" of such terms in the sense explained above, however, would not be permitted in terms of § 1-205 of the UCC.[117]

---

[113] *Decker Steel Co v The Exchange National Bank of Chicago* 330 F 2d 82 (7th Cir 1964). Also *Raney v Uvalde Producers Wool & Mohair Co Inc* 571 SW 2d 199, 25 UCC 41 (Tex Civ App 1978) where trade usage was accepted to define meaning of "25,000 fleeces").

[114] Farnsworth n 33 128.

[115] 664 F 2d 772, 32 UCC 1025 (9th Cir 1981).

[116] At 805.

[117] *Idem*. The facts of the case were as follows. The buyer (a paving company) had agreed with Shell to a long term contract containing language in terms of which the price of asphalt would be Shell's "posted price" at the time of delivery. After the buyer had agreed to supply third parties on the basis of Shell's then existing "posted price", Shell raised its posted price and sought to impose that price on the buyer. The buyer successfully sued Shell for breach by showing that the prevailing trade practice at the time of contracting was to provide "price protection" for such buyers, with the result that Shell's changes in the posted price could not be applied retroactively in the case. See White & Summers n 29 107.

With regard to the possible addition of new terms into written contracts in terms of trade usage, the Code has been interpreted to allow evidence of practices such as course of dealing or trade usage.[118] Since both § 2-202 (a) and 1-205 (3) admit the introduction of trade usages to "supplement" the terms of the contract, the rule obtains that trade usages may be admitted even if the parties intended the writing to be a complete or exclusive statement of the terms of the agreement, unless the contract expressly negates the particular usage or usages of trade in general.[119]

This rule was recognised in *Provident Tradesmen Bank & Trust Co v Pemberton*,[120] where the court utilised evidence of trade usage to add an additional term to the writing, namely that the plaintiff bank owed a duty to notify the defendant (a car dealer) if the latter customer's insurance policy on the car bought through him had lapsed. Although there was also evidence of a previous course of dealing between the parties imposing a duty to give notice, the contract was silent on this point. While the bank did not deny the existence of the practice or course of dealing, it relied upon the printed language contained in the security agreement, in terms of which no notice of any kind was required. The court, in granting judgment for the dealer, quoted the official comment to section 2-202 of the UCC in the sense that "the usages of the trade were taken for granted when the contract was phrased. Unless carefully negated they have become an element of the meaning of the words used".

Relying on the precedent laid down by this case, it seems likely that, in the absence of a contract clause to the contrary, courts will permit parties to use evidence of course of dealing, usage and course of performance to establish additional terms not contained in the wording of the agreement.[121]

---

[118] Levie n 37 1111, White & Summers *idem* at 107.

[119] Levie *idem* notes the Comment to § 202 in the sense that contracts are "to be read on the assumption that the usages of the trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used".

[120] 196 Pa Super 180, 173 A 2d 780, 1 UCC 57 (1961).

[121] White & Summers n 29 108.

The Code has expressly contemplated the legal impact that course of dealing, usage of trade and course of performance have on each other in the event of conflict. After stipulating that the express terms of an agreement and a course of dealing or trade usage be construed as consistent with each other, § 205(4) states that express terms control both course of dealing and usage of trade and that course of dealing controls usage of trade. These provisions notwithstanding, the submission that express terms control inconsistent course of dealing and trade usages cannot be taken entirely at face value. As seen, some courts have admitted evidence of trade usage and course of dealing introduced to supplement or qualify the express terms of an agreement in certain circumstances.[122] On the other hand, it appears that course of dealing does override usage of trade and course of performance overrides both course of dealing and usage of trade.[123]

3.3 Other national legal systems

Similar to the situation in the Unites States under the Uniform Commercial Code, under German law, trade usages are not genuine sources of law, but, rather, tools of contract interpretation.[124]

When there is no express reference by the parties to the contract to the various rules and practices which have become common use in international trade, their effectiveness is normally considered to depend on the extent to which it is possible to recognise them as *Handelsbräuche* in terms of paragraph 346 of the German Commercial Code (HGB, *Handelsgesetzbuch*), which refers to commercial custom and usages as instruments of contract interpretation.

---

[122] White & Summers refer to the cases of *Celebrity Inc v Kemper* 96 NM 508, 632 P 2d 743, 32 UCC 105 (1981) where the court said that although express terms control over course of dealing, it allowed course of dealing to control so long as the buyer had reason to rely on it, for the provision cannot be taken at face value; also the *Nanakuli* case n 115; see Farnsworth n 33 128.

[123] "Course of dealing is, in a sense, 'closer' to their [the parties'] expectations than general trade usage and should prevail over it". *Idem* with further references.

[124] Jokela n 35 85; E Rabel *Das Recht des Warenkaufs* vol 1 Walter de Gruyter 1957 59.

Once recognised as such, they bind parties for the sole reason that the parties belong to the relevant professional category or conduct business in a given commercial field, irrespective of whether they were in fact aware of the usage in question.[125] In this sense, it suffices that the party ought to have known of the usage in question, i.e. if, on an objective basis, a reasonable person in his place would have been aware of its existence and scope.[126]

With regard to trade terms frequently used in international transactions, it must be noted that the status of *Handelsbräuche* has been conferred only to Trade Terms, i.e. the German version of the Incoterms contained in the annex to the HGB.[127] Other definitions of trade terms such as the ICC Incoterms are generally considered simple model definitions (*Musterdefinitionen*) which apply only if, and to the extent that, they are expressly referred to by the parties in the contract.[128]

Paragraph 346 of the HGB follows similar provisions contained in paragraphs 157 and 242 of the German Civil Code (BGB, *Bürgerliches Gesetzbuch*) which deal with usages in the ambit of civil law. Within the ambit of good faith (*Treue und Glauben*), these provisions refer expressly to usages which shall also be taken into account in the interpretation and performance of contracts.[129] Usages, therefore, have both an interpretive function and a supplementary function in relation to the performance of the contract.[130]

---

[125] Bonell n 1 111. See also *BGH* 1 December 1965; NJW (1966) 502.

[126] Rabel n 124 59; Schmitthoff n 10 16.

[127] See Baumbach s 6(1) (*Incoterms und andere Handelskaufklauseln*) n 25 at 845, 1142. Also Bonell n 1 111.

[128] Bonell *idem*.

[129] O Palandt *Bürgerliches Gesetzbuch* Beck 1992 and the English translation in S Goren & I Forrester *The German Civil Code* North-Holland 1975. Usages however, will not be applied if they lead to a result which contradicts the "good faith" criteria in the interpretation of a particular contract. See H Sonnenberger *Verkehrsitten im Schuldvertrag* Beck 1969 119.

[130] De Ly n 12 139 and further references.

With regard to the hierarchy between usages and other rules, usages may not derogate from express contract provisions, but they supersede supplementary rules, i.e. rules of contract law which may be derogated from by the parties, with regard to the interpretation of the parties' declarations. The relation between usages and supplementary rules with regard to the process of interpreting the parties' declarations is controversial.[131]

The contractual nature of trade usages is also recognised in Italy. In terms of the Civil Code (*Codice Civile*) usages of trade - *usi negoziali o interpretativi* - are rules of construction for interpreting and clarifying ambiguous clauses or terms, in the absence of a contrary intention of the parties. Article 1340 deals with usual practices and contract terms *(clausole d'uso)* which are part of the contract "unless it appears that they were not intended by the parties". A further provision, article 1368, stipulates that ambiguous clauses should be interpreted in accordance with the general practice (*pratiche generali interpretativi*) prevailing at the place where the contract was concluded. Read together, these provisions indicate that trade usages may be part of the contract either by their express incorporation by the parties, or in terms of principles of contract interpretation, i.e. based on the parties' implied intention.[132]

Under Italian law, usages may also have a supplementary function and form part of the contract without the consent or even the knowledge of the parties, i.e. on an objective basis. In terms of article 1374 of the Code,[133] normative usages (*usi normativi*) create additional obligations for the parties in certain circumstances. Bonell notes that the main discussion in Italian case law and legal writing on the various practices which have developed in international trade law has essentially focused on the question whether these practices may be considered genuine "*usi normativi*" under article 1374 of the Civil Code - and as such a means of completing the terms of international contracts - or

---

[131] *Idem* 140.

[132] *Idem* 143.

[133] Article 1374 states:
A contract binds the parties not only as to what it expressly provides, but also to all the consequences deriving from it by law or, on its absence, according to usage and equity.

whether they are simply tools for the interpretation of ambiguous contract terms. In this regard, there seems to be a tendency in Italy to abandon the traditional theory in terms of which the application of usages to specific transactions presupposes the express or implied intention of the parties. Rather, it is thought that their application should be based on an objective criteria, to the extent that these practices and general clauses are widely employed in international business transactions similar to the particular contract under consideration.[134]

In drawing a distinction between custom as a source of law and trade usages, French law traditionally follows a subjective approach.[135] In terms of this point of view, usages operate only in contractual situations and represent the expression of the parties' intent. Article 1135 of the *Code Civil*[136] states that "agreements are binding not only as to what is expressed, but also as to all the consequences which equity, usage or statute impose upon an obligation according to its nature". One current of thought, supporting the view that the usages referred to in this article are normative usages (*usages de droit* or *usages légaux*), has sought to explain their application on an objective basis, on the ground that they are genuine sources of law like any other legal norm of general application and validity.[137] However, the prevailing view seems to be that the basis for the application of usages under the French Civil Code must be found, exclusively, in the intention of the contractual parties.[138] Following Geny's theory, a distinction is made between custom or legal usages on the one hand, and contractual usages (*usages volontaires, usages du fait, usages conventionnels* or *usages interpretatifs*) on the other. The latter category comprises usages referred to in article 1135 of the Civil Code already mentioned, as well as in

---

[134] Bonell n 1 112-113.

[135] Jokela n 35 85.

[136] Dalloz n 24 and the English translation in J Crabb *The French Civil Code* Rothman 1977.

[137] Sonnenberger n 129 127; Bonell n 1 112, quotes Stoufflet *Le Crédit Documentaire* Paris 1969 (with reference to the ICC Uniform Customs and Practice for Documentary Credits); Loussouarn & Bredin *Droit du Commerce International* vol I Paris 1969 and Padis *La Vente Commerciale Internationale par Contrats-Type et Incoterms* La Gazette du Palais 1970 II (with regard to the ICC Incoterms). See also De Ly n 12 145 ff.

[138] Bonell *idem*; F Geny *Méthode d'Interprétation et Sources en Droit Privé Positiv* Paris Libraire Generale de Droit et de Jurisprudence 2 ed 1954 446 ff.

articles 1159 and 1160 which deal with contract interpretation. These last two provisions state that ambiguities found in contract language should be interpreted in accordance with usage prevailing at the place where the contract was concluded, and that contracts should be supplemented by usual clauses.

Under the seemingly predominant subjective theory of usages, usages can only be applied where the parties knew of them and intended their incorporation into the contract. Naturally, this approach leads to a restrictive application of usages as a means of supplementing contracts, in that the interpretation process is subjective and relies mainly on the intention of the parties.[139]

A first conclusion to be drawn from the domestic legal rules previously examined is that usages, as opposed to custom, do not appear to be regarded as formal sources of law, but rather as elements of contract interpretation. Accordingly, their operation is confined to the ambit of an agreement entered between parties, with the main function of completing and interpreting contractual terms.

A more difficult question, however, is to determine to what extent the terms of a contract may be supplemented by trade usages and other forms of spontaneous behaviour such as usual clauses, general conditions or courses of dealing, in the absence of express reference by the parties.

Under a subjective approach, the legal basis of the various rules evolved out of commercial practice must be found in the intention of the parties, expressed or implied. A different view is represented by the objective approach, in terms of which, in the absence of a contrary intention, usages may apply to a contract even in cases where the parties had no previous knowledge of the practices in question, based on the assumption that parties normally expect regular trade practices to be followed. Consequently, parties should be bound by established trade usages as part of the unspoken, implied agreement,

---

[139] De Ly n 12 153-54.

which forms the basis of their contract.[140]

Following the objective approach to trade usages, in Germany, the United States and Italy, among other countries, apart from being devices of contract interpretation, usages may supplement contracts to a greater or lesser degree, independently of party intent. In England the same position is taken in practice, although in theory a reference is still made to party intent.

The objective test also prevails in modern international formulations. The Hague Uniform Law on Sales (ULIS) takes an objective approach to trade usages in article 9(2) by making binding usages "which reasonable persons in the same situation as the parties usually consider applicable to their contract", while article 9(2) of CISG refers to "usages of which the parties knew or ought to have known and which in international trade are widely known and regularly observed" as the basis for their application in international sales contracts.

[140] A Kastely 'Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention' 8 *Northwestern Journal of International Law and Business* (1988) 610; Schmitthoff n 10 16.

CHAPTER 3
THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

1 Development of the convention

On 10 April 1980 a diplomatic conference meeting in Vienna adopted the United Nations Convention on Contracts for the International Sale of Goods (CISG).[1]

1.1 Origins: the 1964 Hague Conventions

The legislative history of the CISG dates from approximately 1930, when the International Institute for the Unification of Private Law (UNIDROIT), then under the auspices of the League of Nations, set up a drafting committee of European legal scholars to work on a uniform law for international sales.[2]

The committee developed a draft uniform law which in 1935 was sent by the League of Nations to national governments for their comments. At the same time, a separate committee was appointed to examine aspects of contract formation.[3]

---

[1] The text of the convention is set out in Annex I to the Final Act of the Vienna Conference. Final Act, A/CONF 97/18, Annex 1 (April 10, 1980). The signing took place on 11 April 1980. The text is reprinted in the official records of the conference. United Nations Conference on Contracts for the International Sale of Goods, *OR* A/CONF 97/19 at 178-190 (1981) (Sales No E 82 V 5). See also 19 *International Legal Materials* (1980) 668.

[2] The initial committee was composed of A Bagge (Sweden), H Capitant (France), M Fehr (Sweden), H Gutteridge (Great Britain), J Hamel (France), E Rabel (Germany), and C Hurst (Great Britain). As one commentator noted, the committee comprised representatives from the "four principal systems of law which are concerned in any scheme for unification, i.e. the Anglo-American, the Latin, the Germanic and the Scandinavian systems" H Gutteridge 'An International Code of the Law of Sale' 14 *British Yearbook of International Law* (1933) 82. A series of volumes entitled *Unification of Law*, published by UNIDROIT in 1948, 1954 and 1956 contain comprehensive information on the drafting of the uniform sales law and other similar projects. See also J Honnold 'A Uniform Law for International Sales' 107 *University of Pennsylvania Law Review* (1959) 299.

[3] This committee comprised representatives from Austria, France, Great Britain, Italy and Peru. By 1936 the committee had prepared a preliminary draft of a uniform law on international contracts made by correspondence. See E Farnsworth 'Formation of International Sales Contracts: Three Attempts at Unification' 110 *University of Pennsylvania Law Review* (1965) 305.

Although most governments supported the idea of a unification effort in the area of international sales, doubts were raised with regard to the practical importance of such an initiative, as national reports pointed out that many businessmen, particularly from major trading countries, did not perceive a real need for a uniform law.[4]

A revised draft issued by UNIDROIT in 1939 addressed specific issues raised by governments in their comments and embodied a number of basic policy decisions on the scope and content of the uniform sales rules which were maintained throughout the subsequent drafts. An early decision was made, for instance, that the uniform law would be restricted in its scope to international sale transactions to the exclusion of domestic sales,[5] in an attempt to facilitate widespread adoption of the text. The committee also reaffirmed the principle of party autonomy, so that even if an international sales contract fell within the scope of the uniform law, parties to the contract were explicitly authorised to exclude application of the uniform law or to derogate from any of its provisions.[6] Furthermore, it was thought that the uniform law should represent a comprehensive system of sales rules primarily designed to meet the practical needs of merchants, rather than a mere collection of rules taken from the various domestic sales laws. The drafters of the convention attempted to establish a sense of shared interest among contracting states, including both private and state traders, legal practitioners, judicial courts and commercial arbitrators, in the hope that the rules of the convention would be perceived as a truly common legal system through which future sales transactions would be shaped

---

[4] See P Winship 'The Scope of the Vienna Convention on International Sales Contracts' in N Galston & H Smit (eds) *International Sales: the United Nations Convention on Contracts for the International Sale of Goods* Matthew Bender 1984 1-5.

[5] E Rabel *Das Recht des Warenkaufs* Walter de Gruyter & Co 1957 35. Commenting on the 1935 uniform draft's restricted sphere of application, Rabel wrote:

> [T]he proposed international law is not meant as a substitute for the actual domestic law. The overwhelming majority of sales contracts remain under the same rules as they are at present. It intends to do no more than to take the place of the rules of the conflict of laws concerning sales and the legal norms called for by the conflict rule. The law thus to be applied now might be that of any foreign country, different in different cases, and difficult to apply. The proposed international law, on the other hand, would be uniform, kindred to the Sales Act, and at least intelligible.

E Rabel 'A Draft of an International Law of Sales' 5 *University of Chicago Law Review* (1938) 544.

[6] Articles 3 of ULIS and 6 of the CISG state that parties are free to exclude the application of the uniform rules in whole or in part.

and related litigation settled.[7] Other decisions on issues such as the irrelevance of the nationality of the parties or the commercial character of the contract or the parties in terms of domestic law survived in the CISG's provisions on its sphere of application.[8]

The unifying work, suspended during the war, resumed shortly after the end of hostilities. In 1951 a conference convened by the Government of the Netherlands in The Hague was attended by representatives of twenty nations which, with the exception of Japan, belonged to Western Europe, although several non-European nations also sent observers.

The Final Act of the conference adopted the UNIDROIT sales text as the basis for further study, made some observations on the substance of the 1939 draft, and appointed a special commission of experts from West European countries with the task of further elaborating the text. The Final Act also recommended that inquiry should be made into the preparation of a text on contract formation.

By 1956 the special commission had prepared a new draft of the uniform sales law which the Government of the Netherlands circulated to governments and interested international organisations for their comments. On the basis of these comments the commission completed a final draft in 1963 for submission to an international conference.[9]

In a separate development, the council of UNIDROIT completed a draft text dealing with contract formation in 1958 and submitted it for consideration at the international conference scheduled to take place in 1964.

The diplomatic conference, convened in The Hague from 2 to 25 April 1964, was

---

[7] To this effect, the rules on interpretation of the 1980 convention emphasise its international character and the need to promote a uniform application of its rules (article 7 CISG). See M Bonell 'International Uniform Law in Practice – Or Where the Real Trouble Begins' 38 *American Journal of Comparative Law* (1990) 867.

[8] Article 1 CISG.

[9] For an analysis of the 1956 draft see Honnold n 2.

attended by twenty-eight states, while four other states and six international organisations sent observers. Although the United States and several Eastern European countries were officially represented,[10] most of the delegations at The Hague were Western European. This aspect is important because the lack of participation of socialist and developing countries in the development of the Hague Sales Laws is frequently mentioned as one of the main factors which contributed to the failure of the uniform laws on a larger scale.[11]

Two conventions were adopted at the conference, namely, the Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).[12]

The two documents entered into force in 1972, following ratification by five states. However, only a total of nine states acceded to the Hague Conventions. Most of them were Western European, i.e. members of the European Communities (Belgium, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, San Marino and the United Kingdom) while the two non-European states were the Gambia and Israel. In addition to the low number of ratifications, all acceding states, with the exception of Israel, availed themselves of the possibility of making use of reservations permitted by the conventions. The Gambia and the United Kingdom, for instance, made the application of the uniform laws dependent on an express declaration to this effect by the parties to each contract. A commentator has remarked of this reservation that it raised

---

[10] For the last-minute involvement of the US in the development of the Uniform Sales Laws see J Honnold 'The Uniform Law for the International Sale of Goods: The Hague Convention of 1964' 30 *Law and Contemporary Problems* (1965) 327 ff.

[11] P Schlechtriem *Uniform Sales Law* Manzsche 1986 18. Similarly, Honnold pointed out that the absence of "nearly all of the common law world, Eastern Europe and Latin America" and of "several African and Asian countries" proved "fatal". J Honnold 'The Sales Convention, Background, Status, Application' 8 *Journal of Law and Commerce* (1988) 3.

[12] The official texts of the Hague Conventions appear in 834 UNTS 107 (1972) and in 834 UNTS 169 (1972). They are also reprinted in J Honnold *Uniform Law for International Sales* Kluwer 1991.

the question whether a state which resorts to it can really be said to have ratified at all.[13] In actual fact, no ratification of the convention is necessary for this purpose, since article 4 of ULIS allows parties to adopt the convention as the proper law of the contract in the exercise of their freedom of contract.[14] The Federal Republic of Germany, Luxembourg, the Netherlands and San Marino limited the scope of application of the sales laws by declaring that they would apply the uniform laws only to contracts entered into by parties whose places of business were in the territory of "contracting" states, rather than simply in "different states" as envisaged in article 1.[15] Finally, Belgium and Italy made use of the reservation in terms of which the uniform laws are applicable only if required by the conflict of laws rules contained in the 1955 Hague Convention on the Law Applicable to International Sales Contracts of which these countries are member states.[16]

If, as suggested, reservations permitted to a convention usually reflect the quality of the work done and the degree of agreement actually reached,[17] the fact that nearly all states ratifying the Hague Conventions thought it necessary to do so with a reservation indicates that the two drafts of substantive law were not ready for finalisation at the end of their three-week period of consideration.[18]

---

[13] The United Kingdom's ratification of the uniform laws seems to have had no practical results, in that there has been no reported case in the English or Scottish courts involving the application of ULIS and ULF. B Nicholas 'The Vienna Convention on International Sales Law' 105 *The Law Quarterly Review* (1989) 202.

[14] Article 4 of ULIS provides that the uniform law shall apply where it has been chosen as the law of the contract by the parties (whether or not other requirements for its application have been met), to the extent that such choice does not affect the application of any mandatory rules of the law which would have been applicable if the parties had not chosen the uniform law as the proper law of their contract.

[15] In terms of article 1 of ULIS, the uniform law applies to contracts of sale of goods entered into by parties whose places of business are in the territories of different states and there is also a specified indication that the contract involves an international transaction.

[16] See *supra* introduction n 3.

[17] K Nadelmann 'The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglio' *The Yale Law Journal* (1965) 455. Another commentator noted that "the many different reservations Contracting States can make under the ULIS/ULF Conventions seriously disturb the applicability of these uniform laws" F Van der Velden 'The Law of International Sales: the Hague Conventions 1964 and the UNCITRAL Uniform Sales Code 1980 – Some Main Items Compared' in C Voskuil and J Wade (eds) *Hague-Zagreb Essays 4 on International Trade Law* Martinus Nijhoff 1983 55 n 30.

[18] Honnold n 10 328.

It soon became apparent that ULIS and ULF would not be widely adopted even with the authorised reservations.[19] As Winship points out, criticism centred on the sphere of application of the uniform laws, the abstractness of several key concepts and the failure to take into account the interest of many third world and socialist countries which had not participated in the 1964 conference. With regard to the first argument, the sphere of application of the uniform laws was criticised as being too wide. In terms of article 1, the uniform laws govern contracts of sale between parties whose places of business are in different states if there is also a specified indication that the contract involves an international transaction.[20] Thus, a forum in a state which has ratified or acceded to the convention would apply the uniform laws to all international sale transactions, even when the parties are from non-contracting states and the sales transaction itself has little or no connection with the forum or other contracting state.[21]

Furthermore, ULIS explicitly rejected any reference to rules of private international law for purposes of determining the scope of application of the convention,[22] as a means to extend the application of the uniform law and escape from "the chaos of conflicts rules".[23] This has been criticised on the ground that rules of private international law should be retained as subsidiary to the uniform laws to address the lack of specificity of

---

[19] Nadelmann n 17 459.

[20] Under article 1(1) ULIS and ULF a contract of sale is international if the transaction involves international carriage, the acts constituting offer and acceptance are effected in different states, or if delivery of goods is to be made in a state different from the state where the contract is concluded.

[21] Nadelmann n 17 457 has explained this result in the following terms:

> Thus, if a person in Canada sells goods to a person in the United States which goods must be shipped to the United States, in any subsequent disputes between the parties respecting the transaction either party can – notwithstanding the fact that neither the United States nor Canada has adopted the Uniform Law – take advantage of the law if its relevant provisions are more favourable to that party than the otherwise applicable law. The party merely brings suit in a "contracting" state which will automatically apply the Uniform law. This result may be accomplished as long as the other party happens to have assets in a "contracting" state and presence of assets is a basis there for assumption of jurisdiction.

[22] ULIS article 2 reads:

> Rules of private international law shall be excluded for the purposes of the application of the present Law, subject to any provision to the contrary in the said Law.

[23] Honnold n 10 333 notes that the wide reach for jurisdiction which results from the combined effect of articles 1 and 2 could lead to a situation similar to the example given by Nadelmann, a result which he qualifies as "remarkable".

ULIS with regard to several aspects of the international sale.[24]

Several concepts included in ULIS were criticised as being far too technical, abstract and, thus, legally complex. The detailed elaboration of the basic system of remedies for breach of contract is one example.[25] Similarly, the use of terms related to local legal idioms rather than standard events of commercial life created considerable difficulties in translating key expressions such as *déliverance* and *résolution de plein droit* into English and other languages in a meaningful way.[26]

As a result, in spite of their entry into force, the uniform laws have had a negligible impact on the actual conduct of international trade on a global scale.[27]

1.2 UNCITRAL

Anticipating possible resistance to widespread adoption of the sales laws, the Final Act of the 1964 Conference included a recommendation that if the conventions did not enter into force by 1 May 1968, UNIDROIT should establish a committee to consider further

---

[24] In the view of Berman, the elimination of article 2 was needed to solve the problem of the "excessive generality" of ULIS, in that national law would then be subsidiary to ULIS, "just as the ULIS is subsidiary to usage and contract". See H Berman 'The Uniform Law on the International Sale of Goods: A Constructive Critique' 30 *Law and Contemporary Problems* (1965) 367.

[25] In terms of ULIS, the various aspects of the parties' performance are set apart for separate treatment, so that remedies are separately stated for each type of performance; Van der Velden n 17 52. The author states:

> The [basic system], although well considered and perfected, is in practice too complicated, and therefore, not perspicuous or manageable enough to serve international commerce between states with enormous legal, social and economic differences (at 54).

[26] For a criticism of the difficulties posed by the use of the word *déliverance* see Honnold n 2 317, 324; also Honnold n 10 350.

[27] Winship n 4 1-2. Even though the Hague Conventions did not fulfil the high expectations which accompanied the signing of the 1964 Uniform Laws, both ULIS and ULF have been in effect in five original EC member states. In Germany alone, where the uniform laws entered into force on 4 April 1974, there have been a considerable number of judicial decisions applying their provisions, including decisions of the highest German court (*Bundesgerichtshof*). See P Schlechtriem 'From the Hague to Vienna – Progress in Unification of the Law of International Sales Contracts' in N Horn & C Schmitthoff (eds) *The Transnational Law of International Commercial Transactions* (Studies in Transnational Economic Law vol 2) Kluwer 1982 126, and also G Reinhart 'Zehn Jahre Deutsche Rechtsprechung zum Einheitlichen Kaufrecht' *Praxis des Internationalen Privat- und Verfahrensrecht* (1985) 1. A comprehensive general commentary of the uniform laws was published in Germany in 1976: H Dölle (ed) *Kommentar zum Einheitlichen Kaufrecht* Beck 1976.

action.

