

THE CONCEPT AND FUNCTION OF USAGES IN THE UNITED  
NATIONS CONVENTION ON THE INTERNATIONAL  
SALE OF GOODS<sup>1</sup>

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INTRODUCTION

The effect to be given to the usages that develop more or less spontaneously in the practice of international trade has always been a matter of controversy, just like the precise definition of such usages. Substitution of the provisions of a uniform-law convention by trade usages has been criticized as imperialistic.<sup>2</sup> Incorporation by the adjudicator, rather than the parties, of trade usages into a contract has been viewed as contrary to the autonomy of the parties' will or economic efficiency.<sup>3</sup>

The fact of the matter is that, on the one hand, modern commercial transactions are extremely complex, while, on the other hand, efficiency and profit depend on speed and volume. Parties are unlikely to address in minute detail every possible problem related to the contract. Trade usages are capable of both filling in the gaps in the contract and interpreting the contract's terms.<sup>4</sup> They also constitute the core of the so-called *lex mercatoria*.<sup>5</sup>

The United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention) does recognize the privileged position of trade usages in the practice of international sales.<sup>6</sup> Several of its provisions refer to

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1. Many thanks are due to Ms. Perdikari and Dr. Hatzimihail for their invaluable assistance.
  2. See the legislative history of the Vienna Convention. Stephen Bainbridge, *Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Convention*, 24 VA. J. INT'L L. 619 (1984).
  3. See Clayton P. Gillete, *The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG*, 5 CHI. J. INT'L L. 157 (2004); Avery Wiener Katz, *The Relative Costs of Incorporating Trade into Domestic versus International Sales Contracts: Comments on Clayton Gillete, Institutional Design and International Usages under the CISG*, 5 CHI. J. INT'L L. 181 (2004).
  4. Bainbridge, *supra* note 2, at 623.
  5. Ch. Pamboukis, *La lex mercatoria reconsidérée*, MÉL. PAUL LAGARDE 636 (2005).
  6. C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW, THE 1980 VIENNA CONVENTION 103 (1987); Bernard Audit, *La vente internationale de marchandises, Convention de Nations—Unies du 11 avril 1980*, LIBRAIRIE GÉNÉRALE DE DROIT ET DE JURISPRUDENCE 44 (1990); VINCENT HEUZÉ, LA VENTE INTERNATIONALE DE MARCHANDISES, DROIT UNIFORME 84 (1992); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 11, 124 (3d ed. 1999).

usages and/or practices, directly and indirectly.<sup>7</sup> At the same time, the Convention's treatment of trade usages is often general and vague.

The Vienna Convention prescribes a double function for trade usages, *interpretative* and *normative*. The principal example of the former is found in Article 8(3), which states that “[i]n determining the intent of a party, or the understanding [of] a reasonable person, . . . due consideration is to be given to . . .” practices and usages among other things.<sup>8</sup> Thus, this particular provision uses trade usages as a factor for *interpreting* the will of the parties, in other words it lends an interpretative value to the usages.<sup>9</sup>

However, the most important provisions concerning trade usages are those of Article 9. In stating that “[t]he parties are bound by any usage to which they have agreed and by any practices they have established between themselves” (Article 9(1)) and that “[t]he 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” (Article 9(2)), Article 9 grants *normative value* to trade usages.<sup>10</sup>

Article 9 reconciles two competing theories regarding trade usages. The first is the *subjective theory*, according to which usages can only be applicable if parties have agreed to them. The usages are seen as part of the contract and

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7. For example, in CISG Article 18(3), it is stated that an offer can be accepted by an act, if practices and usages permit this. See Patrick X. Bout, *Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods* (1988), available at <http://www.cisg.law.pace.edu/cisg/biblio/bout>. An example of indirect reference to usages and practices can be found in Article 32(2), regarding carriage of goods.

8. CISG art. 8(3). Such as the relevant circumstances of the case including negotiations and any subsequent conduct of the parties.

9. CH. PAMBOUKIS, *THE LEX MERCATORIA AS APPLICABLE LAW IN CONTRACTUAL OBLIGATIONS* 247 (1996) [in Greek].

10. CISG art. 9. The antecedent of this article is to be found in Article 9 of the Uniform Law on the International Sales of Goods (ULIS) (1964), which reads:

- (1) The parties shall be bound by any usages which they have expressly or impliedly made applicable to this 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.
- (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.