In 1966 the United Nations General Assembly established a Commission on International Trade Law (UNCITRAL) to promote the "progressive harmonisation and unification of the law of international trade", above all "by co-ordinating the work of organisations active in this field and encouraging co-operation among them" and "promoting wider participation in existing international conventions and wider acceptance of existing models and uniform laws".[28]

At its first session in 1968 the Commission decided to give priority to the topic of a uniform law for international sales. To this end, it requested the Secretary General to transmit to all Member States of the United Nations the texts of both ULIS and ULF and to ask Governments whether they intended to adhere to these instruments and the reasons for their positions.[29]

When it became evident from the responses received that the 1964 Conventions would not receive adequate adherence, UNCITRAL established a Working Group of fourteen states representing the different regions of the world, which in the light of the comments and suggestions made by states would ascertain "which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems", or "whether it will be necessary to elaborate a new text for the same purpose".[30]

---

[28] GA Resolution 2205 (XXI) of December 17, 1966 (reprinted in UNCITRAL Yearbook I (1968-70) 2). See also G Herrmann 'The Contribution of UNCITRAL to the Development of International Trade Law' in Horn n 27 35.

[29] Of the 36 states which replied, three indicated that they had already adopted the uniform laws, ten announced their intention to ratify them in the near future, twelve stated that they had not yet reached a decision in this respect and ten declared that they were not willing to adopt the uniform texts; Report of the Secretary General (UNCITRAL Yearbook I (1968-70) 15).

[30] The Working Group was composed by representatives of the following fourteen states (later increased to fifteen): Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, the former USSR, the United Kingdom, the United States, Austria, Czechoslovakia, the Philippines and Sierra Leone. It also profited from the participation, as observers, of several international organisations, including UNIDROIT, The Hague Conference on Private International Law, The International Chamber of Commerce (ICC), the UN Economic Commission for Europe (ECE), the Council for Mutual Economic Assistance (CMEA) and the Organisation of American States (OAS).

The Working Group completed its work based on the 1964 Hague Sales Conventions in nine annual sessions. The two draft conventions on international sales (based on ULIS) and on contract formation (based on ULF) were submitted in 1976 and 1977 respectively. In June 1978 the full Commission completed its review on these drafts and decided to combine them in a single draft convention which would deal both with the formation of the contract (Part II) and with the rights and obligations of parties to such contracts (Part III). To this effect, a Drafting Committee comprising ten representatives was established.[31] The consolidated draft was then transmitted to the United Nations General Assembly which in terms of resolution 33/93 of 16 December 1978 decided to convene an international conference of plenipotentiaries to consider the draft convention.

1.3 The Diplomatic Conference

The United Nations Conference on Contracts for the International Sale of Goods was held in Vienna from 10 March to 11 April 1980. In contrast to the conference which concluded the Hague Sales Laws, the Vienna Conference was attended by representatives of sixty-two states and eight international organisations. This wide representation from all geographical, economic and political sectors of the world community - not only at the Vienna Conference but also during the preparation of the subsequent drafts within UNCITRAL - contributed decisively to the approval of the UNCITRAL Draft Convention of 1978 with relatively few amendments.[32]

The main work was done in two committees, one dealing with the substantive provisions of the uniform law (articles 1-88) and the other with the preparation of the final clauses which govern the steps necessary to bring the convention into force and the content of permissible reservations by adhering states (articles 89-101). At the end of the conference the texts prepared by the committees were considered in a plenary session and voted

---

[31] The Drafting Committee comprised representatives from Chile, Egypt, France, Hungary, India, Japan, Mexico, Nigeria, USSR and the United Kingdom (UNCITRAL Yearbook IX (1978) 13).

[32] Winship n 4 1-15. Similarly Honnold n 12 55. The international organisations represented in Vienna were the World Bank, the Bank for International Settlements, the Central Office for International Railway Transport, the Economic Council for Europe, the European Economic Community, the Hague Conference on Private International Law, UNIDROIT and the ICC.

article by article. The convention as a whole was then submitted to a roll-call vote and was approved unanimously in six equally authentic languages, namely Arabic, Chinese, English, French, Russian and Spanish.

2 Structure of the 1980 Convention

Although the CISG does not formally represent a revision of the two Hague Conventions, it is clearly intended to replace the latter in the regulation of international sale contracts on a world-wide basis. For this reason article 99 expressly provides that states which have adopted ULIS and ULF are expected to denounce them when adhering to the CISG.[33]

The convention is divided into four parts. Part I outlines the CISG's sphere of application and its general provisions, including rules on interpretation, usages and requirements of contractual form. The two basic aspects of the sales transaction are regulated in Part II on formation of the contract, and Part III on the obligations of the seller and the buyer arising from the contract. Part IV deals with the procedure to bring the convention into force and with authorised reservations.

Part II on Formation (articles 14 to 24) includes rules on the certainty required of offers, the effect of communications addressed to the general public, the power to revoke an offer and the requirements for a binding acceptance. Part III (articles 25 to 88) contains rules regarding the seller's obligations with respect to quality of the goods and their freedom from third-party claims, the buyer's obligation to pay for the goods, the allocation of risks and the remedies available in the event of breach of contract.

---

[33] Of the states which had adopted ULIS and ULF, Italy, Germany and the Netherlands have acceded to the CISG. On the other hand, rules of purely regional character may coexist with the convention in terms of article 94(1) which states:

> Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

The Scandinavian Sates, i.e. Denmark, Sweden, Finland and Norway, in ratifying the convention, have made use of the declaration authorised in this article. Honnold *idem* at 595.

Parts II and III are both subjected to the general provisions of Part I but operate independently from each other. In terms of article 92(2), a state can declare that it will not be bound by the rules on contract formation or on the obligations of the parties to the contract.[34]

3 Characteristics and main features

The convention represents an improvement on ULIS and ULF, both in the formal and substantive aspects. The consolidation, in a single text, of the rules concerning the formation of the contract and the obligations of the buyer and the seller has eliminated duplications and uncertainties as to the relationship between provisions belonging to different texts.

A fundamental characteristic of the CISG is the non-mandatory character of its rules.[35] The convention does not interfere with the freedom of sellers and buyers to shape the terms of their agreement. Parties may set aside the uniform rules by inconsistent contract terms, practices or previous courses of dealing. In addition, the provisions of the convention yield to international usages to which the parties may be bound. Under article 9, the parties are not only bound by any usage to which they have agreed and by any practices which they have established between themselves, but also by usages which in international trade are "widely known and regularly observed". The recognition of courses of dealing and usages of trade as part of the law governing the parties' agreement constitutes one of the most dynamic aspects of the convention, allowing the CISG to adapt to changing circumstances and the particular needs of parties engaged in international business, an aspect which, as seen, constitutes one of the essential tenets of the modern *lex mercatoria*.

The drafters of the convention have furthermore attempted to avoid the use of abstract

---

[34] As from 1990, the Scandinavian countries have ratified the convention subject to a declaration not to be bound by Part II of the convention on the formation of the contract. Honnold *idem* at 191.

[35] In terms of article 6 the parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

and ambiguous language by resorting to more analytic formulations and descriptions of a practical nature to express the content of individual rules. Such effort to produce a simple, straightforward language may be seen, e.g. in the replacement of traditional concepts such as "*force majeure*" or "frustration" with a definition, in analytic terms, of cases of "exemption" from liability for non-performance.[36] Similarly, the CISG abandoned any reference to "delivery" as an abstract concept (cf article 19 of ULIS), and replaced it with an indication of the material acts that the seller must effect in order to fulfil his "obligation to deliver the goods".[37] In the area of risk of loss or damage, rules are not complicated by concepts such as "property", but are stated in terms of physical events. For example, risk passes when goods "are handed over to the first carrier" or – where the contract does not involve carriage – when the buyer "takes over" the goods.[38]

The rules on the effects of sale contracts have been considerably simplified. Contrary to the position under ULIS, where the various remedies for breach of contract were laid down separately for each of the different obligations of the seller and the buyer, the CISG adopted a unified approach to the obligations of the parties arising from the contract and, consequently, a unified system of remedies for breach. Under the new law, the full array of remedies for breach of contract apply when either the seller or the buyer "fails to perform any of his obligations".[39] The availability of remedies for breach, therefore, does not depend on formal classifications of types of breach but, rather, on the seriousness of the breach.[40] In terms of article 25 of the convention, a breach is of a fundamental nature if "it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result".

---

[36] Article 79 CISG.

[37] Article 31 CISG.

[38] Articles 67, 69 CISG. These rules are subject to special provisions on the effect of breach of contract in terms of articles 69 and 70.

[39] Articles 45 & 61 CISG.

[40] Honnold n 12 64.

Fundamental breach thus defined is a central concept in the convention's system of remedies. While in all cases of breach performance and damages can be claimed,[41] the existence of a fundamental breach is a pre-requisite for avoidance of the contract by either party[42] and also for the buyer's right to require delivery of substitute goods in case of non-conformity.[43] Other remedies provided for are the seller's right to "cure" any failure to perform his obligations,[44] the right of either party to fix an additional period of time of reasonable length for performance by the other party,[45] and the right of the buyer, in case of non-conformity of the goods, to reduce the price.[46]

4 Scope of application

The scope of application of the Vienna Convention is limited in the following respects: (1) it applies only to international sales; (2) it governs contracts for the sale of goods; (3) it excludes specific issues often encountered in sales transactions; and (4) it recognises the principle of party autonomy, in terms of which the parties to a contract of sale otherwise covered by the convention are free to exclude the application of its provisions.[47]

4.1 Role of the contract

The convention categorically affirms the principle of party autonomy by making all its

---

[41] Articles 46, 62 and 45(2) CISG.

[42] Articles 49(1)(a)(failure by the seller to perform his obligations amounts to fundamental breach), 51(2)(failure by the seller to deliver completely), 64(failure by the buyer to perform his obligations amounts to fundamental breach), 72(1)(anticipatory breach), and 73(1)(failure by either party to perform any obligation in respect of contracts for delivery of goods in instalments).

[43] Article 46(2) CISG.

[44] Article 48 CISG.

[45] Articles 47(1), 49(1)(b), 63(1) and 64(1)(b) CISG.

[46] Article 50 CISG.

[47] E Farnsworth 'The Vienna Convention: History and Scope' 18 *The International Lawyer* (1984) 19.

provisions optional (with the sole exception of article 12 concerning the preservation of the written form in certain circumstances).[48] The parties can, therefore, agree that the rules of the convention shall be excluded by choosing to apply a specified domestic law. Although the convention is silent on this point, there is agreement in the sense that the exclusion can be explicit or implied.[49]

It is also possible to render some provisions of the CISG ineffective without choosing an applicable law. Substantively, any rule of the convention can be altered or rejected by inconsistent provisions agreed between the parties, e.g. by standard contract terms, as long as the requirements for their validity in domestic law are fulfilled.[50] In this way, the convention protects the parties' exercise of their freedom of contract by accentuating the primacy of the contract, which is to be construed in the light of previous courses of dealing and established commercial practices.[51]

In the absence of an express or implied exclusion,[52] however, the provisions of the convention apply automatically, i.e. without any positive "opting in".[53]

---

[48] A Goldstjan 'Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention' in P Sarcevic & P Volken (eds) *International Sale of Goods. Dubrovnik Lectures* Oceana 1986 58. In part IV article 96 authorises a contracting state "whose legislation requires contracts of sale to be concluded in or evidenced by writing" to make a declaration that article 11 (affecting formal requirements) "does not apply where any party has his place of business in that State". Article 12 articulates the effect of a declaration under article 96 in the following terms:

> Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

[49] Nicholas n 13 208; Schlechtriem n 11 35 ("The intent of deleting the word 'implied' was to prevent the courts from being too quick to impute exclusion of the Convention [but] this does not mean that a tacit exclusion is impossible").

[50] Schlechtriem *idem*; P Volken 'The Vienna Convention: Scope, Interpretation and Gap-filling' in Sarcevic n 48 35.

[51] Honnold n 12 47. See also article 8 of the CISG.

[52] See M Bonell 'Parties' Autonomy' in C Bianca & M Bonell *Commentary on the International Sales Law* Giuffré 1987 57.

[53] Schlechtriem notes that the "opting-in" solution proposed by the United Kingdom, in terms of which the CISG would apply only to contracts in which the parties have chosen the convention as the proper law of the contract, was rejected. A demand to include a reservation clause to this effect in the Final Provisions

4.2 International sales

The convention deals only with international contracts for the sale of goods. The limitation of sales rules to international transactions – and the consequent exclusion of purely domestic contracts – was necessary in order to attract adoption of the uniform law on a worldwide basis. In particular, it has been pointed out that an attempt to replace entirely the diverse national sale laws would have been "unrealistic" at this stage of the international legal unification process.[54]

The criterion of internationality is laid down in article 1 of the convention. Although an international transaction is normally determined by the place where either the parties to it or the goods are located, the Vienna Convention refers only to the first aspect, i.e. the place where the places of business of the parties are situated, to define the international character of a sales contract.[55] No other criterion, whether of the nationality of the parties or the intended movement of the goods, is relevant.[56]

The basic rule is that the CISG applies to contracts of sale where both the seller and the buyer have their places of business in different states. It is no longer required, as it was in article 1 of ULIS, that the goods be carried from the territory of one state to another or that the acts constituting the offer and the acceptance be effected in the territories of

---

(as had been done in ULIS) was similarly rejected; n 11 35.

[54] Bonell in Bianca n 52 8 states:

> The principal reason for which the Convention has been limited solely to international transactions rests in the impossibility, at the present time, of agreeing, with respect to sales contracts no less than to other commercial contracts, on uniform rules intended to replace entirely the different national laws. At a universal level, the only realistic approach is that of limiting the attempts at unification to international transactions, leaving States free to continue regulating purely domestic relations according to their own special needs.

[55] L Vékás 'Zum Persönlichen und Räumlichen Anwendungsbereich des UN-Einheitskaufrecht' *Praxis des Internationalen Privat – und Verfahrensrecht* (1987) 342.

[56] Article 1 of the CISG states:

> (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
> (a) when the States are Contracting States; or
> (b) when the rules of private international law lead to the application of the law of a Contracting State.
> (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

different states.[57]

Two alternative restrictions apply to this basic rule. First, the convention requires that both states in which the parties' places of business are situated be contracting states (article 1 paragraph (1)(a)).[58] If a party has more than one place of business, the place of business is that of the closest relationship to the contract and its performance.[59] Secondly, the convention stipulates that it will also apply if the applicable rules of private international law lead to the application of the law of a contracting state (article 1 paragraph (1)(b)). Article 95 permits a contracting state to declare that it will not be bound by this last paragraph.

Given the number of variables - where each party has his place of business, where a forum sits, which state's laws are applicable under the rules of private international law - there are numerous possible cases in which the question of the convention's sphere of application might arise.[60] If the parties to the contract have their places of business - or alternatively, their habitual residence - in contracting states, the CISG is automatically applicable,[61] regardless of any alternative rules of private international

---

[57] Volken n 50 26; also K Siehr 'Der Internationale Anwendungsbereich des UN-Kaufrechts' 52 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* (1988) 590.

[58] Although the term "place of business" is left undefined, neither the mere place of contracting nor the locality where the negotiations have taken place constitute a "place of business". Reference should rather be to a permanent establishment (not, e.g. a warehouse, or the office of an agent of the seller with authority to conclude contracts). On the other hand, commercial management of the enterprise is not necessary, since the convention does not require the place of business to be the main office. See E Jayme 'International Sales Contracts' in Bianca n 52 30; Schlechtriem n 11 43.

[59] Article 10 of the CISG. This question, which had not been solved by ULIS, was examined in Germany, a state which acceded to the Hague Uniform Laws. The *Bundesgerichtshof*, anticipating the Vienna Convention, decided to apply ULIS to a sales contract concluded between an American corporation and a German firm on the ground that the American seller had entered the contract in the Netherlands; Judgment of 2 June 1983, reproduced in 3 *Praxis des Internationalen Privat- und Verfahrensrecht* (1983) 228.

[60] For a detailed analysis of cases involving the application of paragraph 1(b) see Siehr n 57 592 ff; also Winship n 4 1-26 ff.

[61] L Réczei 'The Rules of the Convention Relating to its Field of Application and to its Interpretation' in Problems of Unification of International Sales Law. Colloquium of the International Association of Legal Sciences Potsdam, August 1979 *Digest of Commercial Laws of the World* Oceana 1980 at 64, states that:

> [T]he objective condition is implied in the circumstance that the states of the contracting parties are signatories and not in the transaction of the parties.

law, unless the parties exclude the application of the convention in terms of article 6.[62] The automatic application of the CISG in cases falling under paragraph (1)(a) of article 1 only leads to uncertain results where the dispute is brought before a forum in a non-contracting state, since such state is not bound to apply the convention. The convention, therefore, cannot in this case preclude the application of the private international law rules of the non-contracting forum.[63]

Paragraph (1)(b) of article 1 extends the sphere of application of the convention considerably,[64] in that the rules of private international law (presumably, of the forum state)[65] may direct the application of the convention when, even though the parties have their places of business in different states, the requirement that these states are contracting states is not met. In this case, it would be sufficient that the rules of private international law of the forum point to the law of a contracting state. This might, in the first instance, be the law which has been expressly chosen by the parties,[66] if only one or neither of them belongs to a contracting state, or, in the absence of such choice, the law with which the contract has its closest connection.[67] In the latter case, this may happen when the private international law rules of the forum (a contracting state) point to that state's own law to be applied to a contract in which at least one of the parties is

---

[62] In terms of article 6, parties may opt out of the uniform law completely, either by choosing a particular domestic law, or by allowing the rules of private international law of the forum to determine the proper law of the contract. Schlechtriem n 11 24.

[63] Winship n 4 1-30; Réczei n 61 65.

[64] Volken n 50 29.

[65] Nicholas n 13 205.

[66] See, for example, article 3(1) of the EC Convention on the Law Applicable to Contractual Obligations; article 2 of the 1955 Hague Convention on the Law Applicable to International Sale of Goods and article 7 of the 1986 Hague Convention on the Law Applicable to International Sale of Goods.

[67] In sales contracts this will usually be the law of the state where the seller has his place of business. See, for example, article 4(2) of the EC Convention (the law of the country where the party who is to effect the performance which is characteristic of the contract has his habitual residence), article 3(1) of the 1955 Hague Convention (a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order), and article 8(1) of the 1985 Hague Convention (the law of the state where the seller has his place of business at the time of conclusion of the contract).

from a non-contracting state.[68]

4.3 Sale of goods governed by the convention

Although the convention does not provide a definition of "contract of sale", the statement of the obligations of the seller (to deliver the goods, hand over any documents relating to them and transfer the property in the goods; article 30) and the buyer (to pay the price for the goods and take delivery of them; article 53) imply a conventional definition which does not differ fundamentally from those found in domestic sales laws.[69]

Article 1(3) of the CISG provides that the application of the convention does not depend on whether the parties are considered "civil" or "commercial" under the law of a contracting state. However, the extension of the uniform law to non-commercial sales is restricted by article 2(a) which excludes so-called "consumer sales", i.e. sales of goods bought for personal, family or household use, from the ambit of the convention. The exclusion of consumer sales serves the purpose of avoiding possible conflict between the convention and the mandatory rules of domestic law designed for the protection of consumers, which are generally more favourable to the buyer than the convention. An exception to the exclusion of the CISG in case of consumer sales results from the fact that the "seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for such use". In this case the convention applies.[70]

Although the purpose of the purchase will normally be recognised from the

---

[68] F Enderlein & D Maskow *International Sales Law* Oceana 1992 30.

[69] See e.g. § 2-106 and § 2-301 of the UCC; section 2 of the 1979 United Kingdom Sale of Goods Act; article 1582 of the French Civil Code.

[70] This provision may raise questions concerning the burden of proof with regard to the purpose of the purchase (for personal, household or family use). In accordance with the deliberations at Vienna, it seems that it is the seller who must prove that he neither knew nor ought to have known that the goods were bought for such use, while the buyer bears the burden of proving that the sale is a consumer sale in terms of the convention. See J Honnold *Documentary History of the Uniform Law for International Sales* Kluwer 1989 460; W Khoo 'Exclusions from the Convention' in Bianca n 52 37.

circumstances of the transaction, e.g. retail sale or sale through mail-catalogue, it has been pointed out that some overlapping may occur between the convention and domestic consumer laws. This would be the case, for instance, where the consumer-protection rules do not recognise the exception to the exclusion of the application of the CISG contained in article 2(a), i.e. where the seller cannot recognise the character of the sale.[71] Further overlapping could arise where the goods purchased are intended for occupational and even commercial use, since, in this case, domestic laws for consumer protection may still apply.[72] Where domestic consumer-law rules invalidate provisions of a contract, the application of the uniform law and the domestic provisions may be reconciled by virtue of article 4 of the CISG which excludes questions of validity of the contract from its sphere of application.

Subsequent paragraphs in article 2 exclude certain types of transaction from the ambit of the CISG. In general, these transactions present unique problems which differ from the usual international sale of goods and are, in addition, subject to special mandatory rules in many countries.[73] They are: (b) sales by auction; (c) on execution or otherwise by authority of law, i.e. forced sales resulting from the exercise of judicial power; (d) sale of stocks, shares, investment securities, negotiable instruments or money;[74] (e) of ships, vessels, hovercraft or aircraft; and (f) of electricity.

---

[71] Schlechtriem n 11 28. In this case, the author is of the opinion that the law of the contracting state should decide the priority between the uniform law and the domestic consumer-protection rules. In particular, "if domestic law allows the conflicting consumer-protection provisions to remain in force and take precedence over the application of the Uniform Law for International Sales, this must be accepted, even if it means that the state thereby violates one of the obligations it made by ratifying the Convention".

[72] Schlechtriem makes special mention of a German law which regulates instalment purchases *(Abzahlungsgesetz)*. These rules could apply, for instance, to the purchase of an office machine by a lawyer, or building materials by a contractor, or a beer delivery by a restaurant owner, if the latter two are not registered merchants. *Idem*.

[73] Khoo in Bianca n 70 39; Schlechtriem *idem* at 29.

[74] The exception for shares, investment securities, negotiable instruments and money takes into consideration that international securities and currency transactions are governed by their own rules which are often mandatory. The reference to "negotiable instruments" however, is not intended to exclude the application of the convention to documentary sales. Bills of lading and other documents controlling the delivery of goods are therefore governed by the convention; Secretariat Commentary on article 2 of the 1978 Draft in Honnold n 70 406.

Article 3 deals with the question of the distinction between contracts of sale and contracts for services. A contract in which one party undertakes to supply goods to be manufactured (e.g. machinery) or produced (e.g. agricultural products), is a sale unless the other party supplies a "substantial part" of the materials involved (article 3(1)).[75] The second paragraph of article 3 further excludes contracts which may require the delivery of goods, but are primarily contracts for labour or services, such as construction contracts.[76] In this case, the convention refers to contracts in which "the preponderant part" of the obligations of the party who furnishes the goods consists in the supply of labour or other services.[77]

Apart from the problems of interpretation arising from the use in the same article of two different expressions and the determination of what constitutes "substantial" and "preponderant", commentators are uncertain as to the application of the convention to contracts for the setting up of industrial plants and other combined contracts.[78] Since such transactions often encompass two - closely related but nevertheless different - aspects, i.e. sale of goods and supply of services, a further problem lies in determining which set of rules - the convention or domestic law - ought to govern the transaction

---

[75] If the party ordering the goods supplies a substantial part of the materials, the contract is more akin to a contract for the supply of services or labour, which is governed by domestic law. The distinction, therefore, ultimately depends on whether the materials supplied by the buyer may be considered "substantial". The use of the rather vague term "substantial part" creates flexibility but also uncertainty in this regard. Enderlein n 68 36 states that the term "substantial part" should be defined using a "criteria of value" so that:

> [w]hen the relevant proportional value is to be calculated, a complementary criterion could be to assess the importance of supplies of parts of the goods for the purpose of manufacture. Only if those are substantial for determining, for instance, the technical parameters of a machine to be delivered, a portion of less than one half of the value could be considered sufficient to exclude the Convention. In this case, it should not be substantially lower, otherwise it should be above that portion.

[76] The Secretariat Commentary on the 1978 Draft refers to the example where the seller agrees to sell machinery and undertakes to set it up in a plant in working conditions or to supervise its installation. If the preponderant part of the obligation of the seller consists in the supply of labour or other services, the contract is not subject to the provisions of the convention. See Honnold n 70 406.

[77] Article 3 reads:

> (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
> (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

[78] Nicholas n 13 207; Khoo in Bianca n 70 43; Enderlein n 68 37 with further references.

as a whole.[79] Alternatively, the parties may wish to treat the delivery contract separately from the provision of services, even where the domestic law regards such combination as a single transaction, and thus submit the sale contract to the CISG, on application of their party autonomy in terms of article 6.[80]

4.4 Excluded matters: validity, passing of property and product liability claims

Article 4 limits the convention's sphere of application to the rules on formation of the contract and the rights and obligations of the seller and the buyer arising from it. This article leaves to domestic law the regulation of (a) the validity of the contract or any of its provisions or of any usage; and (b) the effect of the contract on the transfer of title to the goods sold, as long as the convention's own rules do not apply.

The exclusion of validity issues from the scope of the convention reflects the intention of the drafters to preserve the role of domestic laws in addressing protective interests in their respective jurisdictions. The provision constitutes a compromise which enables contracting states to enforce certain limitations on party autonomy.[81] However, the convention does not provide any guidance as to the definition of the term "validity".[82]

---

[79] Khoo in Bianca ("In the absence of a clear indication in the Convention, national courts may well adopt different answers to this problem") *idem* at 43; Schlechtriem ("Domestic law should decide whether these two contracts can and must be distinguished") n 11 32; but cf Enderlein ("The situation in respect of the application of the CISG is to be decided pursuant to the CISG and not to applicable domestic law, since the latter is applicable only to the extent to which the former is unable to apply") n 68 38.

[80] Furthermore, article 6 permits the parties to modify article 3(2) in such a way that, although the obligation to provide services is the "preponderant part", the whole contract is subject to the uniform law. Schlechtriem *idem* at 32.

[81] Bonell in Bianca n 52 60 ("[Contractual terms may be] stricken because of inconsistency with the mandatory rules of the law governing the validity of the contract"); B Audit 'The Vienna Sales Convention and the *Lex Mercatoria*' in T Carbonneau (ed) *Lex Mercatoria and Arbitration* Dobbs Ferry 1990 156 ("Such rules can preempt the provisions of the Convention and prevail over them").

[82] C Reitz 'Validity of Contracts Under the United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980 and Swiss Law' 20 *Vanderbilt Journal of Transnational Law* (1987) 640 (analyses the question of error or mistake in the light of the CISG and Swiss law). The records of the 1964 uniform laws indicate that the issues contemplated under "validity" were the capacity of the parties, the existence and defects of consent and municipal regulations inspired in public policy or enacted for the purpose of protecting certain contractual parties. See H Hartnell 'Rousing the Sleeping Dog: The Validity

This raises difficult questions, such as how a court is to ascertain which issues are validity issues and to what extent applying non-uniform domestic rules of validity to contracts for the international sale of goods adversely affects the CISG's potential for achieving the unification goal.[83]

Unlike ULIS, which excluded mandatory provisions of domestic law,[84] the CISG does not refer expressly to mandatory rules.[85] Instead of resolving the question of the relationship between the convention and mandatory rules of domestic law, the drafters of the CISG avoided the treatment of this issue by limiting the convention's scope to "transactions and issues which, within the various domestic laws, are traditionally

---

Exception to the Convention on Contracts for the International Sale of Goods' 18 *Yale Journal of International Law* (1993) 25 ff (deals extensively with the legislative history of article 4 of the CISG).

[83] P Winship 'Commentary on Professor Kastely's Rhetorical Analysis' 8 *Northwestern Journal of International Law and Business* (1988) at 637 states:

> Despite this lack of controversy [at the UNCITRAL deliberations on the exclusion of validity issues] Article 4(a) has the potential for mischief. The very reason for excluding issues of validity – the differing and strongly felt national traditions – suggests that judges and arbitrators will be tempted to enforce domestic rules on validity: either of the forum, or of the state whose laws would apply by virtue of the rules of private international law.

[84] In a provision similar to article 4 of the CISG, article 8 of ULIS provides that:

> The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage.

In addition, articles 4 and 5(2) of ULIS concern the relationship between the uniform law and the "mandatory" rules of domestic law. Article 4 of ULIS provides that the provisions of the uniform law shall also apply where it has been chosen as the law of the contract by the parties, whether or not [they have their places of business different states and whether or not such states are contracting states], to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the uniform law. Article 5(2) of ULIS preserves the superior role of domestic rules protecting consumers in certain credit transactions by providing that the provisions of the uniform law "shall not affect the application of any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by instalments".

[85] "Mandatory rules" are described, e.g. in article 3(3) of the EC Convention as "rules of law of a country which cannot be derogated from by contract". Generally, the term refers to special protective rules (e.g. protection of the weaker party to a contract such as the consumer, the employee, the insured, etc), other market regulatory legislation (e.g. exchange control regulations, restrictions on the import and export of certain goods, laws for the protection of the cultural heritage or of vital economic interests, trade embargoes and antitrust legislation) or to any rule of law which restricts party autonomy (e.g. capacity, consent, error and fraud). On mandatory rules in general see O Lando 'The Conflict of Laws of Contract' 189 *Hague Recueil* (Collected Courses of the Hague Academy of International Law) (1984) 394 ff.

governed by provisions of a non-mandatory character".[86] Potential conflicts between the convention and domestic law were only addressed through the express exclusion of consumer sales and other types of contract (article 2), validity and property issues (article 4) and liability for death and personal injury (article 5)[87] from the CISG's sphere. On the other hand, the provision excluding validity from the scope of the uniform law was retained during the UNCITRAL Working Group deliberations despite proposals for its deletion, on the ground that it "served the purpose of preventing the Convention from overruling domestic law relating to the validity of contracts".[88]

It is clear from the legislative history of article 4 of the CISG that the intention of the drafters was to make sure that the convention neither disturbed deeply engrained notions of public policy, such as, e.g. the invalidity of contracts for the sale of illegal drugs, or contracts entered into by minors or incompetent persons, nor tried to determine what public policy should entail for all nations.[89] A consensus exists in the sense that issues such as contractual capacity, defects of consent and illegality are, generally, outside the scope of the convention.[90] The same may be said of market regulatory legislation and other rules of public law inspired by public policy such as certain trade regulations, antitrust laws and product liability rules, which would constitute mandatory rules in an international sense, and, thus, be applicable to transactions which transcend the

---

[86] Bonell in Bianca n 52 47. The UNCITRAL Working Group noted that:

> [T]he underlying problem was exceedingly difficult. Different legal systems follow differing approaches in deciding what rules are mandatory or imperative, and these concepts have no generally understood meaning. [While] a general exception for local mandatory rules would undermine the uniformity of the law, it was recalled that at the Hague Conference many felt that the present solution [articles 4 & 5(2) of ULIS] was not wholly satisfactory.

Honnold n 70 25.

[87] This article amplifies the general rule in article 4 that the convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer. It excludes death or personal injury caused by the goods to any person, including the buyer. However, it does not exclude claims for damage to property. Therefore, semi-finished products ruined by a defective machine and raw materials wasted because they were combined with unsuitable materials would probably be subjected to the convention's rules. According to Schlechtriem, damages in those circumstances should be governed by the convention and compensated in conformity with the provisions of article 74 of the CISG, as long as they arise from a contractual situation; n 11 35.

[88] See Honnold n 70 243.

[89] B Crawford 'Drafting Considerations under the 1980 United Nations Convention on Contracts for the International Sale of Goods' 8 *Journal of Law and Commerce* (1988) 191.

[90] See Schlechtriem n 11 32; Winship n 4 1-37.

territorial borders of a particular state.[91]

However, because article 4 contains a reference to domestic law to govern issues of validity "except as otherwise expressly provided in this Convention", the question remains whether a particular issue is one of "validity" (excluded from the uniform law) or one which is expressly provided for in the convention.[92] In other words, whether the term "validity" should be interpreted by looking at the convention's own provisions or from the point of view of domestic law. In this sense, the deliberate omission of a reference to mandatory rules in the CISG, read together with the provision in article 7(1), which urges courts to reach beyond the domestic legal system with which they are familiar in interpreting the convention,[93] has led some scholars to argue that the reference of the CISG to domestic law in the context of article 4 is more limited than a first glance at this provision might suggest. Accordingly, it is submitted that the convention's rules may, in certain cases, displace domestic rules of validity, i.e. mandatory rules of domestic law, by implication. In particular, the view is taken that article 7(1) requires an "autonomous" interpretation of the convention, i.e. in the context of the convention itself and not by referring to the meaning traditionally attached to contractual terms within a particular domestic law.[94] Enderlein, for instance, has argued that the terms which describe the substantive scope of application of the convention have to be identified under the CISG and not under domestic law or other conventions.[95] It is thought that the unifying purpose of the uniform law would not be achieved if domestic law governed an issue that

---

[91] Hartnell n 82 58. See also Enderlein n 68 43 ("In such case, each State will apply his own domestic rules without invoking conflict-of-law rules").

[92] Nicholas n 13 207.

[93] Article 7 states:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

[94] Bonell in Bianca n 52 72 ("Tribunals should avoid relying on the rules and techniques traditionally followed in interpreting ordinary domestic legislation").

[95] Enderlein n 68 40 ("It is sufficient that the CISG contains other options to settle the problem").

is addressed in its provisions.[96] Honnold believes that "the crucial question is whether the domestic rule is invoked by the same operative facts that invoke the rules of the convention".[97] If so, the convention would displace the otherwise applicable provisions of domestic law.

An example of this is the issue of error regarding the quality of the goods sold. In Honnold's view, it should be governed exclusively by the convention, on the ground that the CISG both addresses whether the quality of the goods conforms to the contract (article 35) and provides for appropriate remedies to the buyer in case of non-conformity of the goods.[98] Similarly, Schlechtriem stresses that, in view of article 4, domestic law would regulate questions concerning the validity of a contract, but only to the extent that "the convention does not include express provisions to the contrary".[99] Concurring with Honnold, he states that domestic laws which accord legal recourse in situations where a party errs about the goods to be delivered or the solvency of the other party would not apply under the convention because these problems are specifically and conclusively regulated by the provisions of the CISG on conformity of the goods and rules on anticipatory breach.[100] With regard to less definite concepts such as "unconscionability", for instance, he suggests that a contract clause that limits recoverable damages to foreseeable losses should be valid because of the damage principles of the convention (articles 74 and 76), even if domestic law would declare such clauses unconscionable.[101]

---

[96] Honnold n 12 317.

[97] *Idem* 115.

[98] *Idem* 317. Conversely, domestic law should govern aspects not dealt with in the convention, such as the prohibition of sale of a particular product or the possibility by one party to revoke a contract that such party concluded unaware of the wilful deception of the other party.

[99] In this author's interpretation, this should not be taken to mean only those provisions of the convention that expressly indicate a deviation from domestic law or the validity of an obligation despite the domestic prohibition. The author illustrates this with the situation under article 8 of ULIS (similar to article 4 of the CISG), in terms of which "the general view was that if the subject of the sale was non-existent at the time the contract was formed, the breach-of-contract provisions of the Uniform Law for International Sales would apply, and not domestic provisions which would nullify the contract, such as BGB [German Civil Code] § 306"; n 11 33.

[100] Articles 35 and 71 of the CISG.

[101] Schlechtriem n 11 33 n 83b.

Writers have expressed concern over a too wide interpretation of the exclusion contained in article 4.[102] In particular, it is feared that the interpretation of issues of validity from the point of view of domestic law could lead to a situation where all mandatory rules of a state are seen as raising questions of "validity" of the contract. Since an important function of the CISG is to reduce the need to resort to private international law rules, such view would unduly restrict the potential development of a uniform body of law that can adapt to changing practices and meet the needs of modern international sale transactions.[103]

4.5 Interpretation of the convention

Given the need to promote the greatest possible uniformity in the application of the convention, it is clear that the creation of internationally uniform legal rules to govern aspects included in the convention would be seriously compromised if these rules were to be interpreted differently within the different contracting states.[104]

The CISG includes special rules of interpretation in article 7.[105] In the light of its legislative history, this article may be divided into three different provisions: (1) paragraph 1, first part, where the basic criteria for the interpretation of the convention are laid down; (2) paragraph 1, second part, referring to the observance of good faith in international trade; and (3) paragraph 2, which deals with the procedure to be observed in case of gaps in the convention.

---

[102] Winship describes article 4 as a "potential black hole removing issues from the Convention's universe" (n 83 636) arguing that it is "potentially, the most troublesome [provision of the convention]" (n 4 1-37); similarly Audit n 81 156 refers to article 4 as "a roadblock" to the unification of sales law.

[103] The Secretariat Commentary on the 1978 Draft states that the convention's three major purposes are (1) to reduce the search for a forum with the most favourable law; (2) to reduce the necessity of resorting to rules of private international law; and (3) to provide a modern law of sales appropriate for transactions of an international character. See Honnold n 70 405.

[104] Bonell n 7 879.

[105] See text of article 7 *supra* n 93.

The convention expressly directs judges and arbitrators applying the convention to have regard to its "international character" and to the "need to promote uniformity in its application". Since the convention, in terms of article 1(b), applies by virtue of the rules of private international law pointing to the law of a contracting state, it was considered necessary to lay down such an interpretive rule to indicate that the convention should be interpreted in an autonomous manner, i.e in the context of the convention itself.[106]

To have regard to the international character of the convention means, above all, to avoid reliance on national legal constructions and terms or, as one commentator has stated, "a natural tendency to read an international text through the lenses of domestic law".[107] To this effect, an interpretation based on the literal and grammatical meaning of the text should be rejected. Instead, courts should adopt a liberal approach and consider, wherever possible, the underlying purposes and policies of individual provisions as well as of the convention as a whole.[108] In particular, reference should be made to the legislative history of the convention, which includes the acts and proceedings of the Vienna Conference and the summary records of the previous deliberations within UNCITRAL, foreign judicial decisions and scholarly writings.[109] An additional element

---

[106] J Barbic 'Uniform Law on the International Sale of Goods, Uniform Law on the Formation of Contracts for the International Sale of Goods (1964) and United Nations Convention on Contracts for the International Sale of Goods (1980) in Voskuil n 17 9; G Eörsi 'General Provisions' in Galston n 4 2-6 states:

> Clearly, this [the material for the interpretation of the convention] should, unless CISG expressly provides otherwise, be taken from the Convention itself. It should not be taken from external sources such as the law of the forum or the law applicable under a conflict of laws rule. CISG is not a law complementary to national laws but is meant to be an exhaustive regulation.

[107] J Honnold 'The Sales Convention in Action - Uniform International Words: Uniform Application?' 8 *Journal of Law and Commerce* (1988) 208:

> Years of professional training and practice cut deep grooves. How can we avoid the tendency to think that the words we see are merely trying, in their awkward way, to state the domestic rule we know so well?

[108] M Bonell 'Interpretation of the Convention' in Bianca n 52 73 with further references. For English case law on the interpretation of the 1956 Geneva Convention on International Carriage by Road see R Munday 'The Uniform Interpretation of International Conventions' 27 *International and Comparative Law Quarterly* (1978) 450.

[109] UNCITRAL Working Group Second Session 1970 in Honnold n 70 68:

> The formula adopted ... expresses two considerations ... (1) the international character of the law, and (2) the need for uniform interpretation and application. These considerations were emphasised since some courts might otherwise give local meanings to the language of the Law - an approach that would defeat the law's objective to produce uniformity. It was also suggested that the provision would contribute to uniformity by encouraging recourse to foreign materials, in the form of studies and court decisions, in constructing the Law. This language might also help courts in some countries to make reference to *travaux préparatoires* and other materials on the legislative history of the Law which they may not be otherwise able to do.

Similarly Eörsi n 106 2-6 ("The legislative history may also give some guidance, as where a principle in ULIS

is the existence of six equally authentic versions of the convention, which permits the interpreter to apply a method of comparative interpretation and resort to texts in other languages in case of ambiguities.

Article 7(1) also requires in the interpretation of the convention "the observance of good faith in international trade". The inclusion in the convention of a provision creating an obligation of good faith was the occasion for an extensive debate, not only between representatives from centrally planned and free-market economies, but also between common law and civil law delegates and even among representatives who shared a common cultural and legal background. Opinions ranged from the idea that good faith should be viewed as a fundamental obligation arising from the contract to the view that it should not be expressly mentioned in any provision.[110]

One of the main objections to the inclusion in the convention of a provision imposing on the parties a general obligation to act in good faith was that this concept was considered too abstract and vague. Although good faith and fair dealing were highly desirable principles in international commerce, it was thought that their express inclusion in the provisions of the convention would inevitably lead to divergent interpretations by national courts.[111]

The wide connotations of the principle of good faith have been characterised thus:

> At the very least, good faith is an interpretative tool that precludes a party from unduly rigorous insistence on the right to terminate after a minor deviation in performance by the other. Viewed somewhat more expansively, it imports affirmative obligations on the parties to communicate during performance and to cooperate in the cure of defects and the modification of obligations in unforeseen circumstances. It precludes a perfect tender

---

was deliberately rejected in the course of the preparation of the Convention, such as *ipso facto* avoidance or the ULIS concept of delivery"; Bonell in Bianca n 108 90 ("Possible doubts about the precise meaning and effect of a single provision may well be resolved by reference to the *travaux préparatoires*").

[110] For debate on the good faith provision see Summary Records of the 5th Meeting of the First Committee, Diplomatic Conference (Doc C (4) OR 258) in Honnold n 10 478 ff.

[111] Professor Farnsworth, a US delegate to the Vienna Conference, pointed out that there was some degree of uncertainty as to how the concept of good faith would be interpreted in the international context. Because of this, he felt that such a provision would be "uncertain and dangerous". Honnold n 70 479.

approach to interpretation of the seller's obligation of delivery and does not treat minor deviations by either side as an event that terminates the contract.[112]

In continental and socialist systems the concept corresponds to this broad approach,[113] although its application in practice may vary from country to country.[114] In particular, the notion of good faith is not limited to the performance of contracts, but extends to the process of negotiations prior to the formation of the agreement. This contrasts with the considerably more limited scope of good faith in the common law based systems, where the principle is applied to the performance of the contract, but not to its formation stage.[115]

In the course of the revision of the uniform law on formation of contracts for the international sale of goods, the Working Group of UNCITRAL adopted at its ninth session in 1978 a new provision, not contained in the ULF, in terms of which "in the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith".[116] The inclusion of this article generated a heated debate and a number of possible solutions were put forward to resolve differences of opinion. The proposal which finally emerged as a realistic compromise solution, was to incorporate the principle of the observance of good faith into the article on the

---

[112] Rosett quoted in A Garro 'Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods' 23 *The International Lawyer* (1989) 466.

[113] See, for example, the general good faith clause in § 242 of the German Civil Code; Schlechtriem n 11 39.

[114] In this regard, Bonell recalls "the impressive amount of case law" developed in Germany in application of § 242 of the Civil Code, concerning such issues as *culpa in contrahendo*, abuse of rights, hardship and unconscionable contract terms, and draws a comparison with the relatively modest role which similar provisions have played in the judicial practice of other countries; Bonell in Bianca n 108 86.

[115] The UCC provides in § 1-203 that "every contract or duty within this Act imposes an obligation of good faith in its performance and enforcement". Commenting on the divergence in this regard between civil and common law systems, Farnsworth states that "there is no body of law in common law countries that imposes an obligation of good faith in the negotiating process before the contract is made". E Farnsworth 'Problems of the Unification of Sales Law from the Standpoint of the Common Law Countries' in Problems of Unification n 61 19.

[116] Bonell in Bianca n 108 68.

interpretation and application of the provisions of the convention.[117] This is also the solution which prevailed in article 7(1) of the CISG.

This provision, which represents a compromise between those who would have preferred a provision imposing the duty to act in good faith directly on the parties, and those who were opposed to any express reference to the principle of good faith in the convention, has been analysed by several scholars.[118] There are those who, based particularly on the legislative history of the article, interpret this provision in a narrow way. In terms of this view, good faith is strictly limited to the interpretation of the convention generally, but does not impose an additional obligation on the parties to act in good faith.[119] On the other hand, there are those who see good faith as a general principle that must be regarded in interpreting and extending the convention's provisions.[120] This viewpoint accords with the Secretariat Commentary to article 6 of the 1978 UNCITRAL Draft - which has the same meaning as article 7 of the official text - but does not follow from the legislative history of the provision, which suggests a limited reading of the role of

---

[117] Eörsi n 106 2-7 describes this process thus:

> The situation was aggravated by a proposal of the GRD to the effect that, if one party violates the principle of fair dealing, the other party may demand reimbursement of his costs. After lengthy discussions, a proposal of an *ad hoc* Working party recommended that as a compromise good faith could survive but should be shifted to the provisions on interpretation of the Convention, thus consigning it to a ghetto and giving it a honourable burial.

[118] A Kritzer *Guide to Practical Applications of the U.N. Convention on Contracts for the International Sale of Goods* Kluwer 1989 112.

[119] Farnsworth n 115 19 represents this view. He comments with regard to article 7:

> It may be hoped that these familiar and seemingly harmless words may be of some use without being thought to impose on the parties in the formation of contracts a set of civil law obligations that are unknown to the common law tradition.

See also Winship n 83 633. The same author, however, stated in a different article that "a persuasive case can be made, for example, that an obligation to act reasonably and in good faith is mandated by article 7(2)"; P Winship 'Private International Law and the U.N. Sales Convention' 21 *Cornell International Law Journal* (1988) 529. The article on good faith has been labelled "a particularly telling illustration... of the ineffectual results of patchwork compromise [which] are apparent in some of the Convention's central provisions" T Carbonneau & M Firestone 'Transnational Law-making: Assessing the Impact of the Vienna Convention and the Viability of Arbitral Adjudication' 1 *Journal of International Dispute Resolution* (1986) 74.

[120] Bonell in Bianca n at 85; A Kastely 'Unification and Community : A Rhetorical Analysis of the United Nations Sales Convention' 8 *Northwestern Journal of International Law and Business* (1988) 597.

good faith.[121] Advocates of this wide approach point to the many applications of good faith throughout the text. Kastely, for instance, observes that good faith is reflected, in particular, in the commitment of the convention to honest communication between the parties and in provisions requiring the parties to act with some concern for each other's interests. Good examples are the provisions on preservation of goods and the mitigation of damages.[122] The principle of good faith may also be recognised in other substantive provisions such as those dealing with the non-revocability of certain offers,[123] regarding errors in transmission,[124] performance of the contract[125] and the exercise of rights in the event of breach.[126] A variation of this viewpoint is represented by scholars who, while deploring the absence of a general clause to this effect, still maintain that good faith may play an active role in spite of its location in the convention.[127]

---

[121] Winship n 83 631. The Secretariat Commentary, after citing several provisions which reflect a duty for the parties to act in good faith, concludes by saying that:

> The principle of good faith is, however, broader than these examples and applies to all aspects of the interpretation and application of the provisions of this Convention.

See Honnold n 70 408.

[122] Arts 85-88 of the CISG. If the buyer has wrongfully failed to take delivery or the seller has made a defective delivery, the party in possession of the goods is obliged to preserve them for the benefit of the other party (art 85). This duty may include arranging for storage or resale of the goods (storage costs and other expenses can be recovered from the breaching party) (arts 85-88). If the person in charge does resell the goods, he must account to the other party for the proceeds (art 88(3)). Article 77 provides that a party injured by the other party's breach must take reasonable steps to mitigate damages.

[123] See article 16(2) of the CISG.

[124] The recipient of an erroneously transmitted acceptance, notice of defect, or other such communication is obliged either to notify the other party of the error or to treat it as effective (arts 21(2), 27).

[125] The seller must consider the interests of the buyer when arranging for carriage and insurance (arts 32(1) & 32(2)) or when specifying the goods to be sold (art 32(3)). In exercising a right to cure a defect in the goods delivered or in the documents relating to the sale, the seller must consider any inconvenience or extra expense to the buyer (arts 34, 37, 48). Similarly, a buyer must consider the interests of the seller by promptly inspecting the goods and giving notice of any defect (arts 38, 39); etc.

[126] In the system of remedies adopted by the convention, one party may not avoid the contract on account of the other party's breach unless the breach was fundamental, i.e. so serious as to substantially deprive the former of the expected benefit of the contract (art 25). The requirement of good faith also applies in circumstances in which the right to declare a contract avoided is lost (arts 49(2), 64(2), 82).

[127] U Huber 'Der Uncitral-Entwurf eines Übereinkommens über Internationale Warenkaufverträge' 43 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* (1979) 432. Schlechtriem n 11 39 for instance, states:

> The German jurist may regret this rejection of a "good faith rule" corresponding to § 242 of the German Civil Code in its present day meaning. However, the function of such a general clause can probably be fulfilled by the rule that the parties must conduct themselves according to the standard of a "reasonable person" which is expressly described in a number of provisions and, therefore, according to Article 7(2), must be regarded as a

As has been observed by Honnold, a party who, for instance, fixes an additional period for performance by the other in terms of articles 47 or 63 may not, in good faith, refuse to accept the performance he requested.[128] Similarly, a delay in compelling specific performance or in avoiding the contract after a market change constitute situations which would permit a party to speculate at the other's expense, a result that may be inconsistent with the convention's provisions on remedies construed in the light of the principle of good faith.[129] Although scholarship and judicial doctrine have still to develop a meaning for the application of "good faith principles" to issues that arise in international trade, it is clear that the reference in the convention to the aim of promoting "uniformity in its application" precludes the use of purely local definitions and concepts to construe an international text such as the CISG.[130]

Assuming that the provisions of the uniform law are themselves an expression of good faith, the "general principles on which the convention is based" - referred to in paragraph 2 of article 7 as gap-filling devices - must necessarily be construed as manifestations of this principle. When applying the convention to an agreement worded in an ambiguous manner, therefore, its provisions have to be interpreted in such a way that the conduct prescribed reflects good faith, so that any deviating conduct must be

---

general principle of the Convention.

Similarly, Eörsi n 106 2-8 thinks that the interpretation of the convention may lead to application of the good faith clause. He states:

> It might be argued that in such cases it was not the Convention which was interpreted but the contract. In my humble opinion, however, interpretation of the two cannot be separated since the Convention is necessarily interpreted by the parties also; after all, the Convention constitutes the law of the parties insofar as they do not make use of Article 6 on freedom of contract.

[128] In terms of article 47, in case of non-performance, the buyer may fix an additional period of time for performance by the seller of his obligations. During this period, the buyer may not resort to any remedy for breach of contract. Article 63 contains a similar provision in case of non-performance by the buyer.

[129] Honnold n 12 147.

[130] *Idem*. On application of articles 9(1), 38 and 39 of ULIS, A German court held that, if over previous transactions between the parties a practice has grown up of the buyer being entitled to give the seller notice of defects in the goods even after a certain period of time following delivery, the principle of good faith prevents the seller from relying in a subsequent transaction, in that articles 38 and 39 of ULIS require the buyer to examine the goods "promptly" and to notify a lack of conformity of the goods "promptly" after he has discovered it or ought to have discovered it. *LG Wuppertal* 8 Dec 1981 reported in Revue de Droit Uniforme/Uniform Law Review 1985 546.

qualified as unlawful.[131] In the view of Enderlein, this would mean, for example, that unfair clauses be interpreted in favour of the disadvantaged party.[132]

Paragraph 2 of article 7 refers to general principles of law as a means for filling gaps in the convention. It states that "questions concerning matters governed by this Convention which are not expressly settled in it" should be settled "in conformity with the general principles on which the Convention is based".[133] In the absence of such general principles, the interpreter may resort to "the law applicable by virtue of the rules of private international law".

As far as possible, gaps in the convention should be filled, therefore, from within its own provisions. Bonell suggests that there are two complementary methods for gap-filling allowed under article 7(2). First, an analogical application of specific provisions of the convention, and secondly, a consideration of the general principles underlying the convention as a whole.[134]

The analogical application of specific provisions requires examination of the provisions of the convention dealing with similar cases.[135] If the cases expressly governed by the

---

[131] Enderlein n 68 57; however, "a contract with clear wording cannot be modified in this way".

[132] *Idem*.

[133] Referring to general principles of law as a gap-filling device is a familiar technique in civil law countries. Many Civil Codes (e.g. those from Austria, Italy, Spain, Argentina and Switzerland) contain such provisions. On the contrary, common law countries such as Australia, England and the United States have traditionally filled statutory gaps by referring to the general principles that may be found in the appropriate case law. More recently, a number of common law countries have been filling gaps by giving effect to the purpose and object underlying a statute. In the United States, moreover, the Uniform Commercial Code has adopted both approaches: the reference in § 1-103 to the "principles of law and equity" has been interpreted by many American authors as an application of the traditional common law approach, while § 1-102, which stipulates that the law "be liberally construed and applied to promote its underlying purposes and policies" is seen as an endorsement of the civil law approach. See I Dore & J Defranco 'A Comparison of the Non-substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code' 23 *Harvard International Law Journal* (1982) 63-64.

[134] Bonell in Bianca n 108 78.

[135] Bonell *idem* illustrates:

> For instance, article 49(1)(b) provides that, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with article 47(1) or declares that he will not deliver within the period so fixed, the buyer may declare the contract terminated even if the seller's failure to perform does not amount

provision and the case in question are so analogous that "it would be inherently unjust not to adopt the same solution for them", the gap should be filled by applying the principle of that provision.[136]

If the gap is unable to be filled by analogical application of specific provisions, resort may be had to the broader use of general principles, which may be expressly stated in the convention or may be extracted from provisions dealing with specific issues.[137] General principles evidenced by express reference in the convention include, e.g. good faith (article 7(1)), party autonomy (article 6), the principle that the agreement between the parties is not subject to any formal requirement (articles 11 and 29(1)), the principle according to which any notice or other kind of communication made after the conclusion of the agreement becomes effective on dispatch (article 27) and the rule that delay in payment creates an obligation to pay interest on the sum in arrears (article 78).

Other principles may be extracted from the provisions of the convention dealing with particular issues. The conduct of a "reasonable person" is relevant in several contexts throughout the uniform law, (e.g. articles 8(2) and 25)) in that reasonable conduct is expected from the contracting parties or from a potential contracting party (articles 16(2)(b) and 35(2)(b)). Similarly, article 44 permits a "reasonable excuse" for failure to give notice of non-conformity, while article 79 mentions conduct which "could not reasonably be expected".[138] Other examples of formulations which are important in this

---

to a fundamental breach of contract. Nothing is said with respect to other cases of non-performance, e.g. delivery of goods which do not conform to the contract or are not free from rights of a third party. Yet any extension of the rules established by Article 49(1)(b) to these latter cases would be arbitrary, because there are objective reasons for limiting the exception from the general rule of Article 49(1)(a) to the case of non-delivery only.

[136] *Idem*.