For a detailed analysis of the trade usages in those two conventions, see Bainbridge, *supra* note 2.

usages unknown to either party can never, according to this theory, be applicable.

Opposite to this is the *objective theory*, based on the notion that usages are applicable if they represent a legal norm and have a normative power. The application of usages in an agreement is independent of the intention of the parties. It “comes from the binding force of the usage itself” and that implies that “[e]ven usages unknown to both parties can be applicable to an agreement in this theory.”<sup>11</sup> Both theories are somehow reflected in Article 9 of the Vienna Convention.<sup>12</sup>

This reconciliation is reflected in the issue of the *hierarchy* of norms.<sup>13</sup> The fact that the Convention does not expressly state that in case of a conflict between usages and the provisions of the Convention the former will prevail, does not mean that under the CISG the usages may apply only to the extent that they do not conflict with any of the Convention’s provisions. According to the prevailing view within UNCITRAL, and at the Vienna Conference, such an express statement was simply considered to be unnecessary as the precedence of the usages applicable under Article 9(1) and (2) automatically follows from Article 6, which embodies the principle of the parties’ autonomy.<sup>14</sup>

It has been indeed shown in a number of cases that the usages of trade prevail over the provisions of the Convention, independently of whether they bind the parties pursuant to Article 9(1) or Article 9(2).<sup>15</sup> According to the

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11. Bout, *supra* note 7, § II(A), who also states that “the difference between the two theories has influenced the drafting of article 9 CISG. Delegates from [former] socialist countries . . . were especially opposed to the acceptance of usages based only on their objective normative power.” According to Bout, Article 9(2) is supposed to be a “compromise between the subjective and the objective theory.” According to Enderlein and Maskow, the solution of Article 9(2) resembles mostly the objective theory.

12. Bout, *supra* note 7, § II(A) (delegates from developing countries were opposed to the objective normative power of usages).

13. PAMBOUKIS, *supra* note 9, at 245. For the hierarchical ranking of the sources of *lex mercatoria*, see Aleksandar Goldstajn, *Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention*, in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 55 (Petar Sarcevic & Paul Volken eds., 1986), available at <http://www.cisg.law.pace.edu/cisg/biblio/goldstajn.html>; Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, in LEX MERCATORIA & ARBITRATION 173-94 (Thomas E. Carbonneau ed., 1998).

14. BIANCA & BONELL, *supra* note 6, at 104; HERBERT BERNSTEIN & JOSEPH LOOKOFKY, UNDERSTANDING THE CISG IN EUROPE 43-44 (2d ed. 2003). “Reading Article 9 together with the freedom-of-contract rule in Article 6, we see that much international sales law is to be found not in the CISG text, but rather, within the ‘consensus’ reached by CISG merchants, their ‘bargain in fact.’”

15. See *Rechtbank van Koophandel Ieper*, Belgium, 18 Feb. 2002; *Rechtbank van Koophandel Veurne*, Belgium, 25 Apr. 2001; *Rechtbank van Koophandel Ieper*, Belgium, 29 Jan. 2001, available at <http://www.law.kuleuven.ac.be/ipr/eng/cases/2001-01-29.html> (Dutch), reported in UNCITRAL Digest of Case Law; CLOUT Case No. 425 [Oberster Gerichtshof, Austria, 21 Mar. 2000], available at <http://>

Austrian Oberster Gerichtshof, “[t]hus adopted, agreed usages, established practices and widely known and regularly observed usages prevail over other deviant CISG provisions.”<sup>16</sup> In an earlier decision, regarding the trade of work, the Court stated that “Austrian usages, if applicable, would prevail over the provisions of the CISG.”<sup>17</sup> Another example can be found in an earlier ruling by a German Court, which “observed that the provisions contained in the Articles 38 and 39 [of the Convention] can be derogated . . . through a usage, [despite the fact] that in the case at hand, [the Court] excluded such a possibility. . . .”<sup>18</sup> Moreover, according to an Argentinean Court, “international trade usages ‘are assigned by CISG itself a hierarchical position higher than the very same CISG provisions.’”<sup>19</sup>