[137] *Idem* ("To this effect, the particular rules they establish must be analysed in order to see whether they can be considered as an expression of a more general principle, as such capable of being applied also to cases different from those specifically regulated") at 80; Similarly Schlechtriem n 11 58 ("The authoritative principles can be inferred from the individual rules themselves and their systematic context" and Honnold n 12 155 ("[Article 7(2) requires that] general principles must be moored to premises that underlie specific provisions of the Convention").

[138] Bonell n 108 81 ("These references demonstrate that under the convention, the reasonableness test constitutes a general criterion for evaluating the parties' behaviour to which the interpreter can resort in the absence of any specific regulation, as long as the issue falls under the sphere of application of the convention").

context are (a) the reference to comparable circumstances (article 55) and to a reasonable time for performance (article 63(1)), which declare normal commercial conduct in international trade as binding on the parties,[139] (b) the obligation of the parties to co-operate in securing the performance of the contract and to mitigate the loss resulting from a breach of contract (articles 37, 48(1), 77 and 88 *et seq*) and (c) the so-called "predictability of effects" in assessing the legal consequences of nonconformity or failure to perform by one party (articles 25, 35(2)(b), 42(1)(a) and 74).

[139] Enderlein n 68 59.

CHAPTER 4
TRADE USAGES IN THE CISG

1 Trade usages as tools to facilitate agreement

Parties to international sale transactions quite often do not provide for detailed regulation of specific aspects of their arrangement, such as the mode of delivery, the allocation of risk, the mode of payment and many others. Instead, they refer to usages in the widest sense, i.e. spontaneous behaviour which develops into generalised practice in the particular trade or country, or, more generally, to the various formulations of the many agencies and organisations which are active in international trade. A set of rules drafted and adopted by a restricted group of persons may develop into usages of a whole trade sector, through their voluntary and repeated use by a broad range of businessmen. As has been seen in chapter 2, domestic laws grant varying degrees of normative effect to the repeated use of contract forms and contract terms, and to courses of dealing established between the parties. Despite the differences in doctrinal background, it seems that the primary role of the courts is to test the application of a particular usage against the requirement of reasonableness to fulfil particular needs as they occur in the professions, in designated ports and in particular markets.[1]

On the international level, the effect which should be given to usages - understood as rules developed more or less spontaneously in trade practice - has been a highly controversial issue in the context of uniform legislation on international sales contracts.[2] Two issues in particular created considerable difficulty during the preparation of the CISG, namely, whether trade usages may have normative effect and apply independently from the parties' intention or knowledge, and, secondly, the relationship between usages,

---

[1] H Jokela 'The Role of Usages in the Uniform Law on International Sales' 10 *Scandinavian Studies in Law* (1966) 86; H Dölle *Kommentar zum Einheitlichen Kaufrecht* Beck 1976 40.

[2] G Eörsi 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' 31 *American Journal of Comparative Law* (1983) 341; E Farnsworth 'Developing International Trade Law' 9 *California Western International Law Journal* (1979) 465.

the contract and the convention.[3] Two principal questions must, therefore, be analysed in connection with the role of trade usages in the uniform sales law. First, what criteria are to be adopted in order to determine which usages are binding on the parties, and secondly, whether usages can override the uniform law or apply only to the extent that the uniform law contains no conflicting provisions.[4]

At the outset, it is necessary to point out that a set of uniform rules such as the CISG cannot purport to be equally suitable for all sale transactions. Contracts of sale differ considerably according to the type of goods sold. At the one extreme are sales of commodities such as grain, silk, coffee, sugar, oil, etc. which are exchanged in great quantities on international markets. This type of sale can accommodate strict rules on the obligations of the seller and the buyer and on the remedies for breach of contract available to the aggrieved party. Such contracts generally contain an element of speculation, in that gains and losses, and, consequently, damages, respond to fluctuations in commodity prices. Where there is a breach of contract by the seller, damages will normally be determined by developments in price rather than by the particular situation of the buyer, i.e. they will be the same no matter who the buyer is. Moreover, if the goods do not conform to the contract and the buyer declares the contract avoided, the seller will normally be in the position to re-sell the goods to another buyer without much difficulty, even if at a lower price because of the defect.

At the other extreme are sales of manufactured goods, e.g. sale of complex machinery, in particular when such machinery is specially manufactured to meet the requirements of the buyer. Here more lenient rules are required. The avoidance of such contract will adversely affect both parties, since the seller will not easily be able to replace the transaction with a similar one, while the buyer may have to wait a long time for new machinery to be supplied. In this kind of transaction, therefore, the buyer's loss and the

---

[3] E Bergsten 'Basic Concepts of the UN Convention on the International Sale of Goods' in P Doralt (ed) *Das UNCITRAL-Kaufrecht im Vergleich zum Österreichischen Recht* Manzsche 1985 20; P Schlechtriem *Uniform Sales Law* Manzsche 1989 40.

[4] M Bonell 'Usages and Practices' in C Bianca & M Bonell (eds) *Commentary on the International Sales Law – The 1980 Vienna Sales Convention* Giuffré 1987 103; O Marzorati *Derecho de los Negocios Internacionales* Astrea 1993 89.

corresponding damages are likely to depend less on fluctuations in price than on the individual situation of the buyer, and in particular, on how the termination of the transaction affects the buyer's level of production. Often the seller cannot foresee the consequences of a breach of contract for the buyer and cannot, therefore, predict the amount of damages to cover the buyer's loss. For these reasons, the avoidance of the contract is not a suitable remedy except in extreme circumstances. If the machinery is found to be defective, priority should rather be given to the duty of the seller to remedy the defect by repairing the goods.[5]

The drafters of the CISG were presented with the dilemma of how best to accommodate diverse and, in many cases, conflicting interests within a text designed to impact equally on different types of sale transactions. In contrast to ULIS, it is possible to find in the Vienna Convention some rules which recognise the need for different solutions according to the type of goods sold. In the area of remedies for breach of contract, for example, the right of the buyer to request the seller to repair defective goods is recognised in article 46(3). The omission in the CISG of a provision similar to article 28 of ULIS (which referred to remedies for breach of contract in sales of goods for which a price is "quoted on a market where the buyer can obtain them", such as sale of commodities),[6] may similarly be regarded as a sign that the convention is as concerned with establishing suitable rules for the sale of manufactured goods as is the case with the sale of commodities.[7]

Parties to a particular transaction, on the other hand, are only interested in adjusting the rights and remedies offered by the convention to their particular contract. The convention recognises this need and expressly authorises such adjustments in terms of article 6, which deals with the freedom of the parties to exclude the uniform law totally

---

[5] J Hellner 'The Vienna Convention and Standard Form Contracts' in P Sarcevic & P Volken (eds) *International Sale of Goods. Dubrovnik Lectures* Oceana 1986 337-338.

[6] Article 28 of ULIS states:

> Failure to deliver the goods at the date fixed shall amount to a fundamental breach of the contract whenever a price for such goods is quoted on a market where the buyer can obtain them.

[7] Hellner n 5 337. However, as this writer states, this does not change the fact that the convention is intended to apply equally to all kinds of goods, regardless of differences between them.

or partially, and article 9, which refers to the incorporation of established usages and practices into the contract. This latter provision recognises the major significance of trade practices as one of the elements which define the nature of the rights and obligations of parties operating in a business environment where such practices are widely accepted and understood.[8] Through the express recognition of party autonomy in article 6, the incorporation of usages into the uniform law creates a hierarchy of sources, in terms of which the CISG becomes a subsidiary source where usages and the will of the parties as expressed in the contract are sufficiently precise.[9]

The trade usage provisions of the CISG were developed through a series of drafts, beginning with the consideration of the ULIS text and concluding with the final version of article 9 which introduced significant changes to its predecessor's rules on the observance of usages. Although both ULIS and the CISG provide that the parties shall be bound by the usages which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves, this is not expressed in both texts in the same way. As has been pointed out, the main difference lies in the criteria to be considered in order to determine whether the parties have impliedly made a usage applicable to their contract.[10] In this regard, whereas article 9 of ULIS applies a purely objective test in binding parties to usages "which reasonable persons in the same situation as the parties usually consider to be applicable to their contract", article 9 of CISG contains a two-fold test that includes a subjective element: the provision makes applicable usages "which the parties knew or ought to have known" and "which in international trade are widely known to, and regularly observed by, parties

---

[8] G Ginsburgs 'International Trade Customs' 5 *Journal of International Law and Policy* (1975) 325; 'Note: A Practitioner's Guide to the United Nations Convention on Contracts for the International Sale of Goods' 16 *New York University Journal of International Law and Politics* (1983-84) 90.

[9] Bergsten n 3 20 states:

> In a very real sense, this leads to a hierarchy of norms. The highest level is the contract itself, to the extent that it covers the matter. Next come usages which are applicable to the contract. In third place comes the law, in this case the Convention.

[10] J Barbic 'Uniform Law on the International Sale of Goods, Uniform Law on the Formation of Contracts for the International Sale of Goods (1964) and United Nations Convention on Contracts for the International Sale of Goods (1980)' in C Voskuil & J Wade (eds) *Hague Zagreb Essays 4: On the Law of International Trade* Oceana 1986 10.

to contracts of the types involved in the particular trade concerned".[11] The addition of a subjective element to determine the applicability of usages in the absence of an express reference in the contract reflects the concern of several delegations from developing countries, who feared a too broad application of trade usages in situations where the merchants concerned had not participated in their development and might not be aware of their existence.[12]

2 Different attitudes towards trade usages

The positive aspects of trade usages as tools to facilitate agreement have been highlighted. Developed countries such as the United States place prime emphasis on trade usages which are regularly observed, on the ground that they increase mercantile flexibility and, thereby, economic efficiency.[13] The Uniform Commercial Code's liberal approach to trade usages is an example of this.[14] By referring to trade usages in a contract merchants rely on prevailing practices and the reasonable expectations they create, thereby effectively promoting standardisation of contractual processes. As part of the unspoken, implied agreement of the parties, perhaps the most important aspect of trade usages is the flexibility they provide in adapting the contract to a particular product environment.[15] As part of the *lex contractus*, therefore, usages of trade have been recognised as a source of commercial law and international trade law.[16]

---

[11] Articles 9(2) ULIS and 9(2) CISG.

[12] See A Garro 'Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods' 23 *The International Lawyer* (1989) 476.

[13] See generally J Chen 'Code, Custom and Contract: The Uniform Commercial Code as Law Merchant' 27 *Texas International Law Journal* (1992) 127.

[14] See *supra* ch 2 p 54 ff.

[15] J Honnold *Uniform Law for International Sales* Kluwer 1991 173 (refers to "the most basic patterns [which] go without saying"); see also A Goldstajn 'Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention' in Sarcevic n 5 at 79:

> Such a method of forming contracts [with reference to trade usages] is practised for economic reasons, as a time and money saving expedient, while the inclusion of usages instead of detailed formulation in each individual case makes for uniform application. A conscientious party presumes the application of usages and expects the other party to do likewise.

[16] Goldstajn *idem* 84.

At the same time, however, usages involve uncertainties in certain circumstances. As Winship pointed out:

> [I]t seems appropriate to make a distinction: usages within a branch or community are in fact most useful; the usages are well known, and there is no uncertainty. On the other hand, where a businessman may find himself taken by surprise, usages may present a high risk, which should be taken into consideration unless one is of the opinion that weak parties deserve their fate.[17]

The fact that most usages operative in international trade were established primarily by groups and organisations within Western, developed free-market economies[18] added a political tone to the debate on trade usages during the Diplomatic Conference that drafted the CISG. The discussion on the scope of application and legal effect of trade usages became, to a large extent, an essentially political controversy based on dissimilar political, social and economic perspectives.[19]

Farnsworth, a representative from the United States stated:

> Viewed in the context of the United Nations, [trade usages] become political. Generally, developed nations like usages. Most usages seem to be made in London, whether in the grain or cocoa trade, for example. Developing countries, on the other hand, tend to regard usages as neo-colonialist. They cannot understand why the usages of, let us say, the cocoa trade should be made in London. And usages are looked on with perhaps even more suspicion by the Eastern European countries, because the Eastern Europeans, being even more bureaucratic in their outlook than our multinationals, like to have everything in their files. There is nothing more distressing to a bureaucrat than the thought that some Englishman or Ghanian is going to appear and claim that there is a usage that he does not

---

[17] G Eörsi 'General Provisions' in N Galston & H Smit (eds) *International Sales: the United Nations Convention on Contracts for the International Sale of Goods* Matthew Bender 1984 2-21.

[18] The *lex mercatoria* was developed during the primacy of Western European-oriented trade. See generally L Trakman 'The Evolution of the Law Merchant: Our Commercial Heritage' 12 *Journal of Maritime Law and Commerce* (1981) 1, 153.

[19] The concerns of many third world nations are reflected in the preamble to the Vienna Convention, which refers explicitly to the United Nations General Assembly resolutions regarding the establishment of a New International Economic Order, and further acknowledges the "different social, economic, and legal systems" which "are to be taken into account in developing a uniform law for international sales". In particular, the developing countries are faced with the extremely difficult task of linking their own less developed economies with the complex mechanism of modern international trade that has developed over the centuries without their active contribution and without regard to the needs of newly-independent developing states. See, e.g. E Boka 'The Sources of the Law of International Trade in the Developing Countries of Africa' in C Schmitthoff (ed) *The Sources of the Law of International Trade* Stevens 1964 227.

have in his files.[20]

During the preparation of the uniform law, the view was expressed by several representatives from socialist and developing states in particular that the binding force of trade usages based solely on objective grounds as in article 9 of ULIS would not be accepted.[21] Opponents argued that trade usages, if made binding on a purely objective basis, would function as an independent source of law, a result they found unacceptable, particularly because most international trade usages were established by traders in the Western industrialised countries. In the view of these representatives, the recognition of such trade usages as legal rules would give industrial states an unfair advantage. Thus, trade usages should not be given preeminence over the terms of the convention, unless expressly stipulated in the contract. The delegate from Ghana summarised the position of many developing states thus:

> Developing countries have tended to be suspicious of settled usages and customs in the international sphere. For instance, it has been observed that many new nations consider traditional customary public international law as Euro-centric and accordingly have been reluctant to submit to certain aspects of it, particularly the areas dealing with economic relations. The basis of this suspicion of customs and usages by developing countries is the feeling that such usages and customs usually crystallise from practice dominated by actors from the developed countries, particularly those in the West. Such usages are therefore likely to reflect the interests of such developed countries.[22]

In the former socialist countries of Eastern Europe, the role of trade usages in the

---

[20] Farnsworth n 2 465-466.

[21] See, e.g. Eörsi n 2 341 observing that:

> In the course of unification of the rules of international trade, East-West conflicts have not been typical: nor were they at the Vienna Conference. Nevertheless, on [a number of] issues the front lay more or less between the Socialist and Western legal systems. [Among these were] the scope of application of usages.

Like the socialist nations, some developing countries also viewed trade usages negatively. See Garro n 12 476.

[22] S Date-Bah 'Problems of the Unification of International Sales Law from the Standpoint of Developing Countries' in Problems of Unification of International Sales Law; Colloquium of the International Association of Legal Sciences Potsdam, August 1979 *Digest of Commercial Laws of the World* Oceana 1980 46. The author quotes the comment made by the Mexican government in response to the Secretary General's invitation to member states of the United Nations to indicate their views on ULIS, in which this government was critical of the subordination of ULIS to commercial usages and practices in article 9(2), on the ground that this could lead to the imposition of unfair usages or inequitable practices. See also the similar view of the USSR government in stating that "usages are often devices established by monopolies and it would hence be wrong to recognise their priority over the Law" at n 7.

regulation of international trade transactions, although relevant,[23] appeared similarly limited by the principles and requirements inherent in a planned economy, in particular the socialist emphasis on security and predictability in contractual situations.[24] Maskow has stated:

> [Of] special importance for socialist countries are the criteria usages have to fulfil to become accepted as applicable to a sales contract without a reference. These criteria are, that the parties knew or ought to have known the usage and that it is in international trade widely known and in the particular trade concerned. [T]hese criteria in their entirety must be interpreted in that way that the acceptance of the respective usage in all existing three groups of states is required, that means by socialist, developing and developed market economy countries. This is the principle [said to be deduced from a principle of "reasonableness" to be read into the Convention via Article 7(2) and from the reference to "equality and mutual benefit" contained in the Preamble to the Convention]. In practice it may suffice that the respective usages are accepted in the group or groups concerned. In other words the formula of Article 9 para (2) excludes that enterprises of socialist or developing countries are bound by usages originating in developed market economy countries and not accepted by the other groups.[25]

The drafters of the CISG faced the challenge of establishing provisions which would reconcile different approaches to international trade policy from countries with free-market economies and those with centrally planned economies, as well as the political confrontation between developed and developing countries.[26] The debate on trade usages constituted one instance where conflicts of interest between developed and developing countries dominated the discussion almost to the exclusion of any further legal consideration.[27]

---

[23] Ginsburgs n 8 325 ("all Soviet specialists in the field acknowledge that, according to prevailing usage, particular questions relating to the terms of international trade contracts may be regulated by trade customs"); J Jakubowski 'International Commercial Usages in the Light of Polish Law and Foreign Trade Practice' in *New Directions in International Trade Law* Acts and Proceedings of the 2nd Congress on Private Law, UNIDROIT, vol 2 Oceana 1977 549 ("in Polish foreign trade practice, international commercial usages have always had an important place and a broad application").

[24] See D Ramzaitsev 'The Law Applied by Arbitration Tribunals I' in Schmitthoff n 19 151; Jakubowski *idem* 549 and Eörsi n 2 342.

[25] D Maskow 'The Convention on the International Sale of Goods from the Perspective of the Socialist Countries' quoted in A Kritzer *Guide to Practical Applications of the United Nations Convention On Contracts for the International Sale of Goods* Kluwer 1989 133.

[26] M Bonell 'Introduction to the Convention' in Bianca n 4 11.

[27] Garro n 12 453.

In the case of ULIS, the broad application of trade usages to contractual situations was less problematic, since the text of the uniform law was conceived and ratified almost entirely by Western European states. In contrast, the convention prepared by UNCITRAL had to accommodate the interests of developing and Eastern European countries represented at Vienna - in addition to those of the developed states - [28] by producing a system of law which, in the eyes of the developing countries, would serve their needs in the same measure as those of their partners abroad.[29]

3 Binding usages under ULIS

The liberal approach of ULIS towards the incorporation of trade usages in the contract can be easily recognised. Under the system created by ULIS, the provisions of the uniform law occupy the last position in a hierarchical sequence of legal sources. Any stipulation relying on the express or implied agreement of the parties enjoys priority over the provisions of ULIS.[30]

The 1964 Uniform Law contains three provisions governing the application of usages. In terms of article 9 of ULIS:

> (1) The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.
>
> (2) They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present law, the usages shall prevail unless otherwise agreed by the parties.

---

[28] Bergsten n 3 21.

[29] Goldstajn n 15 75.

[30] L Reczei 'The Rules of the Convention regarding its Scope of Application and its Interpretation' in Problems of Unification of International Sales Law n 22 58-59 states the following hierarchy: (1) the contract of the parties; (2) the practices established in the dealings of the contracting parties; (3) usages, international or national; (4) the expressly or impliedly accepted standard forms; (5) in the event of article 4 of ULIS all municipal mandatory rules which would be applied had the parties not subjected their contract to ULIS; and (6) the provisions of ULIS.

(3) Where expressions, provisions or forms of contract commonly used in commercial practices are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned.

It follows from the above provisions that under ULIS trade usages were incorporated into the contract (a) if referred to by the parties either expressly or by implication (article 9(1)), and (b) if "reasonable persons" in the same situation as the parties usually follow such trade usages.

While it is clear that usages expressly incorporated into the contract bind the parties on application of the principle of party autonomy, a more difficult issue is to determine what usages are "impliedly" made applicable to the contract under paragraphs 1 and 2 of article 9.[31]

Jokela notes that the provisions of article 9 of ULIS reflect the various possible theories on the function of usages in commercial law. In his view, while paragraph 1 represents the contractual approach, i.e. usages found to be applicable because of the express or implied agreement of the parties, paragraph 2 recognises the binding force of a different type of usages - normative usages - i.e. usages not expressly or impliedly agreed upon by the parties in the sense of paragraph 1, which apply on the basis of "a general feeling as to the validity of the usage in question among reasonable persons in the same situation of the parties".[32] Consequently, under article 9(2) of ULIS, it is not necessary that the parties should be acquainted with the usages or even have knowledge of their existence.

In addition, these abstract norms in the form of usages are expressly accorded a higher normative standing than the rules of the convention themselves, in terms of paragraph 2, while usages incorporated in terms of party agreement do not necessarily overrule

[31] S Bainbridge 'Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions' 24 *Virginia Journal of International Law* (1984) 653.

[32] Jokela n 1 89 and further references to the relevant discussion preceding the adoption of article 9 ULIS. Similarly Bonell in Bianca n 4 105.

applicable legal rules.[33]

Article 9(2) of ULIS binds parties to trade usages which "reasonable persons in the same situation as the parties" usually consider applicable. The reasonableness analysis - which has its origins in the requirement of English common law for the acceptance of a binding trade custom not recognised by a judicial precedent[34] - refers to a person in the same situation as the parties exercising due care and diligence.[35] As will be seen, however, this provision met with considerable criticism during the drafting process of the CISG.[36]

A source of uncertainty associated with article 9 of ULIS is related to the distinction between local and international usages.[37] Apart from the provision of article 9(2), in ULIS there are no clear indications as to whether or not the usages contemplated in a particular case must necessarily be international.[38]

---

[33] Bergsten n 3 20. Note that only article 9(2) expressly states that usages override contrary ULIS provisions.

[34] Dölle n 1 43; B Wortley 'Mercantile Usage and Custom' 24 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* (1959) 262.

[35] Cf Lord MacNaghten in *Drummond & Sons v Van Ingen* (1887) 12 AC 284 at 297 (quoted in K Sutton 'The Draft Convention on International Sale of Goods (1)' 4 *Australian Business Law Review* (1976) 284):

> The sample speaks for itself. But it cannot be treated as saying more than such sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time.

[36] See *infra* p 119.

[37] A distinction between international and domestic usages may be made. As opposed to usages of a purely local origin, e.g. local practices for the packing of jute, or the delivery dates imposed by arctic climate, it is normally considered that a usage is international when it is so widely known in international trade that the parties can be expected to know or ought to have known of it. It is not necessary that the usage be universally practised; it suffices that it is applied in trade centres in a particular branch and accepted by those engaged in the trade of the particular branch. Thus, international usages would include transnational formulations issued by the formulating agencies such as the International Chamber of Commerce and UNCITRAL for the use of the international business community, and the various documents issued by trade associations, professional organisations, interested trade circles or governmental bodies in the form of standard contracts. C Schmitthoff *International Trade Usages* Institute of International Business Law and Practice 1987 (ICC Publication N° 440/4). Within the general category of international trade usages which are contractual, Professor Schmitthoff classifies the first as "transnational formulations", e.g. Incoterms and the UCP, among others, and the second as "other contractual usages", e.g. GAFTA standard forms, the FIDIC Conditions of Contract (International), widely used charter party forms, etc.

[38] *Idem.*

Article 38(4) refers to local usages in stating that "the methods of examination shall be governed by the agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examination is effected". Article 21 refers to delivery of the goods effected within a certain period (such as a particular month or season) in terms of the agreement of the parties or usage. As Jokela explains, in the context of determining practical issues of performance, one can imagine cases where there are no international usages available, because the question to be settled is closely connected with a particular locality or a designated port.[39] If local usages may be applied under articles 38 and 21, the same should be true of article 9(2) which may be said, then, to incorporate both domestic and international usages.[40]

The question whether ULIS should contain a definition of trade terms, such as those included in the US Uniform Commercial Code[41] and the ICC Incoterms,[42] was raised during the preparatory work of ULIS but was finally rejected.[43] It was felt that a uniform law should regulate aspects of the transaction which parties normally do not think of or regulate in detail, such as the consequences of a breach of contract, rather than regulate aspects which they can hardly forget at the bargaining stage, such as price

---

[39] *Idem*.

[40] Cf Dölle n 1 at 44:

> Im Rahmen des Art. 9 können alle Gebräuche ohne Rücksicht auf ihren örtlichen Geltungsbereich verbindlich werden. Eine Beschränkung auf internationale Gebräuche ergibt sich nicht weder aus dem Wortlaut noch aus den Intentionen des EKG.

Nevertheless, as the author points out, in practice, the situation of reasonable persons (specially if the parties are from different states) considering a certain usage applicable will normally refer to a usage which has become sufficiently "internationalised" as to apply to the transaction in question:

> Derartige internationale Gebräuche, die für bestimmte Geschäfte zwischen bestimmten Verkehrskreisen aus bestimmten Staaten gelten, werden sehr häufig bestehen.

The wording of article 9 of the CISG has clarified the issue to a certain extent, by requiring usages to be "widely known in international trade" in order to be applicable to the contract by implied reference.

[41] UCC §§ 2-319 to 2-324; see Chen n 13 102.

[42] International Chamber of Commerce, Rules for the Interpretation of Trade Terms (ICC Publication N°460, Incoterms 1990); J Ramberg 'Incoterms 1980' in N Horn & C Schmitthoff (eds) *The Transnational Law of International Commercial Transactions* (Studies in Transnational Economic Law vol 2) Kluwer 1982 137; H Schneider 'Incoterms 1990' *Recht der Internationalen Wirtschaft* (1991) 91.

[43] C Schmitthoff 'The Risk of Loss in Transit' in J Honnold (ed) *Unification of the Law Governing International Sale of Goods* Dalloz 1966 177. The author notes the statement by E Rabel that "it is not enough to simply refer to usages; usages must be defined in the law itself, so that conflicting interpretations of usages may be resolved".

and terms for delivery, aspects normally covered by usual trade terms. It was pointed out that a definition of trade terms in ULIS would negatively interfere with the work of the International Chamber of Commerce in periodically issuing a revised version of usual trade terms contained in the Incoterms, and would add a great number of provisions to an already long document.[44]

ULIS does contain a provision regarding the interpretation of trade terms in accordance with their usual meaning. Article 9(3) provides that where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted in accordance with the "meaning usually given to them in the particular trade". The reference to "the meaning usually given in the trade concerned" has been interpreted as to allow the determination of the parties' obligations in terms of definitions issued by international agencies such as the International Chamber of Commerce for the delivery and payment clauses, e.g. Incoterms and the UCP, or, alternatively, to usages existing at the parties' respective places of business.[45]

4 Binding usages under the CISG

Many commentators agree that article 9 of the CISG has substantially narrowed the sphere of application of usages in comparison with ULIS, in the sense that usages may

---

[44] *Idem* 382 (referring to the statement of Professor Tunc). Similarly Honnold ("I incline to the view that ULIS chose the wiser course") states:

> One crucial question is the extent to which the details of performance expected under various forms of price quotation are now standardised, or can become standardised under the influence of international enactment. This alone may decide the question, for one cannot responsibly launch detailed statutory provisions on the international scene in ignorance of their impact on practices applicable to a myriad of commodities in countless remote trading and shipping centres. The study by the International Chamber of Commerce that preceded the promulgation of Incoterms showed significant deviations; the extent to which these have been ironed out by trader's use of Incoterms is unclear. And it must be remembered that both Incoterms and the ECE Standard Contracts are prepared for voluntary acceptance; a much higher degree of restraint is needed for the promulgation of a statutory norm from which traders can escape only by express contractual provision or by proof of an overriding course of dealing or trade custom.

J Honnold 'The Uniform law for the International Sale of Goods: The Hague Convention of 1964' 30 *Law and Contemporary Problems* (1965) 341.

[45] Bonell in Bianca n 4 115.

be less frequently applied under CISG.[46] While article 9(1) of the CISG also provides that parties are bound by usages to which they have agreed and by practices which they have established between themselves, the main difference between the 1964 and 1980 uniform laws is found with respect to usages which are implicitly incorporated into the contract.

Article 9 of the CISG reads:

> 1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
>
> 2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

4.1 Usages to which the parties have agreed and established practices

Paragraph 9(1) of the CISG states that parties are bound by usages to which they have agreed and by any practices which they have established between themselves. The two parts of the paragraph are distinct, in that the first relates to patterns established generally in a trade or line of commerce, while the second relates to practices that have been followed by the parties in relation to each other, i.e. their own "course of dealing". Both parts of this paragraph proceed from the theory that such usages and practices are part of the contractual undertaking of the parties, either by express agreement or by an implied expectation that performance will follow such established patterns.[47]

---

[46] Reczei n 30 83; Goldstajn n 15 97; Eörsi n 17 2-24; Bergsten n 3 20; Barbic n 10 11; U Huber 'Der Uncitral-Entwurf eines Übereinkommens für Internationale Warenkaufverträge' 43 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* (1979) 432-433; F De Ly *International Business Law and Lex Mercatoria* North-Holland 1992 160; M Bonell 'UN-Kaufrecht und Uniform Commercial Code' 58 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* (1994) 31.

[47] Report of the Secretary General: Pending Questions With Respect to the Revised Text of a Uniform Law on the International Sale of Goods (A/CN 9/100 annex III) UNCITRAL Yearbook VI (1975) 94 reprinted in J Honnold *Documentary History of the Uniform Law for International Sales* Kluwer 1989 218. On application of article 9(1) of the CISG a Hungarian court ruled that parties are bound by their previous courses of dealing; (in the case, the court held that the parties had impliedly determined the quantity, quality and price of the goods in accordance with prior transactions between themselves). *Hauptstadtgericht Budapest*

The fact that parties are bound by usages to which they have agreed corresponds to article 9(1) of ULIS and follows the principle of party autonomy which is recognised in article 6 of the CISG. Accordingly, the parties may negotiate all the terms of the contract or refer to usages to govern certain specific aspects of it. In such a case the usages become an integrated part of the contract and prevail over the rules of the convention.[48] For example, a provision in the contract that trade terms such as FOB or CIF are governed by Incoterms 1990 constitutes a clear illustration of an agreement expressly making a specified usage applicable to the contract.[49]

The notion of trade usage is not defined in the CISG. Insofar as usages have been expressly agreed upon this is irrelevant for practical purposes. On application of the principle of party autonomy agreed rules bind the parties irrespective of their categorisation as usages of trade, as long as they are not invalidated by the national law applicable in terms of the relevant rules of private international law. As has been seen in chapter 3,[50] article 4 of the CISG states, among others, that "the Convention is not concerned with ... the validity ... of any usage". It was expressed then that the intention of the drafters was to make sure that the convention did not interfere with domestic notions of public policy. The decision as to whether a given practice is invalid because of its inconsistency with the law, therefore, is to be made according to domestic law. Like any other contractual provision, a usage may be invalid because it is contrary to a provision of law or public policy, or because the parties' consent was defective in the particular case, e.g. if consent was induced by fraud or other illegal means, such as the abuse of bargaining power, or the parties lacked capacity to contract.[51] Apart from this limitation concerning the intrinsic validity of agreed usages, the parties can agree to be

---

24 March 1992, *IPRax* (1993) Heft 4 263.

[48] F Enderlein & D Maskow *International Sales Law* Oceana 1992 67.

[49] Honnold n 15 174.

[50] See *supra* ch 3 p 88.

[51] Bonell in Bianca n 4 112.

bound by any selected usage, whether international, regional or local.[52]

Article 9(1) of the CISG omitted the phrase "expressly or impliedly" as it appeared in article 9(1) of ULIS, to avoid the application of "abnormal usages", i.e. usages not regularly observed, without the actual consent of the parties.[53] However, this does not mean that an agreement to apply certain usages cannot be implied under paragraph 1. This would be the case, for instance, where during the formation or the performance of the contract, the parties deliberately act in conformity with a local usage or a usage within a particular trade. The convention offers a rule of interpretation of the parties' conduct which might in certain cases help to establish an existing, albeit implied, agreement to apply trade usages.

In terms of article 8(1) of the CISG the decisive factor in this respect is the actual intent of the party making a statement or adjusting his conduct to certain practices, where the other party knew or could not have been unaware of such intention. Failing this, the understanding which a reasonable person of the same kind as the other party would have had in the same circumstances is to be considered in terms of article 8(2). In both cases regard is to be given to all the relevant circumstances of the particular transaction, including "any practices which the parties have established between themselves and usages" (article 8(3)).

In accordance with article 8, references in the contract that are less explicit than, e.g. "FOB Incoterms", might well invoke usages if the court is of the opinion that such was the intention of the parties.[54] However, the inference of an implied agreement between the parties in terms of article 9(1) should be exceptional, i.e. only where a statement or the conduct of the parties clearly permits such inference, for otherwise the cumulative requirements contained in paragraph 2 to make a usage applicable by implication could

---

[52] From the fact that requirements of internationality and regular observance are only needed to make usages applicable by a presumption of an implied intention of the parties, it can be concluded that such requirements are not necessary when the parties have expressly made a usage applicable to the contract.

[53] Honnold n 15 174.

[54] *Idem*.

be evaded.[55]

4.2 Implied incorporation of usages

Paragraph 2 of article 9 defines usages which are binding on the parties although they were not agreed on. In relation to article 9(2) of ULIS, the CISG abandons the "reasonable person" standard. Furthermore, the Chinese proposal that only reasonable usages should be recognised[56] was rejected to avoid as far as possible the dismissal of usages by domestic courts on normative grounds.[57]

It was pointed out during the drafting process of the CISG that the reference to "reasonable persons" in article 9(2) of its predecessor ULIS was too vague, since usages relating to the same type of contract might differ from one region to another, so that "reasonable persons" from different parts of the world might consider different usages applicable to the contract.[58] Questions were also raised concerning the extent to which in article 9 of ULIS paragraph 2 extended beyond paragraph 1, and concerning the justification for such extension. It was noted that article 9(1) of ULIS gave effect to any usage which the parties have "expressly or impliedly" made applicable to their contract and that paragraph 2 provided that the parties should "also" be bound to certain further usages. This wording suggested that paragraph 2 was not based on the presumed expectation of the parties but upon some other unstated principle possibly some

---

[55] Enderlein n 48 68.

[56] Summary Records of the 6th Meeting of the First Committee, Diplomatic Conference (Doc C 4 OR 89) in Honnold n 47 483 ff (Chinese draft amendment A/Conf 97/C 1/L 24). The Chinese representative referred to "trade restrictions imposed by certain trade practices [which] could be called unreasonable". The main objection, however, to the proposal of binding parties to usages applicable without agreement was the concern of developing countries who feared the wide application of usages "which had been formed by a restricted group of countries only whose position did not express worldwide opinion". (See the statement of Mr Blagojevic, representative from Yugoslavia). The proposal was rejected on the ground that, where the conditions set forth in article 9(2) were fulfilled, there would be no reason to consider the case of a usage which was not reasonable. For a usage to be applicable, it should exist and be recognised as being valid.

[57] Domestic prohibitions of certain trade practices which have the effect of voiding the contract remain, however, operative, in terms of article 4 of the CISG. Schlechtriem n 3 42.

[58] UNCITRAL Yearbook II (1970) 58 in Honnold n 47 64.

normative obligation independent of the implied contractual undertaking of the parties.[59] Several representatives objected to the "excessive effect" given by this provision to trade usages. It was noted that under this language usages became binding without any reference to them in the contract, a result which led to uncertainty with regard to the obligations of the parties.[60] More specifically, the ULIS provision that in the event of conflict between the applicable usage and the Uniform Law, the usages prevail unless otherwise agreed by the parties, was seen to conflict with the constitutional principles of some states and to be contrary to public policy in others.[61]

These objections prompted a debate on the CISG's provisions that persisted throughout its drafting history. The final version of article 9 of the CISG evolved as both a partial answer to the objections raised, and as a compromise. Accordingly, this provision narrows the sphere of application of usages, thereby aiming to clarify the circumstances under which parties are expected to behave in the manner that is customary in the particular trade.[62]

Instead of the reasonableness analysis, article 9(2) of the CISG adopts the legal construction that a usage is binding by virtue of an implied silent agreement between the parties.[63] Reflecting the concerns expressed by some delegations against a too wide application of trade usages,[64] the provision restricts the kind of usages that may be incorporated into the contract.

---

[59] UNCITRAL Yearbook VI (1975) 93 *idem* 218.

[60] UNCITRAL Yearbook I (1970) 183 *idem* 21, 243:

> [One] point of view considered usages as a means of imposing the will of the stronger party on the weaker. In this connexion reference was made to the interests of developing States whose merchants had not participated in the development of usages and who might not be aware of them.

[61] Goldstajn n 15 77; M Ndulo 'The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: a Comparative Analysis' 38 *International and Comparative Law Quarterly* (1989) 10.

[62] Report of the Secretary General n 47; in Honnold n 47 219.

[63] *Idem* 41.

[64] UNCITRAL Yearbook I (1970) 183 in Honnold *idem* at 21.

The usages considered to be part of the contract are, in terms of article 9, those of which the parties knew or ought to have known and which in international trade are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. All three aspects of the definition must be satisfied to make a usage applicable.[65] In this way, the application of usages is narrowed and confined to usages relevant in international trade transactions, as opposed to purely domestic ones.[66]

As to the meaning of the concept of usages in this article, it is agreed that the word "usages" refers to usages in the widest possible sense, i.e. to any practice or line of conduct regularly observed within a particular trade sector or at a particular market place, irrespective of any categorisation in terms of national law.[67] The term "usage" is autonomous and can, therefore, be interpreted as broadly as possible. The usages need not be ancient or of long standing. It is also not decisive that they be recorded and issued by some international trade organisation, since the mere fact that they are contained in some official or semi-official publication does not influence their binding character.[68]

The first requirement - that the parties knew or should have known of the usage - is intended to ensure that there will always be an effective link between the application of a particular usage and the parties' intention.[69] Contrary to ULIS, it no longer suffices that reasonable persons in the same circumstances might consider the usages applicable.

---

[65] Bergsten n 3 21:

> The test is twofold. There is a subjective test that the parties to the contract knew or ought to have known of the usage [and] there is an objective test that the usage is widely known and regularly observed. Both tests must be met.

[66] On application of article 9(2) of the CISG an Argentinian court ruled that it is in accordance with international trade usage that outstanding liabilities to be paid in foreign currency (U.S. dollars) should bear interest according to the applicable prime rate, regardless of any further proof of the parties' intention to this effect; *Juzgado Nacional de 1° Instancia en lo Comercial N° 10*, Buenos Aires, 23 October 1991 (quoted in B Piltz *Internationales Kaufrecht* Beck 1993 70).

[67] Enderlein n 48 69; Bonell in Bianca n 4 111. This is in line with the general criteria for the interpretation of the convention, which in terms of article 7 should have regard, among others, to "its international character and to the need to promote uniformity in its application".

[68] F Dasser *Internationale Schiedsgerichte und Lex Mercatoria* Schultess 1989 92.

[69] Reczei n 30 83 ("Article 8 of the Draft [article 9 CISG] has decidedly rejected the application of local usages by surprise").

Yet, this will clearly be the case only when both parties knew of the usage in question. The same cannot be said, however, where the usage is applied because one or both of the parties should have known of it.[70]

In addition, the convention requires the usage to be one which in international trade is widely known and regularly observed in the particular trade concerned. The fact that the usages must be regularly observed within the particular trade to which the parties belong and for contracts of the type involved, corresponds in substance to the solution already found in article 9(2) of ULIS. The purpose of the additional requirement that the respective usages be widely known in international trade is to avoid that usages which until now have been confined to domestic sales, are applied to international transactions without the express reference of the parties. According to the Secretariat Commentary on the Draft Convention,[71] this last sentence defines the usages which the parties "ought to have known". However, whether such usages will necessarily be international as opposed to local, is unclear.[72]

In this sense, the convention demands that the usage be widely known in international trade. If taken literally, this would mean that trade usages would have very little effect. The criteria is further qualified by the reference to usages within the particular branch of business involved and to the parties who enter into similar contracts. This language seems to invoke a pattern of conduct only if it is so "widely known" and "regularly observed" that it can be assumed to be a part of the expectations of the parties.[73] For instance, compliance with usages existing in the international grain trade and followed by parties who buy and sell grain on the international market, will be required in

---

[70] *Idem*. Enderlein & Maskow n 48 71 have criticised this part of the provision as "largely redundant". In their view, only the requirements of regular observance and internationality are decisive, since in practice, it will be very difficult to permit that a party invokes that he did not know, nor ought to have known, the rules which meet the first two requirements.

[71] Secretariat Commentary on the 1978 Draft Convention, Diplomatic Conference (Doc.C3; O.R.19) in Honnold n 47 409.

[72] Reczei n 30 84; Barbic n 10 11.

[73] Honnold n 15 176.

international transactions of this particular trade, although it would be irrelevant whether these practices are known internationally outside grain-trade circles.[74] In a particular case, it might even suffice that the practices are known in the relevant business circles of the states where the parties have their places of business, as long as they are applied there to international transactions as opposed to purely domestic ones.

While article 38 (4) of ULIS explicitly provides for the application of local usages to conduct the examination of the goods delivered, the corresponding article 36 of the CISG does not contain a reference to usages. The Secretariat Commentary to article 36 states that:

> [what] is reasonable in the circumstances will be determined by the individual contract and by usages in the trade and will depend on such factors as the type of goods and the nature of the parties. Because of the international nature of the transaction, the determination of the type and scope of examination required should be made in the light of international usages.[75]

As stated earlier,[76] it is not always possible to find international usages applicable to a particular situation. In the case of the examination of goods delivered to the buyer, this could apply to goods which are traded in exchange markets, e.g. grain, wool, cotton, etc. where the quality standards have been defined in accordance with established usages. In many sale contracts, however, the methods of examination and control are closely linked to a particular locality and may vary for each kind of goods or commodity, depending on circumstances such as quantity and packaging. Unless the parties have agreed on the method for the examination of the goods, it seems that the application of local usages cannot be avoided, at least with regard to some practical aspects of the parties' performance.[77]

---

[74] Schlechtriem n 3 41.

[75] Secretariat Commentary in Honnold n 47 424.

[76] *Supra* p 113.

[77] Reczei n 30 84.

The convention also refers to the observance of usages in other provisions, but does not specify whether international or local usages are intended. Thus, under article 8(3), in the interpretation of statements made and other conduct of a party, due consideration should be given to any practices which the parties have established among themselves, usages, and any subsequent conduct of the parties. In article 18(3) the CISG regulates the way in which the acceptance of an offer may be indicated. If, as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period laid down in the preceding paragraph. Article 32(2) regulates the obligations of the seller if he is bound to arrange for the carriage of the goods. In this case he must make such contracts as are necessary for carriage to the designated place by means of transportation appropriate in the circumstances and in accordance with the usual terms for such transportation.

Another example is article 35(2) of the CISG which refers to goods which do not conform to the contract. It is, among others, specified there that goods do not conform to the contract unless they are fit for the purpose for which goods of the same description would ordinarily be used.

It is evident that usages will be decisive in determining, e.g. which are the usual terms for the transportation of the goods, or the purpose for which goods of the same description would ordinarily be used, and the usual manner in which such goods are contained or packaged. Yet the uniform law does not specify which usages are relevant in this regard.

The question of the selection of usages to be applied in the above cases becomes particularly interesting as in terms of article 9(2) of the convention, tacit incorporation of usages requires that they be widely known in international trade. In particular, it is not clear whether the provisions mentioned above are also examples of usages applied by implication in terms of article 9(2), or a matter of application of domestic usages

observed in a particular contracting state, on application of article 7 of the CISG for the filling of gaps under the rules of private international law. In other words, does the convention insist on the application of international usages in connection with the packaging of the goods, or in determining whether or not the goods are fit for the purposes for which goods of the same description would ordinarily be used even when the goods do not cross the borders of a particular state? And, in particular, what does it mean that the usage is "widely known in international trade"?[78]

The first question, i.e. whether only international usages as intended in article 9, apply to the different stages of the transaction, can only be answered in the affirmative. Usages and practices which meet the standards mentioned in article 9 of the CISG have the same effect as a contract and therefore always apply. So, for example, under the provisions of article 18(3), silence can have the effect of an acceptance on the basis of usages which are legally relevant under article 9.[79]

This does not mean, however, that the convention does not accept the application of local or regional usages, provided they are widely known in international trade and regularly observed in the transnational trade concerned.[80] For the details of the buyer's obligation to take delivery of the goods, including the exact place and time (article 53 of the CISG), for instance, the buyer must observe the regulations of the different kinds of carriers and of port and customs authorities as well as the usages prevailing at the place of destination, if the usages in question meet the requirements of article 9.[81]

The situation is similar with regard to the packaging of the goods. In determining the

---

[78] Barbic n 10 13.

[79] Schlechtriem n 3 54; Enderlein n 48 96; Honnold n 15 220.

[80] The Secretariat Commentary on the 1978 Draft Convention endorses this view by stating that "[t]he trade may be restricted to a certain product, region or set of trading partners" n 36 409. For a comparison with a similar approach contained in the UCC see I Dore & J Defranco 'A Comparison of the Non-substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code' 23 *Harvard International Law Journal* (1982) 58.

[81] D Maskow 'Buyer's Obligations in General' in Bianca n 4 389.

manner in which the goods must be contained or packaged, reference should be made to the "usual manner", i.e. the manner conforming with standards normally observed in the practice of the seller's professional branch, if these correspond to the usual manner in international trade.[82] It will be assumed that such usages are widely known in international trade if they are known in the relevant business circles and relate to sale contracts of the same kind.[83]

The main difference between article 9(2) of the CISG and article 9(2) of ULIS is, then, that in comparison with the latter, the CISG restricts the recognition of national, regional or local usages which were developed for domestic sales and are not regularly followed in international transactions.[84]

5 Legal nature of trade usages under the CISG

The solution adopted in the Vienna Convention means that there are only two types of

---

[82] C Bianca 'Conformity of Goods' in Bianca n 4 277.

[83] Enderlein & Maskow n 48 70 state:

> The types of sales contracts, i.e the subcategories are divided according to the goods sold. Accordingly, the usages for trade in machinery and plants; raw materials or specific raw materials; foodstuffs etc. are applied to the respective contract. But the type of contract can also be determined according to whether the contract is one for single delivery or for delivery by instalments; whether it is a short-term or long-term contract; whether delivery is against cash or credit; or whether it is a tender or a direct transaction. The category of goods traded is also an important criterion for the determination of the decisive branch; but here also other requirements have to be considered like, e.g. the use of the goods sold (sales to re-sellers e.g. dealers – on the one hand, and to final consumers, on the other).

[84] Schlechtriem n 3 40. Huber n 46 428 comments that this difference in approach becomes relevant, in practice, with regard to the application of local usages related to the formation aspect of the contract. In particular, it is unclear whether usages such as those developed in Germany concerning the "commercial letter of confirmation" (*kaufmännischer Bestätigungsschreiben*) will be respected. For case law concerning the applicability of German usage concerning commercial letter of confirmation under ULF see G Reinhart 'Zehn Jahre deutsche Rechtsprechung zum Einheitlichen Kaufrecht' 5 *Praxis des Internationalen Privat- und Verfahrensrecht* (1985) 4. On application of article 2(1) of ULF the *Oberlandesgericht Hamburg* considered the doctrine of the *Bestätigungsschreiben* to be applicable to a contract between a German and a Dutch firm in the following terms:

> Where, after the conclusion of an international contract of sale, one party sends to the other a letter by which he purports to confirm the terms of the oral agreement, but at the same time includes additional conditions, the silence of the receiving party may be considered to be an acceptance of such additional conditions only if this follows from the practices which the parties have established between themselves or from the usages applicable to the contract.

OLG Hamburg 9 July 1980, reported in *Revue de Droit Uniforme/Uniform Law Review* 1980 368. In the view of Schlechtriem, the wording of article 9(2) of the CISG would permit a letter of confirmation to be effective only if it is used in that particular branch of business in several countries and if the practice is acknowledged to have the legal consequence that silence means consent; *idem.*

norms known to the convention, i.e. the terms of the contract and the convention itself. Usages in the CISG would appear, therefore, to have a contractual basis, but would have no normative force, unlike the case under article 9(2) of ULIS.[85]

As part of the *lex contractus*, their main function would be to give particular meaning to and supplement or qualify terms of the agreement[86] insofar as they objectively reflect an implied expectation that the formation or performance of the contract will follow such established patterns of behaviour.[87] The parties may set aside applicable usages by express agreement.[88] In the absence of a contrary intention, however, regularly followed usages which meet the requirements of article 9 will apply.[89]

On the legal criteria for the application of usages Goldstajn has stated:

> Commercial usages are created within a specialised branch, their applicability being self-understood therefore. Commercial usages are operative in relation to those who know them or who were in the position to know them. What is customary should be effective *ipso facto*; it is not necessary to decree it, and still less to have explicit agreement.[90]

On the other hand, it has been said that standard form contracts usually operative in international trade such as the General Conditions issued by the UN Economic Commission of Europe, can only acquire the status of customary law if:

---

[85] Bergsten n 3 20-21; Honnold n 15 179; Schlechtriem n 3 41; De Ly n 46 160; Goldstajn n 15 97; Eörsi n 17 2-23; Huber n 46 428.

[86] Goldstajn *idem*; Dasser n 68 91.

[87] Honnold n 15 178.

[88] Goldstajn n 15 97 draws a parallel between this provision and Comment 4 to s 1-205 of the American UCC, in the sense that usages "are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding".

[89] Honnold n 15 179 ("[when] the parties do not clearly address and negate implicit expectations based on practices and trade usages [as is true of a buyer's expectation that the goods will be free from unusual defects (art. 35(a)), and that he will own the goods (art. 41)], one may not readily conclude that contract provisions were understood to negate such basic expectations").

[90] Goldstajn n 15 79.

> ... businessmen elevate them to this status [by referring] to the standard contracts with such a degree of frequency that it might finally be concluded that such a reference is implicit.[91]

While usages were not intended to apply as normative rules under the CISG, it is clear that in terms of article 9 (2), typical standard form contracts and usual trade terms may bind parties in situations where there is no express reference to them in the contract.[92] For practical purposes, therefore, i.e. the incorporation of usages to a particular transaction governed by the CISG, the categorisation of usages and other terms usually applied within a given business sector as "normative" or "contractual" from a legal point of view, does not seem to be very helpful. Even if usages are incorporated into the contract on the basis of the presumed intention of the parties, they will still be applied in situations where the parties may have been unaware of their existence, i.e. on a purely objective basis, where it can be proven that in international trade they are "widely known to and regularly observed by, parties to contracts of the type involved in the particular trade concerned" in terms of article 9(2).[93] This "somewhat strange juridical construction of a fictitious agreement"[94] may be explained as a compromise solution reached between those states who wanted to recognise the normative effect of trade usages and those who preferred to rely on expressly agreed usages only.[95] Yet, the result which will presumably be achieved through the application of the legal fiction contained in article 9(2) of the CISG will closely resemble the application of usages on normative grounds, because usages "of which the parties should have known" become part of their

---

[91] Goldman (quoted in Dasser n 68 83).

[92] See Dasser *idem* at 83; also Ramberg n 42 146.

[93] Dasser *idem* at 47 ("Auch die Unterscheidung zwischen objektivem Recht und blossem Vertragsinhalt gehe an der Wirklichkeit vorbei") quoting Lew:

> The distinction between normative and contractual trade usages, though important in law, is of minor practical importance. Irrespective of legal form, the true test is the general acceptance of a trade usage by the international business community.

See also Schmitthoff n 37 10.

[94] Enderlein n 48 68.

[95] Schlechtriem n 3 40 ("The so-called 'normative' usages were extremely controversial"). See also Garro n 12 476.

agreement.[96]

The distinction is nevertheless relevant in other respects. For example, in contrast to normative grounds, contractual intent as the ground for the application of usages means that capacity to contract and defects of consent can gain importance as questions of "validity" under article 4 of the CISG.[97] Another important consequence of the contractual approach is that usages prevail over the provisions of the uniform law.[98] Under article 9(1) practices established by the parties become part of the contract, while under article 9(2) the parties are considered, unless otherwise agreed, to have impliedly made those usages which meet the specified requirements applicable to the contract. An applicable usage under either paragraph 1 or paragraph 2 of article 9, therefore, has the same effect as a contract.[99]

On the question of whether commercial usages which are firmly established in domestic law but which do not meet the requirements on the implied applicability of usages in article 9(2) may still override the convention, Honnold is of the opinion that this is not possible. He states that article 9(2) of the CISG alone governs the circumstances in which usages prevail over the convention on application of the party autonomy principle contained in article 6, so that factual compliance with these international standards must

---

[96] Enderlein n 48 68. Similarly Bonell n 46 31 ("Auch nach Art. 9 CISG [liegt] der Geltungsgrund der Gebräuche letzlich nicht, wie behauptet, im Parteiwillen, sondern im Gesetz selbst"); cf also M Bonell 'Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980' 107 *Juristische Blätter* (1985) 389. It must be stated, however, that Prof Bonell's interpretation has been criticised as being contrary to the legal history of the CISG and to the majority opinion in scholarly writing. See De Ly n 46 160.

[97] Schlechtriem n 3 41, see also ch 3.

[98] F Bydlinski 'Das Allgemeine Vertragsrecht' in Doralt n 3 67. The convention does not contain a provision similar to ULIS article 9(2) on the relationship between usages and the uniform rules. The Secretariat Commentary to the 1978 Draft Convention states that such a provision became unnecessary. Since usages which become binding on the parties do so only because they have been explicitly or implicitly incorporated into the contract, they will be applied rather than conflicting provisions of the convention on the principle of party autonomy. The usages cannot, therefore, come into conflict with the law.

[99] Goldstajn n 15 98; F Enderlein 'Rights and Obligations of the Seller Under the UN Convention on Contracts for the International Sale of Goods' in Sarcevic n 15 138:

> This order – contract, usage, Convention – is sometimes made clear in the text of the Convention. Some articles refer expressly to the contract and provide solutions if there is no agreement between the parties. Other articles refer to the contract and stipulate the consequences if there is a certain agreement. But whenever there is a reference to the provisions of the Convention, this is automatically – via Art. 9 – also a reference to usages and practices.

be established for each case, regardless of whether the rule of domestic law, e.g. of the Uniform Commercial Code, is thought to be supported by commercial usage.[100] In this way, the convention does not leave room for the application of domestic rules that determine the circumstances that make a usage applicable (with the exception of the substantive validity issue), since this aspect is governed exclusively by article 9.

[100] Honnold n 15 180 ("Giving effect to domestic law on this ground would be inconsistent with the standards established by article 9(2) and would undermine the Convention's central goal to establish uniform law for international trade").