The hierarchical rank of the applicable rules of law to a contract that falls within the scope of the convention is determined in the following order:

- a) The mandatory provisions of the applicable national law
- b) The trade usages that the parties have impliedly made applicable to their contract (Article 9(2))
- c) The trade usages to which the parties have explicitly or implicitly agreed or the practices they have established between themselves (Article 9(1))
- d) The provisions of the Convention
- e) The general principles underlying the Convention (Article 7(1))
- f) The law applicable by virtue of the rules of private international law of the forum state (Article 7(2))

This hierarchy demonstrates the influence of trade usages on the writers of the Convention. Both trade usages and the will of the parties prevail over national law with the exception of the mandatory provisions. Consequently, international trade practice led to the creation of a Convention that sets as its

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[cisgw3.law.pace.edu/cases/000321a3.html](http://cisgw3.law.pace.edu/cases/000321a3.html).

16. CLOUT Case No. 425, *supra* note 15.

17. CLOUT Case No. 240 [Oberster Gerichtshof, Austria, 15 Oct. 1998], *available at* <http://cisgw3.law.pace.edu/cases/981015a3.html>.

18. CLOUT Case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 Jan. 1993], *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=180&step=Abstract>. In that particular case, this possibility was excluded because:

[A] provision contained in the seller’s standard terms stated that the buyer should have given notice of the non-conformity of the goods within eight days after delivery. The Court left open to what extent this provision modified the rules set forth in Articles 38 and 39 [of the] CISG as its sole existence excluded the applicability of the usage invoked by the buyer.

19. Juzgado Nacional de Primera Instancia en lo Comercial, Argentina, 6 Oct. 1994, *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=178&step=Abstract>.

primary goal to regulate practice by assigning normative value to trade usages.<sup>20</sup>

The Convention merely provides the foundation for the legal effect of usages, by giving them a status superior to the Convention rules itself. Usages as defined by the Vienna Convention will thus prevail over the dispositions of the Convention either by virtue of the will of the parties (Article 9(1)) or objectively (Article 9(2)). The application of usages is submitted to different conditions and poses different problems in both possibilities.

On the contrary, and in light of the complex character of international transactions, the Convention did not intend to provide, or even to incite, a codification of trade usages and it does not contain a definition of usages or practices.<sup>21</sup>

The concept of usages is autonomous and must be understood independently of respective notions of internal laws as custom and usage.<sup>22</sup> It comprises practices and rules, which are observed either by the parties in their relation or in the respective branch of activity for a certain period being commonly known. In fact, the application of the Vienna Convention will progressively clarify what usages are to be covered by Article 9. A uniform notion of usages will thus emerge progressively from the international application of the Vienna Convention.

Usages stipulated by the parties do not require any effort of conceptualisation. They are subjective and therefore relative. On its part, an objective trade usage needs a regular and wide application in the relevant geographical area and in the relevant branch of activity (objective factor) and knowledge from the parties actual or presumed (subjective factor).

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20. PAMBOUKIS, *supra* note 9, at 246.

21. According to BIANCA & BONELL, *supra* note 6, at 111, the meaning of the concept of usages in the context of Article 9, it certainly is to be determined in an autonomous and international uniform way. It follows that distinctions, traditionally made in national laws between “custom,” “proved trade usages,” “simple usages” “Gewohnheitsrecht” and “Handelsbräuche,” “usages de droit” and “usages conventionnelles” are irrelevant for the purpose of this article. It refers to usages in the widest possible sense. In a different context, Philippe Fouchard, *Les usages, l'arbitre et le juge*, in *LE DROIT DE RELATIONS ÉCONOMIQUES INTERNATIONALES, ÉTUDES OFFERTES À BERTHOLD GOLDMAN 67-87* (1982), states that the distinction between custom and usage is doubtful, since in private law, while the term costume has lost its “power,” the term usage is widely used in order to describe the phenomenon.

22. BIANCA & BONELL, *supra* note 6, at 110.

## I. AGREED USAGES AND PARTIES PRACTICES (ARTICLE 9(1))

### A. *Choice of Usages*

According to Article 9(1), the parties are bound by any usage to which they have agreed. This rule derives from the general principle of party autonomy (Article 6).