CHAPTER 5
TRADE TERMS AND THE CISG

1 Trade terms in documentary transactions

International sales are seldom formalised by a single contract. More often, they consist of a cluster of transactions comprising contracts for sale, carriage, insurance and finance. In such cases, the delivery of the shipping documents to the buyer or his agent plays an important role in the performance of the contract of sale. The shipping documents consist normally of a transportation document, e.g. a bill of lading, the marine insurance document and the invoice in the stipulated form.[1]

Documentary transactions embody trade terms evolved from mercantile practice which have simplified, and to a certain extent standardised, the sale of goods abroad. Trade terms deal, *inter alia*, with aspects such as transfer of risk of loss or damage to the goods sold, carriage and insurance, export and import licences and duties, packing and marking of goods, nature and type of documents, checking operations and certificates of origin, of quality or of inspection.[2]

The law of documentary sales is a product of the custom of merchants, shipowners, marine insurance underwriters and bankers in several countries. As part of the law merchant it has developed over many centuries and has been received into the national commercial legal systems of most countries.[3]

Many of the rules of the law merchant relating to documentary sales may be found in international definitions of trade terms such as those elaborated by the International

---

[1] C Schmitthoff *Schmitthoff's Export Trade. The Law & Practice of International Trade* Stevens 1990 6-7.

[2] J Ramberg 'Incoterms 1980' in N Horn & C Schmitthoff (eds) *The Transnational Law of International Commercial Transactions* (Studies in Transnational Economic Law vol 2) Kluwer 1982 138.

[3] See chapter 1.

Chamber of Commerce.[4]

For example, the Incoterms,[5] which contain uniform rules dealing with the obligations of the seller and the buyer under commonly used trade terms, are currently incorporated into a great number of standard contract forms made or recommended by trade organisations worldwide.[6]

By reference to shorthand expressions such as FOB and CIF, merchants are able to allocate between themselves the costs and risks connected to the transaction. If the contract is on CFR,[7] CIF,[8] FOB vessel port of shipment,[9] or FAS[10] terms, for instance, it is said to be a "shipment" contract. In this case, the holder of the bill of lading normally bears the risk of loss or damage from the time the goods were placed on board or alongside the vessel or other carrier. If the trade term of the contract is DES[11] or

---

[4] F Dasser *Internationale Schiedsgerichte und Lex Mercatoria* Schulthess 1989 94.

[5] International Chamber of Commerce, Rules for the Interpretation of Trade Terms (ICC Publication N°460, Incoterms 1990). See H Schneider 'Incoterms 1990' *Recht der Internationalen Wirtschaft* (1991) 91.

[6] O Lando 'Obligations of the Seller: Place of Delivery' in C Bianca & M Bonell (eds) *Commentary on the International Sales Law – The 1980 Vienna Sales Convention* Giuffré 1987 252.

[7] Cost & Freight. The seller must pay the costs of the goods and the freight necessary to transport the goods to the named port of destination. The risk of loss or damage to the goods is transferred to the buyer when the goods pass the ship's rail in the port of shipment (Incoterms 1990); see D Murray 'Risk of Loss of Goods in Transit: A Comparison of the 1990 Incoterms with Terms from Other Voices' 23 *Inter-American Law Review* (1991) 93.

[8] Cost, Insurance, Freight. Under a CIF clause the seller has the same obligations as if the sale were CFR, but with the addition that he has to procure marine insurance against the buyer's risk of loss or of damage to the goods during the carriage (Incoterms 1990).

[9] Free On Board. Under an FOB clause the seller fulfils his obligation to deliver when the goods have passed over the ship's rail at the named port of shipment. The buyer bears all costs and risks of loss of or damage to the goods from that point (Incoterms 1990).

[10] Free Alongside Ship. The seller fulfils his obligation to deliver when the goods have been placed alongside the vessel on the quay at the named port of shipment. The buyer bears all costs and risks of loss or damage to the goods from that moment (Incoterms 1990).

[11] Delivered Ex Ship obliges the seller to tender delivery of the goods on board the ship which has reached the destination port. The seller has the usual obligations, i.e. to supply conforming goods, a commercial invoice, export licences, contract of carriage, freight payment, and to tender delivery. The risk of loss passes to the buyer upon proper tender of delivery while the goods are on board the ship (Incoterms 1990).

DDU[12], the contract is a "destination" contract, and the risk of loss or damage remains with the seller until the goods reach their destination. Similar rules are applicable to shipment and destination contracts involving carriage by rail, truck or air.[13]

Apart from regulating risk of loss or damage, trade terms constitute both price terms defining the buyer's duty to pay upon transfer of the proper documents, and delivery terms defining the obligations of the seller.[14] Several factors, e.g. price, delivery of the goods and passing of risk, are relevant in determining the selection of the appropriate trade term to determine whether a shipment or a destination contract should be chosen. In particular, it is important to ascertain whether the seller or the buyer is in a better position to obtain the best bargain when arranging for carriage and insurance. A seller with large and regular sale volumes would be able to arrange transport more efficiently and at a lower cost than the occasional buyer of smaller quantities, and would thus be able to quote a more competitive C&F and CIF price than, for instance, an FOB price. On the other hand, although according to most shipment contracts the seller is freed in legal terms from further obligations to the buyer upon shipment, in practice this does not always occur. A manufacturer who sells goods in a competitive foreign market must take all necessary precautions to ensure that the goods will arrive at the final destination in good condition. In some cases, he must go even further in guaranteeing the condition and

---

[12] Delivery Duty Unpaid. This term requires the seller to deliver the goods to the named places in the importing country. The seller has the expense and risk involved in bringing the goods to the stipulated place, but is not responsible for duties, taxes, other importation charges or costs and risks of performing customs formalities. The risk of loss shifts from seller to buyer when the goods have been placed at the buyer's disposal (Incoterms 1990).

[13] H Berman & M Ladd 'Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods' 21 *Cornell International Law Journal* (1988) 424. Honnold comments:

> [W]ithin the field of transport, the factual variations are a kaleidoscope that reflects a wide variety of modes of transport and varying degrees of participation by the parties. In recent decades transport arrangements have been profoundly modified by the 'container revolution' and multimodal transport: a container may be loaded and sealed at an inland point and carried to (or near) the buyer by a series of different modes of transport such a truck, rail and ship. [L]ocal transport often will be needed to take the goods from the seller's warehouse to a rail terminal or to an ocean carrier's warehouse or dock, and similar local transport may also be needed when the goods reach a point near the buyer. This local transport may be handled by the trucks operated by the seller or the buyer or by transport companies engaged by one of the parties or by the international carrier. This diversity presents a challenge for the preparation of uniform rules of law.

J Honnold 'Uniform Law and Uniform Trade Terms – Two Approaches to the Same Goal' in Horn n 2 162-163.

[14] *Idem.*

performance of the manufactured goods after they have reached the final consumer.[15]

Virtually all international sale of goods contracts pay particular attention to the choice of trade terms relating to the conditions of payment. Frequently reference is made to the appropriate rules of the International Chamber of Commerce, e.g. the Uniform Rules for Collections[16] and the Uniform Customs and Practice for Documentary Credits[17] so that the obligations of the buyer pursuant to these instruments become part of his obligations under the contract.[18] The documentary letter of credit has established itself as an invaluable method of effective payment in international commercial sales.[19] This is largely due to the fact that payment by means of documentary letters of credit is one of the areas of international trade where the goal of uniformity has been realised to a large extent. The UCP are widely used by the international banking community. They are incorporated into virtually every documentary credit issued at present, thus providing a framework of certainty in payment obligations arising from international sales between

---

[15] Ramberg n 2 140.

[16] The banking practice relating to collection agreements is standardised by the Uniform Rules for the Collection of Commercial Paper 1978 (ICC Publication 322) sponsored by the International Chamber of Commerce. These rules are often embodied in the main contract, particularly in dealings between the remitting bank, which is instructed by the seller, and the collecting bank, which presents the documentary bill of exchange to the buyer on the instructions of the remitting bank. See Schmitthoff n 1 396 ff.

[17] International Chamber of Commerce, Uniform Customs and Practice for Documentary Credits 1993 Revision (ICC Publication N° 500). See D Petkovic 'UCP 500: Evolution not Revolution' 2 *Journal of International Business Law* (1994) 39.

[18] D Maskow 'Buyer's Obligations in General' in Bianca n 6 386. See also E Ellinger 'Letters of Credit' in Horn n 2 242 with further references.

[19] Documentary credits are the most frequent method of payment for goods in the export trade. The essence of the letter of credit transaction is its documentary character: where the goods are represented by a bill of lading, this document of title is used as a means of financing the transaction. Schmitthoff n 1 400 describes the functioning of the letter of credit thus:

> The feature common to all types of letters of credit is this: in accordance with the agreement between the seller and the buyer ("the underlying contract"), the buyer arranges that payment of the price is made by a bank, normally at the seller's place, on presentation of specified documents, which usually include the transport documents, and the performance of other conditions stated in the credit and advised by the bank to the seller. On presentation of the documents the bank pays the purchase price, according to the terms of the credit, by sight payment, deferred payment, or by acceptance or negotiation of a bill of exchange drawn by the seller.

See also R Jack *Documentary Credits* Butterworths 1991.

traders belonging to countries with substantially different legal and economic systems.[20]

Definitions of trade terms such as those contained in the publications of the International Chamber of Commerce may be made binding by express agreement in terms of articles 6 and 9 of the CISG. As has been seen in earlier chapters, article 6 empowers the parties "to exclude the application of this Convention ... or to derogate from or vary the effect of any of its provisions". Article 4 provides that "except as otherwise expressly provided", the convention "is not concerned with ... [t]he validity of the contract or of any of its provisions", leaving validity to be determined by the law applicable under the relevant rules of private international law. Article 9 binds parties to agreed usages and to courses of dealing which they have established between themselves.

Taken together, articles 6 and 4 create a tripartite hierarchy, in terms of which domestic law on validity occupies the highest position, with the agreement of the parties and the convention taking second and third places respectively.[21]

2 Documentary sales and the CISG

The convention recognises the practice of documentary sales in international trade in various articles, and by implication, the use of trade terms in connection with such sales. It does not, however, attempt to define or regulate trade terms used in documentary transactions.[22] In contrast to codifications like the UCC, for instance, which contain such definitions,[23] the CISG, like ULIS, does not include a definition of usual trade terms.

---

[20] M Wayne 'The Uniform Customs and Practice as a Source of Documentary Credit Law in the United States, Canada and Great Britain: A Comparison of Application and Interpretation' 7 *Arizona Journal of International and Comparative Law* (1989) 147; E Ellinger 'The Uniform Customs and Practice for Documentary Credits - the 1993 Revision' *Lloyd's Maritime and Commercial Law Quarterly* (1994) 377; J Stassen 'The Legal Nature of the Uniform Customs and Practice for Documentary Credits (UCP)' 4 *Modern Business Law* (1982) 125. See also Schmitthoff n 1 400.

[21] E Farnsworth 'Review of Standard Forms or Terms Under the Vienna Convention' 21 *Cornell International Law Journal* (1988) 441.

[22] Berman n 13 431.

[23] See UCC §§ 2-319 to 2-324; J Chen 'Code, Custom, and Contract: the Uniform Commercial Code as Law Merchant' 27 *Texas International Law Journal* (1992) 102.

It was thought that these terms were too detailed and complex in their operation to be easily susceptible to international codification, in that their definition would probably be subject to further transformation in the light of changing commercial practice.[24]

The convention deals with the obligations of the parties in a very general manner. The parties' contract plays a role "at least as important as that of the Convention in defining the exact scope of the main duties of the seller and the buyer".[25] A comparison between the provisions of the convention and the incidents of CIF and FOB contracts according to English common law, for instance, shows that many aspects are left undefined in the convention.[26] In all these cases, the convention presupposes the existence of contractual terms regulating the relevant aspect of the transaction.

Besides express contractual stipulations, other obligations of the parties may be determined by usage (article 9), or become part of the contract on application of article 8(3) which deals with the interpretation of conduct and statements of the parties according to their intent.[27]

For example, article 30 of the CISG states that the seller "must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention". The acts which the seller must perform in order to deliver the goods and hand over the documents are laid down in articles 31 to 34 of

---

[24] In the light of these considerations, the drafters of the CISG decided not to include definitions of trade terms in the text of the convention. Honnold comments:

> Leaving out definitions of trade terms ... was not an oversight. In view of the almost infinite variety of settings in which those words may be used, general statutory definitions of merchant's words can be misleading and unsuited to the practices and transactions at hand. Moreover, the definitions of trade terms need to change to take account of changes in commercial practice, such as the container revolution.

J Honnold 'The New Uniform Law for International Sales and the UCC: A Comparison' 18 *The International Lawyer* (1981) 27.

[25] Maskow in Bianca n 18 386.

[26] See J Feltham 'CIF and FOB Contracts and the Vienna Convention on Contracts for the International Sale of Goods' *Journal of Business Law* (1991) 413.

[27] *Idem:*

> Experience shows that parties are commonly able to agree on their primary obligations. On the other hand they often fail to foresee the legal consequences of a breach, particularly those concerning other obligations. For this reason the strength of the Convention lies in its exhaustive treatment of the [remedies for breach of contract], whether the obligation is provided for in the Convention or in the contract.

the convention.[28] The uniform law does not state, however, what must be understood under "documents", nor does it indicate the consequences of a violation of the seller's obligation to hand them over.

Similarly, article 34 states that "[i]f the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract", but does not mention how contractual terms concerning time, place, and form are to be interpreted. While the provision of article 30 is consistent with other uniform rules, such as those contained in § 2-504 of the UCC, it lacks the further specifications needed to regulate the particular trade term used.[29]

In contrast, the Incoterms contain detailed provisions with regard to the procurement, tender and transfer of required documents,[30] and also settle questions which are not considered in the CISG, e.g. which party is responsible for providing the export and or import licence, for paying the export duties, etc.

Article 31 of the CISG deals with the place of delivery as part of the seller's obligation to deliver the goods. The article states that if the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists (if the contract of sale involves carriage of the goods) in handing the goods over to the first carrier for transmission to the buyer. This raises the question of the meaning of "first carrier" in the

---

[28] The requirements the seller must fulfil to transfer title to the buyer are left to the relevant domestic law in terms of article 4 of the CISG. See Lando in Bianca n 6 247.

[29] UCC § 2-504 provides that the seller must 1) hand over the goods to the carrier, 2) obtain and "promptly" deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods, or otherwise required by the agreement, or by usages of trade, and 3) notify the buyer of the shipment. Other provisions of the Code regulate FOB, FAS, CIF and C&F transactions in detail. See Berman n 13 431.

[30] For instance, in the case of the trade term FCA (Free Carrier) it is the railway consignment note; in that of FAS (Free Alongside Ship) a quay receipt or receipt for the bill of lading; of FOB (Free On Board) the mate's receipt; of CFR (Cost & Freight) and CIF (Cost, Insurance, Freight) the on-board bill of lading; of Ex-ship a bill of lading or a delivery order; of DEQ (Delivered Ex-Quay) a delivery order and of DAF (Delivered At Frontier) the usual transport document and/or a docking or warehouse certificate or a delivery note. With regard to bills of lading, the Incoterms demand that they be "clean", meaning that the documents of title in the goods must not contain any additional remarks with regard to the conditions or status of the goods. F Enderlein & D Maskow *International Sales Law* Oceana 1992 138.

convention, in particular in relation to any land carriage prior to shipment which is contemplated in the contract.[31]

In contrast, the place of delivery is well specified under trade terms regulated in the Incoterms. In terms of the 1990 version, the place of delivery where the clauses FCA (Free Carrier), CPT (Carriage paid to) and CIP (Carriage and Insurance paid to) are applied is the first (or only) carrier,[32] be it by rail, road, sea, air, inland waterway, or a combination of the foregoing in a multimodal transport, whereas the named port of shipment and/or destination is the place for delivery - even if transportation by ship is not the first means of transportation - where the terms FOB (Free on Board), CIF (Cost Insurance, Freight) and CFR (Cost and Freight) are concerned.[33]

A further problematic provision in the CISG deals with risk of loss in goods sold in transit. Under article 68, unless circumstances indicate otherwise, the risk of loss in goods sold in transit passes from the seller to the buyer on conclusion of the contract. This rule differs from the traditional practice where risk of loss or damage in goods sold afloat or in transit passes from the seller to the buyer with retroactive effect from the start of the voyage.[34]

These few examples serve to illustrate that the convention deals with overall issues associated with delivery and risk of loss in much more general terms than, e.g. those provided by the Incoterms and, in some cases, the convention does not resolve

---

[31] Feltham n 26 417:
It is to be assumed that carriage in the seller's own transport will not amount to delivery. Otherwise, on the assumption that "the seller is not bound to deliver the goods at any other particular place" delivery to a land carrier prior to shipment may amount to delivery.

[32] Murray n 7 120. A "carrier" is the collective term used for the different means of transportation.

[33] Enderlein n 30 131. Therefore, it is not sufficient for the seller in an FOB contract, to hand over the goods to the railway company as the first carrier.

[34] Berman n 13 430 ("The rule that the risk passes at the time of the conclusion of the contract rests on assumptions connected with transfer of title and is unworkable in most cases of international sales").

responsibilities, e.g. for export licences and export duties, as clearly as the Incoterms.[35]

Terms and contract forms used in international trade are not construed uniformly within the various legal systems. Thus in some countries, for instance, the terms C&F and CIF impose upon the seller the duty to bring the goods on board a ship, even if there is a prior carriage by land, while in other countries the handing over of the goods to the first land carrier suffices to fulfil the seller's obligation of delivery.[36] The interpretation of the term FOB differs in some common law countries and in the regulation contained in the Incoterms.[37] Under English law, for instance, in addition to the obligations of the seller set out in Incoterms, the FOB seller must, in certain circumstances, give the buyer due notice enabling him to insure the goods in sea transit.[38]

Further obligations of the parties arising from an FOB contract may sometimes be determined by trade usages existing in the particular trade or in a particular port. Schmitthoff cites as examples the usage in the oil trade in terms of which an FOB buyer must give the seller timely notice of loading, and the usage applicable in the port of Stockholm, according to which, if wood products are sold "FOB Stockholm", the buyer bears the costs of loading the goods into the vessel.[39]

---

[35] Honnold in Horn n 13 171. On comparing the role played by the convention and the Incoterms in documentary sales Honnold stated that the Incoterms address the question "that is in the forefront of the mind of the merchant", i.e. 'What should I do?', while the convention addresses the question "that concerns the merchant's lawyer", i.e. 'What happens when something goes wrong?' He concludes:

> Incoterms and the Convention play very different roles – roles that support each other. Incoterms, properly invoked, can be very useful to define precisely some of the central steps that the parties should take. The Convention (as in the case of risk of loss) gives general but useful answers to questions that the parties have not answered by contract provisions or by incorporating Incoterms. In addition, the Convention provides a way to avoid or resolve disputes in a wide range of situations, not mentioned in Incoterms, when a party fails to perform his duties under the contract.

[36] Lando in Bianca n 6 251.

[37] J Beraudo 'Convention de Vienne du Avril 1980 sur la Vente Internationale de Marchandises: L'Interpretation du Contrat' 9 *Derecho Comparado (Revista de la Asociación Argentina de Derecho Comparado)* (1993) 41; In the United States for example, definitions of trade terms contained in the (Revised) American Foreign Trade Definitions 1941 are used for export transactions.

[38] Sale of Goods Act s 32(3). See Schmitthoff n 1 504.

[39] *Idem* 18.

Parties may avoid divergences in the interpretation of trade terms by referring expressly to this aspect in their contract. The most common example is the express reference to a given Incoterm, such as FOB or CIF, or to clauses that are common in the trade of a particular commodity. When express provision is made, questions regarding the place of delivery or the passing of risk will be decided by reference to the chosen usages, rather than the convention rules.[40]

As has been seen, the CISG does not define or regulate documentary sales, nor does it refer to trade terms used in such sales.[41] Yet trade terms may become part of a contractual agreement governed by the convention.[42]

Where trade terms are incorporated in the contract, and yet no express reference to standards of interpretation is made, the question concerning the precise meaning to be given to these terms and expressions can be answered by reference to article 8 of the convention regarding the interpretation of statements and conduct of the parties. Alternatively, the application of international uniform rules and definitions which have developed out of international commercial practice such as the Incoterms and the UCP may be justified on the ground that they constitute international trade usages under article 9(2) of the CISG.[43]

3 Interpretation of trade terms under the CISG

Article 9(3) of ULIS expressly provides for the interpretation of trade terms in

[40] Articles 6 & 9 of the CISG.

[41] Berman n 13 431.

[42] G Eörsi 'General Provisions' in N Galston & H Smit (eds) *International Sales: the United Nations Convention on Contracts for the International Sale of Goods* Matthew Bender 1984 2-25.

[43] B Piltz *Internationales Kaufrecht* Beck 1993 68; see also Enderlein n 30 70-71, M Bonell 'Usages and Practices' in Bianca n 6 113-114 and J Honnold *Uniform Law for International Sales* Kluwer 1991 176 ("One of the issues that was discussed repeatedly in framing article 9 was the applicability of such definitions as international trade usage").

accordance with their usual meaning.[44] This paragraph was deleted by the Working Group which drafted the Vienna Convention.[45]

The fear was expressed that by virtue of a provision in the CISG similar to that of ULIS, a given expression or commercial term employed in a contract could be interpreted in terms of model definitions or rules which were not known to the parties.[46] As seen in chapter 4, article 9(2) responded to similar concerns by binding parties to "usages of which they knew or should have known" in addition to the requirement that the usage be "widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned". These cumulative requirements were not included in the proposals for a fourth paragraph, based on ULIS article 9(3), to give effect to trade terms and contract forms, thus giving way to the concerns mentioned, in the sense that expressions contained in the contract might be interpreted with reference to standard definitions unknown to the parties.[47]

Later proposals to reinstate a similar provision at the tenth session of UNCITRAL failed, on the ground that the subject matter of the proposed new paragraph was thought to already have been covered by paragraphs 1 and 2 of article 9 and was considered, therefore, unnecessary.[48]

---

[44] Article 9(3) ULIS states:
> Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned.

[45] UNCITRAL Yearbook VI (1975) 52.

[46] Bonell in Bianca n 43 105.

[47] UNCITRAL Yearbook II (1970) 57 reprinted in J Honnold *Documentary History of the Uniform Law for International Sales* Kluwer 1989 63. Paragraph 4 of the proposed text reads:
> Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning widely accepted and regularly given to them in the trade concerned unless otherwise agreed by the parties.

[48] UNCITRAL Yearbook VIII (1977) 31 in Honnold n 47 324. The Committee considered a proposal designed to reintroduce a provision along the lines of article 9(3) of ULIS. The proposal was made on the ground that a distinction should be drawn between the application of usages, covered by paragraphs 1 and 2 of article 8 of the Draft Convention (article 9 of the CISG), and the application of trade terms such as FOB or CIF, in respect of which several possible interpretations existed.

The point was raised again at the Diplomatic Conference where several delegations favoured the reintroduction of a rule on interpretation of trade terms in the final text of article 9 of the CISG.[49] It was argued that the aim of these proposals was to cover the question of the interpretation of trade terms such as FOB and CIF - a question that was not properly addressed by article 9.

Considering the great frequency with which trade terms were used in international transactions and the difficulties arising from the differences in meaning attached to them in the various legislations, it was obvious that much of the litigation arising out of sale contracts would be concerned precisely with the interpretation of trade terms. Accordingly, in order to avoid differing interpretations of the same terms by judges and arbitrators sitting in different states, it was essential for the uniform law to deal with this issue in the manner proposed by the amendment.[50]

But the proposal was finally rejected, on the ground that the addition of a paragraph on interpretation of trade terms to the article on applicability of usages generally would in practice make it difficult to distinguish between questions of usage and questions of interpretation of trade terms.[51] Concern was also expressed over phrases like "meaning usually given", which were "too vague" and might subject parties in some areas to practices with which they were not familiar.[52]

4 Application of international uniform definitions as trade usages under article 9

The failure to include a rule on interpretation of trade terms incorporated by the parties

---

[49] See the Egyptian proposal to add a provision similar to article 9(3) of ULIS to article 9 of the CISG (A/CONF 97/C 1/L 44) and the Swedish proposal to include a reference to the interpretation of trade terms in paragraph 2 of article 9 of the CISG (A/CONF 97/C 1/L 19) in Honnold n 47 661.

[50] Summary Records of the 7th Meeting of the First Committee, Diplomatic Conference (Doc C(4) OR 267) in Honnold n 47 488.

[51] See statement of Mr Kim, representative from Korea *idem* 89.

[52] See statement of Mr Lebedev, representative from the USSR *idem*.

into their agreement leaves a gap in the convention.[53] The Commentary to the 1978 Draft Convention states that:

> This article [article 9] does not provide for any explicit rule for the interpretation of expressions, provisions or forms of contract which are widely used in international trade and for which the parties have no interpretation.[54]

Article 8 of the CISG, giving principles for the interpretation of the statements and conduct of a party, may assist in the construction of trade terms included in the contract by indicating a particular understanding of trade terms. In terms of paragraph 3 "in determining the intent of a party ... due consideration is to be given to ... usages". In accordance with article 8(2), whenever it cannot be determined that the actual understanding which one party had of the disputed contractual term was known or at least should have been known by the other party, the understanding of a reasonable person of the same kind and in the same circumstances as the other party is decisive.

It has been pointed out that these considerations, if taken in isolation, may lead to unsatisfactory results.[55] Consider, for example, an FOB sale entered into between a seller in New York and a buyer established in Marseilles. If, upon arrival, the goods are found to be defective and the assessment of the damage is linked to the loading practices upon shipment of the goods, the question arises as to whether the term FOB should be interpreted in accordance with usages existing at the port of New York, at the port of Marseilles, or, rather, in accordance with a more "international" definition, e.g. in terms of the definition of the clause FOB contained in the Incoterms.

---

[53] Feltham n 26 416; Bonell in Bianca n 43 114; J Barbic 'Uniform Law on the International Sale of Goods, Uniform Law on the Formation of Contracts for the International Sale of Goods (1964) and United Nations Convention on Contracts for the International Sale of Goods (1980)' in C Voskuil & J Wade (eds) *Hague Zagreb Essays 4: On the Law of International Trade* Oceana 1986 13.

[54] Secretariat Commentary on the 1978 Draft, Diplomatic Conference (Doc C(3) OR 19) in Honnold n 47 409.

[55] Beraudo n 37 42 ("[l]'application de l'article 8 peut conduire dans certais cas á un résultat différente de celui auquel aboutirait l'interprétation selon le sens que les milieux commerciaux intéressés ont l'habitude de leur attacher").

In terms of the provision in article 8, the party proposing the term whose interpretation is at stake, e.g. the New York seller, must first be determined. Once this has been done, then the understanding of a reasonable person of the same kind and in the same circumstances as the other party is to be taken into consideration, i.e. the understanding of the French buyer. In the particular case, however, why should French rules on FOB terms prevail, although they differ not only from the New York rules but also from uniform definitions contained in the Incoterms?[56]

The incorporation in the CISG of a paragraph similar to paragraph 3 of article 9 of ULIS would probably have led to the application of the Incoterms in the above-mentioned case, on the ground that they would provide "the meaning usually given ... in the trade concerned". However, the same result may be achieved through the application of the Vienna Convention, even in the absence of a similar provision.[57]

Particularly meaningful in this regard is the provision of article 7(1) of the CISG which states that in the interpretation of this convention regard is to be had to "its international character" and to "the need to promote uniformity in its application and the observance of good faith in international trade". Bonell points out that this constitutes a methodological requirement common to the interpretation of all uniform laws, whether or not they contain an express provision to this effect.[58]

A uniform law text such as the CISG, which regulates relations between private individuals, is no different from the text of an analogous domestic law. In particular, like domestic laws, it should be capable of an interpretation that goes beyond its literal meaning, even to the extent of its application by analogy.[59] The only peculiarity of the uniform law deriving from its international origin is the need to interpret the terms and

---

[56] Beraudo *idem* at 41 (qualifies this result as "strange").

[57] *Idem* 42, Barbic n 53 15.

[58] M Bonell 'International Uniform Law in Practice – Or Where the Real Trouble Begins' 38 *The American Journal of Comparative Law* (1990) 879.

[59] See *supra* ch 3 p 93 ff.

concepts expressed in it in an autonomous manner, in the sense of its independence from the meaning given to these terms in domestic legal systems.[60] In this context, unless otherwise provided, it would be contrary to the spirit of the convention if trade terms were not interpreted from an international point of view but rather from a purely domestic point of view. In the example provided, therefore, the interpretation of the term FOB under the CISG could not be other than the interpretation provided by the uniform rules contained in the Incoterms, which reflect the usual meaning given to this term in international trade.[61]

The need to clarify issues associated with letters of credit and delivery terms may similarly be accommodated under the convention by its reference in article 9 to established practices and usages. As has been seen, commercial practices are applicable by express party provision or through a course of dealing in terms of article 9(1). Article 9(2) further provides that, unless otherwise agreed, the parties are considered to have made usages applicable to the contract. As expressed earlier,[62] what is significant in article 9(2) is that this provision acknowledges that rules not made by states can be imposed upon the parties in certain circumstances. From this point of view, the effect of these rules is equivalent to the normative effect of ordinary legal rules.[63]

Article 9(2) of the convention requires that the parties must have been aware of the usage, which must also be widely known to, and regularly observed by, parties to

---

[60] Bonell *idem*.

[61] *Idem*; Beraudo n 37 42; B von Hoffmann 'Passing of Risk' in P Sarcevic & P Volken (eds) *International Sale of Goods. Dubrovnik Lectures* Oceana 1986 280

> The materials of the UN Convention constantly refer to INCOTERMS. Therefore, it seems that in the interpretation of those standard terms INCOTERMS should prevail not only over the UN Convention but also over national trade terms.

Similarly Enderlein & Maskow n 30 55

> Usages can, in the meaning of Article 9, also be relevant in determining what is in conformance with the international character of the Convention. Likewise, in international trade this can be widely recognised non-governmental codifications, e.g. the INCOTERMS, the Uniform Rules and Practices for Documentary Credits and the Uniform Rules for Collections. This can be done independently of the degree by which they are already regarded as codification of usages.

[62] See chapter 4 p 127 ff.

[63] B Audit 'The Vienna Sales Convention and the *Lex Mercatoria*' in T Carbonneau (ed) *Lex Mercatoria and Arbitration* Dobbs Ferry 1990 143.

international contracts of the type involved in the particular trade concerned. The point of paragraph 2 is that only usages of which the parties are aware or should be aware on the ground that they are widely used and known justify the expectation that they will be observed with respect to the transaction in question.[64] Accordingly, definitions of trade terms can bind the parties even though they have not been incorporated into the agreement, but only when their regularity of observance meets the standards of article 9(2).

Enderlein & Maskow state:

> When a rule meets the requirements [set out in article 9(2)], the application of usages] is fictitiously agreed. Since this refers to the INCOTERMS, the Uniform Customs and Practice for Documentary Credits and the Uniform Rules for Collections, they are applied without taking the decision on whether they are usages at all. The above-mentioned rules are rules of interpretation which require a specific stipulation in the contract (use of a specific trade term, of specific conditions of payment). If it is not determined at the same time which is the decisive interpretation; e.g. merely FOB named port of shipment, then it is governed by the INCOTERMS and not by national usages or laws.[65]

The legal relevance of international definitions such as the Incoterms and the UCP rests in their widespread acceptance among interested business circles.[66] Thus, as far as the interpretation of typical clauses or expressions is concerned, such definitions have been

---

[64] The Secretariat Commentary to article 8 of the Draft Convention (article 9 of the CISG) in Honnold n 47 409 explicitly refers to the lack of provisions for the interpretation of trade terms or standard contracts widely used in international trade and for which the parties have given no interpretation. In order to solve problems of interpretation it adds:

> In some cases such an expression, provision or form of contract may be considered to be a usage or practice between the parties, in which case this article would be applied.

[65] Enderlein n 30 70-71.

[66] In this sense Eisemann has stated that "[t]he legal value of the Incoterms rests chiefly on the fact that they 'fit', so to speak, the practice most widely followed in international trade" (quoted in Dasser n 4 88 n 52). The territorial scope of the Incoterms must be taken into account. While this formulation has not yet received worldwide acceptance, there are good prospects for this being the case in the foreseeable future. In this sense, it is reported that five of the most influential trading organisations in the United States have discontinued the use of the (Revised) American Foreign Trade Definitions 1941 and have officially declared their intention to promote the Incoterms for use in the United States as well. See Ramberg n 2 151; F De Ly *International Business Law and Lex Mercatoria* North-Holland 1992 175.

used by courts even in the absence of any reference to them in the contract.[67]

When preparing the 1980 version of the Incoterms the International Chamber of Commerce maintained close contact with interested United Nations bodies such as UNCTAD and UNCITRAL. This explains, for instance, the general concept of attaching the critical point for the passing of risk from the seller to the buyer to the moment when the goods are handed over to the first carrier in the Incoterms, which coincides with the main principles of the 1978 United Nations Convention for the Carriage of Goods by Sea (the Hamburg Rules), article 4,[68] and the corresponding provision of the 1980 United Nations Convention on International Multimodal Transport, article 14.[69]

When requested by UNCITRAL to indicate the factors which, in its opinion, provide obstacles to a wider use of the Incoterms in international trade practice, the International Chamber of Commerce stated that these obstacles were mostly of a juridical nature. As Incoterms do not emanate from the legislative authority of any state, they do not have the force of law. Thus, in terms of classical theories of contract interpretation, they will not be applied by a court unless the parties, expressly or by implication, have incorporated them into their contract.[70]

The drafters of the CISG had in mind the availability of the Incoterms when they

---

[67] M Bonell 'The relevance of course of dealing, usages and customs in the interpretation of international commercial contracts' in *New Directions in International Trade Law* Acts and Proceedings of the 2nd Congress on Private Law, Unidroit, vol 1 Oceana 1977 quotes the following decisions applying Incoterms: OLG Munich 19 December 1957, *AWD* 1959 79; BGH 22 January 1959 in *AWD* 1959 20; Trib. Genoa 6 April 1966 in *Dir. Maritt.* 1966 336; OLG Karlsruhe 12 February 1975 in *RIW* 225; award of the arbitral tribunal of the I.C.C. No.1689 of 1970; award of the arbitral tribunal of the I.C.C. No.1788 of 1971. With respect to the UCP : Cass. it. 30 July 1960 in *BBTC* 1960 II 486; Cass. française 13 April 1967 in *Clunet* 1967 184; BGH 21 March 1973 in *NJW* 1973 899.

[68] For the text of the convention see C Cheng (ed) *Basic Documents on International Trade Law* Martinus Nijhoff 1986 284.

[69] *Idem* at 304.

[70] Report submitted to the United Nations by the International Chamber of Commerce, Annex to Doc A/CN 9/14 of 9 February 1969 6 (quoted in Bonell n 67 1).

decided to omit any reference to trade terms in the convention.[71] In 1970, at the second session, UNCITRAL decided that "it would be desirable to give the widest possible dissemination to Incoterms 1953 in order to encourage their worldwide use in international trade".[72] Similarly, the Secretariat Commentary on the 1978 Draft Convention repeatedly refers to the definitions of the Incoterms with respect to trade terms used by the parties in arranging delivery of the goods and the passing of risk.[73]

A reference to the Incoterms can follow from the construction of articles 8(2) and 9(2) of the CISG with regard to the interpretation of trade terms included in the contract. In terms of these provisions, regard should be had to any usage of "which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned". Given the widespread use of these international definitions sponsored by the International Chamber of Commerce, it is highly probable that in dealings between businessmen from various regions of the world, both the Incoterms and the UCP would qualify as such "usage" under the CISG.[74]

---

[71] See discussion on article 8(2) of the Draft Convention (article 9(2) of the CISG) during the 7th Meeting of the First Committee Deliberations, Diplomatic Conference (Doc C(4) OR 268) in Honnold n 47 488 ff.

[72] Report of the Secretary General (addendum): Pending Question with Respect to the Revised Text of a Uniform Law on International Sale of Goods 1975 (quoted in Berman n 13 433).

[73] See, e.g. commentary to article 29 of the Draft Convention (article 31 of the CISG) regarding the use of trade terms for the delivery of the goods and the handing over of documents (Doc C(3) OR 29) in Honnold n 47 419.

[74] Ramberg n 2 151. See also Dasser n 4 88:

> Die Incoterms werden heute von den Gerichten auch ohne ausdrückliche Verweisung der Perteien als subsidiäres Auslegungsmittel herangezogen.

Similar considerations apply to the UCP; see for example M Kurkela *Letters of Credit Under International Trade Law* Oceana 1985 19:

> Because of its wide use and almost global adoption by banks in various countries, UCP has obtained the status of *lex mercatoria* at least in the sense that its principles could be applied to international credits in the interbank relationship even in the absence of specific reference to it. Between banks and their customers it may have the status of *lex mercatoria* of varying binding force depending on the circumstances, or it could have the status of usage or custom or just general banking conditions depending on the applicable law and the circumstances and parties of the case.

See also E Ellinger 'The Uniform Customs - Their Nature and the 1983 Revision' *Lloyd's Maritime and Commercial Law* (1984) 583 ff; A Giampieri & G Nardulli 'Enforceability of International Letters of Credit: An Italian Perspective' 27 *The International Lawyer* (1993) 1016 state:

> As far as the relationship between the UCP and Italian law is concerned, Italian jurisprudence has adopted different interpretations. Some decisions hold that UCP rules are "statutory usages" that are followed as standard business practices even in the absence of a specific contractual provision under article 1374 of the Civil Code.

With regard to other usages which could be considered applicable, article 9 of the CISG should be interpreted to allow a discussion of whether newcomers and other inexperienced parties "ought to have known" of usages used in international trade.[75] In this context, the provision of article 7(1) referring to the observance of good faith in international trade could operate as a uniform criterion for the substantive evaluation of usages.[76]

In terms of article 7(1), in the interpretation of this convention, regard is to be had "to the need to promote the observance of good faith in international trade". If one can read the inclusion of good faith in the convention as a general principle that must be regarded in interpreting and extending the convention's provisions, it is conceivable that a usage could be disregarded, despite the fulfilment of the requirements of article 9, on the ground that in a given case its application would be contrary to the enforcement of good faith in international trade.[77]

> [However, I]talian courts have [also] found that UCP rules are "contractual usages" (that is, standard contractual provisions incorporated by reference in a single contract). Consequently, the UCP would be applicable to the extent that the [underlying contract] makes reference to it. As a practical matter such debate is irrelevant because Italian banks always include the reference to the UCP rules and the UCP rules and Italian domestic provisions are consistent.

[75] A Kastely 'Unification and Community: A Rhetorical Analysis of the United Nations Convention' 8 *Northwestern Journal of International Law and Business* (1988) 613.

[76] Bonell in Bianca n 43 113.

[77] *Idem*; similarly Kastely

> [in the light of article 7] Article 9 should be interpreted to say that a usage perpetuating domination by the powerful threatens the spirit of good faith in international trade and therefore is not impliedly incorporated into contracts under Article 9(2).

For a contrary view see, e.g. Enderlein n 30 69.

SUMMARY AND CONCLUSION

1 International contracts for the sale of goods are generally governed by the national law of a given country, determined in accordance with applicable rules of private international law or in terms of an express choice of law clause, on application of the widely accepted principle of party autonomy, or freedom of contract. Parties often make use of their freedom of contract, not only to select the applicable law but also with regard to the precise regulation of the substance of their contractual obligations. However, by their own nature and with few exceptions, domestic laws are not well suited to international transactions, in that they are not designed to meet the specific needs inherent in international trade arrangements.

2 Reference to trade usages, course of dealing, uniform definitions of trade terms, standard contracts and general conditions are useful tools of conflict avoidance, in that they reduce the incidence of contractual disputes by providing suitable mechanisms to address most of the problems likely to arise during the course of the business relationship.

3 Historically, international trade law has been fostered by merchant practices, inspired by need and mutual interest and shaped according to the realities of the business world. For centuries the law merchant has been – and continues to be today – an international body of law, founded on the shared legal and commercial understandings of an international community comprised primarily of commercial, shipping, insurance and banking enterprises of all countries.

4 International commercial custom has been defined as consisting of "commercial practices, usages or standards which are so widely used that businessmen engaged in international trade expect their contracting parties to conform to them". It is the presence of international commercial custom as a starting point for judicial interpretation and for national and international legislation that allows a reference to international trade law as a special type of international law.

Compared to domestic trade, foreign trade usually requires the carriage of goods over relatively long distances, often by means of shipping transport, and involves a considerable number of parties in different countries. Foreign trade transactions are usually on a large scale, and inevitably give rise to the possibility of legal or arbitral proceedings in a foreign judicial or arbitral court. Therefore, partners in foreign trade transactions are likely to concern themselves with the allocation of the various risks involved by means of universally understood contract terms. This is particularly true with regard to international sale contracts where, for instance, international trade terms related to the allocation of risk of loss or damage to goods sold, bills of lading, documentary credits and other devices used in international sales, are governed by similar legal principles in virtually all trading countries.

5 At present, international commerce is, to a growing extent, guided and co-ordinated by such uniform rules and patterns. In this century, commercial custom has adapted itself to changing circumstances: the general trend of international commercial law has been to move away from the restrictions imposed by domestic laws. The contribution of a great number of international organisations and trade associations that have been active in the process of formulating uniform rules applicable to international trade transactions, has led scholars to refer to the emergence of a "new *lex mercatoria*" which operates on a transnational scale. As in the case of the medieval law merchant, a common foundation of mutual understanding among merchants is still perceived as essential to viable commercial practice across national boundaries.

6 The doctrinal dispute on the alleged autonomy of the new *lex mercatoria* is a core element in the discussion of its legal nature. While some regard the *lex mercatoria* simply as a set of rules which derives its validity from the recognition by domestic legal systems, others regard it as a general body of international substantive law – comprising trade usages and commercial practices – that governs or may govern international business contracts.

7 Much of this revitalised law merchant is already evident in the impressive number of business documents for use in contractual negotiations, in drafting contracts and in settling business disputes on the international level. The most successful of these formulations are two sets of rules issued by the International Chamber of Commerce, i.e. the Incoterms and the Uniform Customs and Practice for Documentary Credits. The first provide uniform definitions of trade terms used in the export trade and the second represent a standardisation of the banking practice relating to letters of credit. Also relevant are the various standard form contracts sponsored by several trade associations and the model contract forms issued by international organisations such as the United Nations Economic Commission for Europe.

8 As international trade develops, political and economic concerns increase the need for fast and efficient resolution of business disputes. In order to avoid the legal uncertainty associated with divergent national laws, as well as other inconveniences relating to differences between the various procedural systems and difficulties in enforcing judgments abroad, foreign trade contracts usually provide for submission of any dispute to arbitral adjudication. It is particularly within the ambit of modern commercial arbitration that the *lex mercatoria* has been acknowledged as an autonomous legal system. In contrast to national courts, international arbitrators often resort to international commercial custom, including trade usages and contract practices, to decide the matter subject to dispute. This development has been facilitated by modern arbitration laws which require that the arbitrator take into account the relevant trade usages, regardless of the law applicable to the substance of the dispute.

9 Contract practices in the form of commercial usages and standard clauses are usually recognised in a similar way by the various national laws. The analysis of selected positive legal systems in chapter 2 in connection with the legal relevance of trade usages in commercial contracts shows that despite the lack of precision in the terminology used, there seems to be consensus of what should be understood under "trade usage", i.e. a method of dealing or manner of conduct

generally observed with such regularity in a particular line of business that it is accepted as binding by those engaged in the particular trade concerned.

10 The comparative analysis of the various national laws also shows that, from a theoretical point of view, the legal basis for the application of trade usages is two-fold. Under a classical, subjective approach, usages incorporated by the parties into their contract, either expressly or by implication, clarify the parties' intention and assist the process of interpreting the terms of the agreement. Under a normative approach, trade usages may also apply in situations where they reflect an implied expectation that the formation or performance of the contract will follow certain established patterns of behaviour, even when they are not referred to in the contract.

11 It should be emphasised, however, that these two distinct approaches to the application of trade usages are closely related in practice and may lead to the same outcome. As seen, trade usages are not generally regarded as genuine sources of law under the legal systems surveyed – but rather devices for contract interpretation. Their binding force rests on the intention of the parties to the contract. However, in all these systems such an intention is very likely to be presumed by the fact that the usage is commonly observed in the trade sector in which the parties operate. Thus, for example, in accordance with German law, when there is no express reference in the contract to the various rules and practices which have developed in international trade, their application depends on whether these rules may be regarded as *Handelsbräuche* in terms of § 346 of the German Commercial Code, in which case they apply independently of the parties' intention, for the sole reason that the parties concerned belong to the relevant professional category or carry out business in the particular trade. Under § 1-205 (2) of the United States Uniform Commercial Code, trade usage is defined as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question". Because the agreement of the parties includes that part of the bargain that may be found in trade usages, course of

dealing and course of performance, these sources not only supplement or qualify express terms, but may themselves constitute contract terms, thus supplementing the written agreement. Under Italian law, usages may also have a supplementary function and form part of the contract without the consent of the parties in certain circumstances. In England, the traditional approach to contractual relations, which is founded on the intention of the parties, tends to exclude the notion that the parties may be bound by rules to which they have not expressly agreed or which cannot be somehow attributable to their intention. In practice, however, usages may be of importance not only to interpret but also to supplement contract terms, especially commercial ones, when they have acquired a certain degree of notoriety in the particular trade. Even within a contractual context, therefore, the objective application of usages, based on notoriety and regularity of observance in a place, vocation or trade is practised in England, although the interchangeable use of the terms "usage" and "custom" in the past has led to usages being denied application in this country on purely formalistic grounds.

12 The articulation of the *lex mercatoria* in international conventions has been more successful in some commercial fields than others. Apart from international texts on international commercial arbitration, one may focus on the unification efforts in the area of international sales contracts to determine the status of trade usages.

13 The United Nations Convention on Contracts for the International Sale of Goods (CISG) was signed in Vienna in April 1980. Drafted by the United Nations Commission on International Trade Law, the CISG contains substantive rules to govern contracts for the international sale of goods which, apart from being uniform, take into account the fundamental fact that export and import transactions are often concluded between parties enjoying unequal bargaining power and operating in different socio-economic contexts.

14 In comparison to its predecessors, the 1964 Hague Uniform Law on the International Sale of Goods (ULIS) and the 1964 Hague Uniform Law on the

Formation of Contracts for the International Sale of Goods (ULF) which only obtained the ratification of nine, mostly Western European states, the CISG has established a first step towards global unification of the law of international trade, in that, as of February 1994 it has entered into force in thirty-eight countries with substantially different legal systems and degrees of economic development.

15 The flexibility of the CISG's rules constitutes its most important feature. Through the express incorporation of the party autonomy principle, the convention makes all its provisions optional, thus recognising the existence of rules evolved out of practice in international trade, which it supplements, acting as a body of residual rules for the case where the parties have not stipulated otherwise in their contract. The parties can therefore agree that the rules of the convention shall be excluded by choosing to apply a specific domestic law. In addition, any rule of the convention can be altered or rejected by inconsistent provisions agreed between the parties, without the need to resort to the choice of a particular domestic law. The criteria adopted to determine the legal effect of trade usages and other standard rules evolved out of commercial practice therefore represent an important aspect of the system created by the CISG.

16 The main provisions regarding trade usages are contained in article 9 of the convention. This article is located in Part I of the CISG, which outlines the convention's sphere of application and its general provisions. A summary view of this part of the convention in chapter 3 is therefore in order, since the application of article 9 to the contract naturally presupposes that the particular transaction is governed by the CISG. The analysis of articles 4 and 7, relating to the exclusion of certain issues from the scope of the convention and the interpretation of the uniform law, provides the necessary background to delineate precisely the scope of application of trade usages under the uniform law.

17 Article 4 leaves the regulation of the substantive validity of the contract and of trade usages to domestic law. An issue of validity thus falls outside the scope of the convention. However, since the CISG does not define the term "validity", the

question remains whether any particular issue is one of validity or one which is expressly provided for in the convention. While the exclusion of issues of validity from the scope of the uniform law reflects a compromise enabling contracting states to continue to enforce traditional limitations on party autonomy, writers have expressed concern over a too wide interpretation of the exclusion contained in article 4. In particular, it is feared that the interpretation of issues of validity from the point of view of domestic law could lead to a situation where all mandatory domestic law is considered to raise questions of "validity", thus endangering the convention's goal of introducing a degree of uniformity into the regulation of international sales. The legislative history of the convention shows, however, that the drafters did not intend to equate validity with all mandatory domestic law. As was mentioned in chapter 4, in the particular case of trade usages, a proposal to the effect that only reasonable usages should be recognised as binding on the parties was rejected, to avoid as far as possible, the dismissal of usages on normative grounds. In this way, the convention only refers to domestic law to govern aspects of validity such as contractual capacity, defects of consent and illegality, and to other rules of public law which are mandatory rules in an international sense. The circumstances which make a usage applicable, on the other hand, are exclusively governed by article 9 of the convention.

18 The importance of a uniform interpretation of the CISG cannot be overemphasised. Since the object of the convention is to provide a uniform regime for international sales, the convention's ultimate success will rest not only on its ratification by a significant number of states, but also on its uniform interpretation by the courts of such states. Article 7 of the CISG addresses this issue and specifies that in the interpretation of the convention, its international character and the need to promote uniformity in its application and the observance of good faith in international trade should be taken into account. The reference to "the observance of good faith in international trade" is particularly useful if interpreted as a general principle of the convention which could be resorted to in the case of a gap in the provisions of the uniform law. In the context of article 9 of the CISG, this provision could operate as a uniform criterion for the substantive evaluation

of trade usages.

19 On application of the principle of party autonomy, both ULIS and the CISG provide that parties are bound by any usage and practice to which they have agreed. As was pointed out in chapter 4, the main difference between the two uniform laws lies in the criteria to be considered in order to determine which usages may be applicable to the contract by implication. In this regard, whereas article 9 of ULIS applies a purely objective test in binding parties to usages which the reasonable person in the same situation would consider applicable to their contract, article 9 of the CISG contains a two-fold test that includes both a subjective and an objective element. Unless otherwise agreed, the parties are considered to have implicitly made applicable to their contract a usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

20 The adoption of article 9 was preceded by a heated debate on the legal basis for the application of trade usages under the convention. The view was taken that because most international trade usages were established by traders in Western, industrialised states, the recognition of such usages as normative rules would give industrial states an unfair advantage. In particular, concerns were expressed over the application of expressions or uniform definitions unknown to parties from developing and former socialist countries.

21 The addition of a subjective element (requiring that parties "knew" or "ought to have known" of the usage in question) to define the sphere of application of usages was directed at narrowing the liberal approach of ULIS towards the recognition of binding usages. From this point of view, article 9 of the CISG represents both an answer to the objections raised, and a compromise.

22 The solution adopted by the uniform law means that there are only two types of norms known to the CISG: the terms of the contract and the convention itself.

Since paragraph 1 of article 9 is reserved for usages and practices expressly agreed upon and paragraph 2 of the same article for cases where usages are implicitly taken into consideration, unless otherwise agreed, the great majority of commentators consider that usages appear in the CISG on a contractual basis, i.e. their binding force rests in the express or implied intention of the contractual parties.

23 At the same time, paragraph 2 of article 9 stretches the notion of implicit contractual agreement to its utmost limits. The provision states that a trade usage is applicable even when the parties have been unaware of its existence, i.e. on a purely objective basis, if it can be proven that the usage is widely known and regularly observed in the trade concerned, so that the parties "ought to have known of it". As has been sharply noticed by one author, "at this point the link between usages and the intention of the parties becomes rather ethereal". The result which will presumably be achieved through the application of the legal fiction contained in the provision of article 9(2) of the CISG will closely resemble the application of usages on normative grounds, because usages "of which the parties should have known" become part of their agreement. In view of this, one could equally argue that the CISG in actual fact adopts the notion of usages as normative rules, in that it acknowledges the inherently binding force of international trade usages as defined in article 9(2) of the convention. This interpretation broadens significantly the scope and enforceability of mercantile understandings in international commerce, but does not follow from the legislative history of article 9 of the convention.

24 It is thought that, although relevant in other respects, the conventional approach which centres the discussion of the binding effect of trade usages on whether they may be classified as normative or contractual, does not reveal the true nature of usages. As Schmitthoff has stated, such an approach addresses the form rather than the substance. More important is the observance of trade usages in practice, and in the context of the CISG, to determine whether a usage is widely known and has acquired such regularity of observance in international trade that parties

"knew or ought to have known" of it, so as to justify an expectation that it will be observed with respect to the transaction in question.

25 International definitions which have developed out of commercial practice such as those contained in the publications of the International Chamber of Commerce, in particular the Incoterms and the UCP, may be incorporated into the contract in terms of articles 6 and 9 of the CISG. But even in the absence of such an express reference, a court applying the CISG to an international sales contract, should not find it difficult to justify their application on the ground that they constitute international trade usages under article 9(2) of the CISG.

26 From the point of view of the *lex mercatoria*, the treatment of trade usages under the CISG seems to be satisfactory. As is the case in recent international legislation in the field of international commercial arbitration and other modern national formulations such as the United States Uniform Commercial Code, the Vienna Convention adopts the term "trade usage" rather than the more traditional and narrow term "custom". It thus abandons the long established common law tests of custom by loosening many of the traditional requirements for custom to be binding. In particular, it replaces the aspect of universality with regularity of observance and further negates the need to show legal obligation in proof of trade usage: the presumed expectations of the parties are sufficient to give rise to the obligation to observe it, unless otherwise agreed by the parties. Even if, as a result of compromise, the CISG resorts to the legal fiction of an agreement between the parties to justify the application of usages, international trade usages enjoy almost complete recognition under article 9(2), although some difficulties may remain concerning the binding nature of newly developed practices that are not yet widely known or regularly observed. Trade usages can be referred to, to clarify ambiguous contract terms or to fill gaps in the contractual regulation, even where the parties have not embodied the formulation into their contract. In recognising freedom of contract and the role of trade usages in the regulation of international sales contracts, the convention acknowledges the idea of an underlying body of customary rules – *lex mercatoria* – which is applicable to international sales. The

provisions of the convention should therefore lead domestic courts to recognise the need to interpret contracts falling within its sphere of application in the light of the changing patterns and norms of behaviour of the international mercantile community, as reflected in established commercial practice.

LIST OF ABBREVIATIONS USED

BGB	Bürgerliches Gesetzbuch (Germany)
CISG	United Nations Convention on Contracts for the International Sale of Goods
CMEA	Council for Mutual Economic Assistance
EC	European Communities
ECE	United Nations Economic Commission for Europe
EFTA	European Free Trade Association
FIDIC	Fédération Internationale des Ingénieurs Counseils
FOSFA	Federation of Oil Seed and Fats Associations
GA	United Nations General Assembly
GAFTA	Grain and Feed Trade Association
HGB	Handelsgesetzbuch (Germany)
ICC	International Chamber of Commerce
ILA	International Law Association
INCOTERMS	Rules for the Interpretation of Trade Terms
OAS	Organisation of American States
OJ	Official Journal of the European Communities
OR	Official Records of the United Nations Conference on Contracts for the International Sale of Goods
UCC	Uniform Commercial Code (United States of America)
UCP	Uniform Customs and Practice for Documentary Credits
ULF	Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	Uniform Law on the International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
UNTS	United Nations Treaty Series

BIBLIOGRAPHICAL REFERENCES

1 BOOKS AND COMPOSITE WORKS

ALLEN, C *Law in the Making* Clarendon Press 1964.

BAUMBACH, A DUDEN, K & HOPT, K *Handelsgesetzbuch* Beck 1989.

BELTRAMO, M *The Italian Civil Code* Dobbs Ferry 1993.

BERGER, K *International Economic Arbitration* (Studies in Transnational Economic Law vol 9) Kluwer 1993.

BIANCA C & BONELL M (eds) *Commentary on the international sales law - The Vienna 1980 Sales Convention* Giuffré 1987.

BOGGIANO, A *Derecho Internacional Privado* vol 2 Depalma 1988.

BOGGIANO, A *International Standard Contracts* Kluwer 1991.

BUCKLAND, W *A Textbook of Roman Law from Augustus to Justinian* Cambridge University Press 1966.

CARBONNEAU, T (ed) *Lex Mercatoria and Arbitration* Dobbs Ferry 1990.

CHENG, C *Basic Documents on International Trade Law* Martinus Nijhoff 1986.

CIPOLLA, C (ed) *The Middle Ages* vol 1 Barnes & Noble 1976.

COMMERCIAL LAWS OF THE WORLD vol VIII 'France' Foreign Tax Law Association 1992 191.

COMMERCIAL LAWS OF THE WORLD vol XX 'Spain' Foreign Tax Law Association 1992 1.

COMMERCIAL LAWS OF THE WORLD vol XI 'Italy' Foreign Tax Law Association 1993 1.

CORBIN, A *Corbin on Contracts* vol 3 West Publishing Co 1960.

CRABB, J *The French Civil Code* Rothman 1977.

DALLOZ *Code Civil* 1990-91.

DASSER, F *Internationale Schiedsgerichte und Lex Mercatoria* Schultess Polygraphischer Verlag 1989.

DE LY, F *International Business Law and Lex Mercatoria* North-Holland 1992.

DELAUME, G *Law and Practice of Transnational Contracts* Oceana 1988.

DÖLLE, H (ed) *Kommentar zum Einheitlichen Kaufrecht* Beck 1976.

DORALT, P (ed) *Das UNCITRAL-Kaufrecht im Vergleich zum Österreichischen Recht* (Recht Wirtschaft Aussenhandel Band 1) Manzsche 1985.

EISEMANN, F *Die Incoterms im Internationalen Warenkauf* Ferdinand Enke 1967.

EISEMANN, F & SCHÜTZE, R *Das Dokumentenakkreditiv im Internationalen Handelsverkehr* Verlagsgesellschaft Recht und Wirtschaft 1989.

EISEMANN, F & EBERT, R *Das Dokumentenakkreditiv im Internationalen Handelsverkehr* Verlagsgesellschaft Recht und Wirtschaft 1979.

ENDERLEIN, F & MASKOW, D *International Sales Law* Oceana 1992.

ETCHEVERRY, R *Derecho Comercial y Económico* Depalma 1987.

FARNSWORTH, E *United States Contract Law* Transnational Juris Publications 1991.

GALSTON, N & SMIT, H (eds) *International Sales. The United Nations Convention on Contracts for the International Sale of Goods* (Parker School of Foreign and Comparative Law, Columbia University) Matthew Bender 1984.

GOREN, S & FORRESTER, I *The German Civil Code* North-Holland 1975.

GOREN, S & FORRESTER, I *The German Commercial Code* Rothman 1979.

GRIGERA NAON, H *Choice-of-law Problems in International Commercial Arbitration* (Max-Planck-Institut für Ausländisches und Internationales Privatrecht; Studien zum Ausländischen und Internationalen Privatrecht vol 29) Mohr 1992.

HARFIELD, H *Letters of Credit* American Bar Association 1979.

HONNOLD, J (ed) *Unification of the Law Governing International Sales of Goods* (International Association of Legal Science) Dalloz 1966.

HONNOLD, J *Documentary History of the Uniform Law for International Sales* Kluwer 1989.

HONNOLD, J *Uniform Law for International Sales* Kluwer 1991.

HORN, N & SCHMITTHOFF, C (eds) *The Transnational Law of International Commercial Transactions* (Studies in Transnational Economic Law vol 2) Kluwer 1982.

JACK, R *Documentary Credits* Butterworths 1991.

KASSIS, A *Théorie Générale des Usages du Commerce* Paris 1984.

KRITZER, A *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* Kluwer 1989.

KURKELA, M *Letters of Credit Under International Trade Law* Oceana 1985.

LITKA, M *International Dimensions of the Legal Environment of Business* PWS-Kent 1991.

LOPEZ, R *The Commercial Revolution of the Middle Ages 950-1350* Prentice-Hall 1971.

LOPEZ, R *Medieval Trade in the Mediterranean World* Oxford 1955.

LOPEZ, J & MELON INFANTE, C *Código Civil* Instituto Nacional de Estudios Jurídicos 1979.

MARZORATI, O *Derecho de los Negocios Internacionales* Astrea 1993.

NEW DIRECTIONS IN INTERNATIONAL TRADE LAW Acts and Proceedings of the 2nd Congress on Private Law held by the International Institute for the Unification of Private Law, UNIDROIT vol 1 & 2 Oceana 1977.

PALANDT, O *Bürgerliches Gesetzbuch* Beck 1992.

PILTZ, B *Internationales Kaufrecht* Beck 1993.

PLUCKNETT, T *A Concise History of the Common Law* Butterworths 1956.

PONSSA DE LA VEGA DE MIGUENS, N *Breve Historia del Derecho Romano* Lerner 1969.

PROBLEMS OF UNIFICATION OF INTERNATIONAL SALES LAW Colloquium of the International Association of Legal Science Potsdam, August 1979 *Digest of Commercial Laws of the World* Oceana 1980.

RABEL, E *Das Recht des Warenkaufs* vol 1 Walter de Gruyter 1957.

RADCLIFFE, G & CROSS, R *The English Legal System* Butterworths 1964.

RYAN, K *International Trade Law* The Law Book Company Limited 1975.

SARCEVIC, P & VOLKEN, P (eds) *International Sale of Goods. Dubrovnik Lectures* Oceana 1986.

SCHLECHTRIEM, P *Uniform Sales Law* Manzsche 1986.

SCHMITTHOFF, C *Schmitthoff's Export Trade. The Law & Practice of International Trade* Stevens 1990.

SCHMITTHOFF, C *Commercial Law in a Changing Economic Climate* Sweet & Maxwell 1981.

SCHMITTHOFF, C (ed) *The Sources of the Law of International Trade* Stevens 1964.

SONNENBERGER, H *Verkehrsitten im Schuldvertrag* Beck 1969.

VOSKUIL, C & WADE, J (eds) *Hague-Zagreb Essays 4 on International Trade Law* Martinus Nijhoff 1983.

WHITE, J & SUMMERS, R *Uniform Commercial Code* West Publishing Co 1988.

ZWEIGERT, K (ed) *International Encyclopedia of Comparative Law* vol 8 (Specific Contracts) Martinus Nijhoff 1983.

2 PERIODICALS AND MONOGRAPHS

BAINBRIDGE, S 'Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions' 24 *Virginia Journal of International Law* (1984) 619.

BENJAMIN, P 'The ECE General Conditions of Sale and Standard Forms of Contracts' 12 *Journal of Business Law* (1961) 113.

BERAUDO, J 'Convention de Vienne du Avril 1980 sur la Vente Internationale de Marchandises: L'Interpretation du Contrat' 9 *Derecho Comparado* (Revista de la Asociación Argentina de Derecho Comparado) (1993) 34.

BERMAN, H & KAUFMAN C 'The Law of International Economic Transactions (*Lex Mercatoria*)' 19 *Harvard International Law Journal* (1978) 221.

BERMAN, H 'The Uniform Law on the International Sale of Goods: A Constructive Critique' 30 *Law and Contemporary Problems* (1965) 354.

BERMAN, H & LADD, M 'Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods' 21 *Cornell International Law Journal* (1988) 423.

BONELL, M 'The Unidroit Initiative for the Progressive Codification of International Trade Law' 27 *International and Comparative Law Quarterly* (1978) 413.

BONELL, M 'International Uniform Law in Practice – Or Where the Real Trouble Begins' 38 *American Journal of Comparative Law* (1990) 865.

BONELL, M 'UN-Kaufrecht und Uniform Commercial Code' 58 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* (1994) 20.

BONELL, M 'Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsubereinkommen von 1980' 107 *Juristische Blätter* (1985) 385.

BOOYSEN, H 'The International Sale of Goods' 17 *South African Yearbook of International Law* (1991/92) 71.

BRAUCHER, R 'The Legislative History of the Uniform Commercial Code' 58 *Columbia Law Review* (1958) 798.

CARBONNEAU, T & FIRESTONE, M 'Transnational Law-making: Assessing the Impact of the Vienna Convention and the Viability of Arbitral Adjudication' 1 *Journal of International Dispute Resolution* (1986) 51.

CHEN, J 'Code, Custom and Contract: the Uniform Commercial Code as Law Merchant' 27 *Texas International Law Journal* (1992) 91.

CRAWFORD, B 'Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods' 8 *The Journal of Law and Commerce* (1988) 187.

CROFF, C 'The Applicable Law in International Commercial Arbitration; Is It Still a Conflict of Laws Problem?' 23 *The International Lawyer* (1989) 613.

DORE, I & DEFRANCO, J 'A Comparison of the Non-substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code' 23 *Harvard International Law Journal* (1982) 49.

EISEMANN, F 'Incoterms and the British Export Trade' *Journal of Business Law* (1965) 114.

ELLINGER, E 'The Uniform Customs – Their Nature and the 1983 Revision' *Lloyd's Maritime and Commercial Law* (1984) 578.

ELLINGER, E 'The Uniform Customs and Practice for Documentary Credits – the 1993 Revision' *Lloyd's Maritime and Commercial Law Quarterly* (1994) 377.

EÖRSI, G 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' 31 *The American Journal of Comparative Law* (1983) 333.

FARNSWORTH, E 'Formation of International Sales Contracts: Three Attempts at Unification' 110 *University of Pennsylvania Law Review* (1965) 305.

FARNSWORTH, E 'Developing International Trade Law' 9 *California Western International Law Journal* (1979) 461.

FARNSWORTH, E 'Review of Standard Forms or Terms Under the Vienna Convention' 21 *Cornell International Law Journal* (1988) 439.

FARNSWORTH, E 'The Vienna Convention: History and Scope' 18 *The International Lawyer* (1984) 17.

FAWCETT, J 'The Lugano Convention' 14 *European Law Review* (1989) 105.

FELTHAM, J 'CIF and FOB Contracts and the Vienna Convention on Contracts for the International Sale of Goods' *Journal of Business Law* (1991) 413.

GAL, I 'The Commercial Law of Nations and the Law of International Trade' 6 *Cornell International Law Journal* (1972) 55.

GARRO, A 'Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods' 23 *The International Lawyer* (1989) 443.

GERTZ, C 'The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual *Depeçage*' 12 *Northwestern Journal of International Law and Business* (1991) 163.

GIAMPIERI, A & NARDULLI, G 'Enforceability of International Letters of Credit: An Italian Perspective' 27 *The International Lawyer* (1993) 1013.

GINSBURGS, G 'International Trade Customs' 5 *Journal of International Trade and Policy* (1975) 325.

GOLDMAN, B *'Lex Mercatoria' Forum Internationale* (1983) 3.

GOLDSTAJN, A 'The New Law Merchant' 12 *Journal of Business Law* (1961) 12.

GUTTERIDGE, H 'An International Code of the Law of Sale' 14 *British Yearbook of International Law* (1933) 82.

HARTNELL, H 'Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods' 18 *Yale Journal of International Law* (1993) 1.

HONNOLD, J 'The United Nations Commission on International Trade Law: Mission and Methods' 27 *American Journal of Comparative Law* (1979) 201.

HONNOLD, J 'The Uniform Law for the International Sale of Goods: the Hague Convention of 1964' 30 *Law and Contemporary Problems* (1965) 326.

HONNOLD, J 'The Sales Convention: Background, Status, Application' 8 *The Journal of Law and Commerce* (1988) 1.

HONNOLD, J 'The Sales Convention in Action – Uniform International Words: Uniform Application?' 8 *The Journal of Law and Commerce* (1988) 207.

HONNOLD, J 'The New Uniform Law for International Sales and the UCC: A Comparison' 18 *The International Lawyer* (1981) 21.

HONNOLD, J 'A Uniform Law for International Sales' 107 *University of Pennsylvania Law Review* (1959) 299.

HONNOLD, J 'Letters of Credit, Custom, Missing Documents and the *Dixon* Case' 52 *Columbia Law Review* (1953) 505.

HUBER, U 'Der Uncitral-Entwurf eines Übereinkommens über Internationale Warenkaufverträge' 43 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* (1979) 413.

JOKELA, H 'The Role of Usages in the Uniform Law for International Sales' 10 *Scandinavian Studies in Law* (1966) 81.

KASTELY, A 'Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention' 8 *Northwestern Journal of International Law and Business* (1988) 574.

LANDO, O 'The *Lex Mercatoria* in International Commercial Arbitration' 34 *International and Comparative Law Quarterly* (1985) 747.

LANDO, O 'The Conflict of Laws of Contract' 189 *Hague Recueil* (Collected Courses of the Hague Academy of International Law) (1984-VI) 235.

LEVIE, J 'Trade Usage and Custom Under the Common Law and the Uniform Commercial Code' 40 *New York University Law Review* (1965) 1101.

MANN, F 'England Rejects "Delocalised" Contracts and Arbitration' 33 *International and Comparative Law Quarterly* (1984) 193.

MEDWIG, M 'The New Law Merchant: Legal Rhetoric and Commercial Reality' 24 *Law and Policy in International Business* (1993) 589.

MONACO, M 'L'Activité Scientifique d'Unidroit' 1 *Revue du Droit Uniforme/Uniform Law Review* (1976) 34.

MUNDAY, R 'The Uniform Interpretation of International Conventions' 27 *International and Comparative Law Quarterly* (1978) 450.

MURRAY, D 'Risk of Loss of Goods in Transit: A Comparison of the 1990 Incoterms with Terms from Other Voices' 23 *Inter-American Law Review* (1991) 93.

MUSTILL, M 'The New *Lex Mercatoria*: the First Twenty-five Years' 4 *Arbitration International* (1988) 86.

NADELMANN, K 'The Uniform Law on International Sale of Goods: A Conflict of Laws Imbroglio' 74 *The Yale Law Journal* (1965) 449.

NDULO, M 'The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis' 38 *International and Comparative Law Quarterly* (1989) 1.

NICHOLAS, B 'The Vienna Convention on International Sales Law' 105 *The Law Quarterly Review* (1989) 201.

NOTE: 'Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law' 55 *Columbia Law Review* (1955) 1192.

NOTE: 'A Practitioner's Guide to the United Nations Convention on Contracts for the International Sale of Goods' 16 *New York University Journal of International Law and Politics* (1983-84) 81.

PARRA ARANGUREN, G 'General Course on Private International Law' 210 *Hague Recueil* (Collected Courses of the Hague Academy of International Law) (1988-III) 25.

PETKOVIC, D 'UCP 500: Evolution not Revolution' 2 *Journal of International Business Law* (1994) 39.

PILTZ, B 'Neue Entwicklungen im UN-Kaufrecht' 17 *Neue Juristische Wochenschrift* (1994) 1101.

RABEL, E 'A Draft of an International Law of Sales' 5 *University of Chicago Law Review* (1938) 543.

REINHART, G 'Zehn Jahre Deutsche Rechtsprechung zum Einheitlichen Kaufrecht' *Praxis des Internationalen Privat- und Verfahrensrecht* (1985) 1.

REITZ, C 'Validity of Contracts Under the United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980 and Swiss Law' 20 *Vanderbilt Journal of Transnational Law* (1987) 639.

SCHMITTHOFF, C 'Das Neue Recht des Welthandels' 28 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* (1964) 47.

SCHMITTHOFF, C 'International Trade Usages' *International Chamber of Commerce. Institute of International Business Law and Practice* 1987 (ICC Publication N° 440/4).

SCHMITTHOFF, C 'International Business Law: A New Law Merchant' *Current Law and Social Problems* (1961) 130.

SCHNEIDER, H 'Incoterms 1990' *Recht der Internationalen Wirtschaft* Heft 2 (1991) 91.

SIEHR, K 'Der Internationale Anwendungsbereich des UN-Kaufrechts' 52 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* (1988) 587.

STASSEN, J 'The Legal Nature of the Uniform Customs and Practice for Documentary Credits (UCP)' 4 *Modern Business Law* (1982) 125.

STOECKER, C 'The *Lex Mercatoria* Today: To What Extent Does It Exist?'7 *Journal of International Arbitration* (1990) 101.

SUTTON, K 'The Draft Convention on International Sale of Goods' 4 *Australian Business Law Review* (1976) 269.

TRAKMAN, L 'The Evolution of the Law Merchant: Our Commercial Heritage' (Part I: Ancient and Medieval Law Merchant) 12 *Journal of Maritime Law and Commerce* (1981) 1.

TRAKMAN, L 'The Evolution of the Law Merchant: Our Commercial Heritage' (Part II: The Modern Law Merchant) 12 *Journal of Maritime Law and Commerce* (1981) 153.

VEKAS, L 'Zum Persönlichen und Räumlichen Anwendungsbereich des UN-Einheitskaufrechts' *Praxis des Internationalen Privat- und Verfahrensrecht* (1987) 342.

WAYNE, M 'The Uniform Customs and Practice as a Source of Documentary Credit Law in the United States, Canada and Great Britain: A Comparison of Application and Interpretation' 7 *Arizona Journal of International and Comparative Law* (1989) 149.

WELLWOOD, J 'Custom and Usage' 12 *Halsbury's Laws of England* 1975 1.

WINSHIP, P 'Commentary on Professor Kastely's Rhetorical Analysis' 8 *Northwestern Journal of International Law and Business* (1988) 623.

WINSHIP, P 'Private International Law and the UN Sales Convention' 21 *Cornell International Law Journal* (1988) 487.

WORTLEY, B 'Mercantile Usage and Custom' 24 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* (1959) 259.

ZAMORA, S 'Is There Customary International Economic Law?' 32 *German Yearbook of International Law* (1989) 9.

3 INTERNATIONAL DOCUMENTS

3.1 CONVENTIONS

International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (The Hague Rules) 1924.

Hague Convention on the Law Applicable to International Sales of Goods 1955.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

European Convention on International Commercial Arbitration 1961.

Uniform Law on the International Sale of Goods (UNIDROIT) 1964.

Uniform Law on the Formation of Contracts for the International Sale of Goods (UNIDROIT) 1964.

EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.

Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (The Hague-Visby Rules) 1968.

United Nations Convention on the Limitation Period in the International Sale of Goods (UNCITRAL) 1974.

United Nations Convention on Carriage of Goods by Sea (The Hamburg Rules) 1978.

Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1978.

United Nations Convention on Contracts for the International Sale of Goods (UNCITRAL) 1980.

EC Convention on the Law Applicable to Contractual Obligations 1980.

Protocol Amending the United Nations Convention on the Limitation Period in the International Sale of Goods (1980).

United Nations Convention on International Multimodal Transport (UNCITRAL) 1980.

Convention on Agency in the International Sale of Goods (UNIDROIT) 1983.

Hague Convention on the Law Applicable to International Sales of Goods 1985.

Convention on International Factoring (UNIDROIT) 1988.

Convention on International Financial Leasing (UNIDROIT) 1988.

Convention on International Bills of Exchange and International Promissory Notes (UNCITRAL) 1988.

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (The Lugano Convention) 1988.

3.2 UNCITRAL DOCUMENTS

Arbitration Rules 1976.

Conciliation Rules 1981.

Model Law on International Commercial Arbitration 1985.

Legal Guide on Electronic Funds Transfer 1987.

Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works 1988.

3.3 ICC DOCUMENTS

The Problem of Clean Bills of Lading 1974 (ICC Publication N° 283).

Uniform Rules for a Combined Transport Document 1975 (ICC Publication N° 298).

Uniform Rules for the Collection of Commercial Paper 1978 (ICC Publication N° 322).

Guide for the Drawing Up of Contracts Between Parties Residing in Different Countries 1983 (ICC Publication N° 410).

Rules of Conciliation and Arbitration 1988 (ICC Publication N° 447).

Rules for the Interpretation of Trade Terms (Incoterms) 1990 (ICC Publication N° 460).

Uniform Customs and Practice for Documentary Credits 1993 (ICC Publication N° 500).

3.4 ECE STANDARD FORMS AND GENERAL CONDITIONS

Form 188	–	For the Supply of Plant and Machinery for Export.
Form 574	–	For the Supply of Plant and Machinery for Export.
Form 188A	–	For the Supply and Erection of Plant and Machinery for Import and Export.
Form 574A	–	For the Supply and Erection of Machinery for Import and Export.
Form 188B	–	Listing Additional Clauses for Supervision of Erection of Engineering Plant and Machinery Abroad.
Form 574B	–	Listing Additional Clauses for Supervision of Erection of Engineering Plant and Machinery Abroad.

Form 188D – Listing Additional Clauses for Supervision of Erection of Engineering Plant and Machinery Abroad.

Form 730 – For the Export of Durable Consumer Goods and Engineering Articles.

Guide for Use In Drawing Up Contracts Relating to the International Transfer of Know-how in the Engineering Industry (ECE/Trade/222/Rev 1).

Guide for Drawing Up Contracts for Large Industrial Works (ECE/Trade/117).

Guide for Drawing Up International Contracts on Industrial Co-operation (ECE/Trade/124).

Guide for Drawing Up International Contracts Between Parties Associated with the Purpose of Executing a Specific Project (ECE/Trade/131).

Guide for Drawing Up Contracts on Consulting Engineering Including Some Related Aspects of Technical Assistance (ECE/Trade/145).

Guide for Drawing Up International Contracts for Services Relating to Maintenance Repair and Operation of Industrial and Other Works (E 87 II E 2).

Guide on New Forms of Industrial Co-operation 1988.

Juridical Guide for the Creation of East-West Joint Ventures on the Territory of Socialist Countries 1988.

3.5 FIDIC STANDARD FORMS

Conditions of Contract for Works of Civil Engineering Construction 1987.

3.6 OTHER DOCUMENTS

Progressive Development of the Law of International Trade; Report of the Secretary General of the United Nations 1966.

Establishment of the United Nations Commission on International Trade Law; GA Resolution 2205 (XXI) of December 17, 1966.

Declaration on the Establishment of a New International Economic Order; GA Resolution 3201 (S-VI) of May 1, 1974.

United Nations Conference on Contracts for the International Sale of Goods; GA Resolution 33/93 of December 16, 1978.

UNCITRAL Yearbook I (1968-70) A/CN 9/SER A/1970.

UNCITRAL Yearbook II (1971) A/CN 9/SER A/1971.

UNCITRAL Yearbook VI (1975) A/CN 9/SER A/1975.

UNCITRAL Yearbook VIII (1977) A/CN 9/SER A/1977.

UNCITRAL Yearbook IX (1978) A/CN 9/SER A/1978.

United Nations Conference on Contracts for the International Sale of Goods, Vienna 10 March – 11 April 1980, Official Records, A/CONF 97/19.

4 TABLE OF CASES

4.1 English cases

Biddell Brothers v Clemens Horst Co [1911] 1 KB 934 (CA).

Clemens Horst Co v Biddell Brothers [1912] AC 18 (HL).

Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Limitada [1949] 1 All ER 269 (HL).

Diamond Alkali Export Corporation v Bourgeois [1921] All ER 283.

Drummond & Sons v Van Ingen & Co (1887) 12 AC 284.

Lord Forres v Scottish Flax Co Ltd [1943] 2 All ER 366.

Nelson v Dahl (1879) 12 Ch D 568.

Phoenix Insurance Co of Harford and another v De Monchy and others (1929) 45 TLR 543.

Pillans and Rose v van Mierop and Hopkins 3 Burr 1664, 97 Eng Rep 1035.

Pyrene Co Ltd v Scindia Steam Navigation Co Ltd [1954] 2 QB 402; [1954] 2 All ER 158.

Robinson v Mollett LJ Rep NS 1875 (HL) 362.

Russian Steam-Navigation Trading Co v Silva (1863) 143 Eng Rep 242.

Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277.

Unterweser Reederei GmbH v Zapata Off-Shore Co [1968] 2 Lloyd's LR 158, 163 (CA).

4.2 US cases

Ambassador Steel Co v Ewald Steel Co 33 Mich App 495, 190 NW 2d 275 (1971).

Boise Dodge Inc v Clark 92 Idaho 902, 453 P 2d 551 (1969).

California Lettuce Growers v Union Sugar Co 289 P 2d 785, 45 Cal 2d 474, 49 ALR 2d 496 (1955).

Celebrity Inc v Kemper 96 NM 508, 632 P 2d 743, 32 UCC 105 (1981).

Decker Steel Co v The Exchange National Bank of Chicago 330 F 2d 82 (7th Cir 1964).

Dixon Irmaos & Cia v Chase Nat Bank of City of New York 144 F 2d 759 (2d Cir 1944) *cert denied* 324 US 850 (1944).

Frigaliment Importing Co v B N S International Sales Corp Ltd 190 F Supp 116 (SDNY) 1960.

Heggblade-Marguleas-Tenneco Inc v Sunshine Biscuit Inc 59 Cal App 3d 948, 131 Cal Rptr 183, 189 (1976).

Hostetter v Park 137 US 30 (1890).

Kunglig Jarnsvägsstyrelsen v Dexter & Carpenter 299 F 991 (SDNY) 1924.

M/S Bremen and Unterweser Reederei GmbH v Zapata Off-Shore Co 407 US 1 (1972).

Nanakuli Paving & Rock Co v Shell Oil Co Inc 664 F 2d 772, 32 UCC 1025 (9th Cir 1981).

Provident Tradesmen Bank & Trust Co v Pemberton 196 Pa Super 180, 173 A 2d 780, 1 UCC 57 (1961).

Raney v Uvalde Producers Wool & Mohair Co Inc 571 SW 2d 199, 25 UCC 41 (Tex Civ App 1978).

Warren's Kiddie Shoppe Inc v Casual Slacks Inc 120 Ga App 578, 171 SE 2d 643, 7 UCC 166 (1969).

4.3 French cases

Cass française 13 April 1967, Clunet (1967) 184.

Cass it 30 July 1960, BBTC (1960) II 486.

SA Discount Bank v Teboul Cour de Cass 1981, Recueil Dalloz 1982 381.

4.4 German cases

BGH 21 March 1973, NJW (1973) 899.

BGH 1 December 1965, NJW (1966) 502.

BGH 22 January 1959, AWD (1959) 20.

OLG Munich 19 December 1957, AWD (1959) 79

OLG Karlsruhe 12 February 1975, RIW (1975) 225.

4.5 Cases applying ULIS and ULF

LG Wuppertal 8 December 1981 Revue de Droit Uniforme/Uniform Law Review 1985 547.

OLG Hamburg 9 July 1980 Revue de Droit Uniforme/Uniform Law Review 1980 369.

4.6 Cases applying the CISG

Hauptstadtgericht Budapest 24 March 1992, IPRax (1993) Heft 4 263.

Juzgado Nacional de 1° Instancia en lo Comercial N° 10 Buenos Aires 23 October 1991 (unpublished).