It seems that Article 9(1) principally covers the usages that the parties *explicitly* chose to be bound by, by expressly referring to clauses like FOB, CIF, EX WORKS, etc., which gain, through this incorporation, the effect of conventional terms.<sup>23</sup>

Issues arise with regard to tacit agreements. The Vienna Convention has omitted the reference “expressly or impliedly” made in Article 9(1) of ULIS. This should limit the creative interpretation of the parties’ agreement by adjudicators.<sup>24</sup> Of course, nothing in the Convention prohibits a tacit agreement to make a usage applicable to the contract.<sup>25</sup> This would be the case, for example, when the parties deliberately act in conformity with a local usage or a usage within a given trade, with respect to particular issues related to the formation or the performance of the contract.

Nevertheless, “the assumption that there is implied agreement must not be stretched too far because paragraph 2 would lose its function and the additional requirements mentioned in this paragraph would be evaded,” as Enderlein and Maskow justly point out.<sup>26</sup> On his part, Bonell’s opinion is that

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23. With regard to that matter, see Audit, *supra* note 13, at 177:

[P]arties are bound by any usages to which they have agreed [and] 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 Convention rules.

24. According to Bainbridge, *supra* note 2, at 653, the “CISG eliminates the notion of making ‘abnormal usages’ binding through implication.” By omitting the phrase “expressly or impliedly,” Article 9(1) “instead adopts a rule that abnormal usages, not of regular observance, cannot bind parties absent explicit agreement to do so.” *Id.*

25. See, e.g., BIANCA & BONELL, *supra* note 6, at 106-07. HONNOLD, *supra* note 6, at 125 (stating that “references that are less explicit might well invoke usages if the Court concludes that such was the intent of the parties, in accordance with the Convention’s rules of interpretation in Article 8”); Bout, *supra* note 7, § II(E).

26. FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 68 (1992); Bout, *supra* note 7, § II(E).

“a usage which has been silently agreed upon under Art. 9 par. 1, should comply with the conditions mentioned in the second paragraph.”<sup>27</sup>

It is therefore necessary, in my view, to distinguish between the (permitted) tacit choice which presupposes the expression of the parties’ will, even if they did not intend the choice of a specific usage, from the (not permitted) hypothetical will of the parties, which presupposes that the judge shall establish what the presumed will of the parties was.

### *B. Notion of Practice Between Parties*

According to Article 9(1), the parties are also bound by practices established between themselves.<sup>28</sup> For example, the China Arbitration Commission found that the parties had established a practice with regard to the issue of quality (specifically, of confirming the cloth sample) in the process of performing the “general” contract.<sup>29</sup>

Two main questions arise in relation to the notion of practices. What is an established practice? When is a practice established?

The convention does not state what practices are. Practices are established by a course of conduct that creates an expectation that this conduct will be continued.<sup>30</sup> “Except for the case [when] a party expressly excludes their application for the future, courses of dealing are automatically applicable not only [in supplementing] the terms of the contractual agreement but also, pursuant to Article 8, in order to help determine the parties’ intent.”<sup>31</sup> “For example, under Article 9(1) a course of conduct by A in past transactions may create an expectation by B that will bind A in a future contract. Of course A

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27. See BIANCA & BONELL, *supra* note 6, at 107.

28. See also UNIDROIT Principle 1.8 (stating that “the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves”). For a discussion of the linkage between the two provisions, see Court of Arbitration of the International Chamber of Commerce, Case No. 8817, Dec. 1997, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=398&step=FullText>.

29. China International Economic and Trade Arbitration Commission, 1990, available at <http://cisgw3.law.pace.edu/cases/900000c1.html>.

30. See also the definitions given by E. Allan Farnsworth, *Unification of Sales Law: Usage and Course of Dealing*, in UNIFICATION AND COMPARATIVE LAW IN THEORY AND PRACTICE: LIBER AMICORUM JEAN GEORGES SAUVEPLANNE 81, 82-83 (1984), available at [http://tdb.uni-koeln.de/php/pub\\_show\\_document.php?pubdocid=111900#fn2](http://tdb.uni-koeln.de/php/pub_show_document.php?pubdocid=111900#fn2) (defining a course of dealing 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”). Bout, *supra* note 7, § II(B), proposes as a general notional approach to define a practice as “if in an individual relationship between two parties the parties act in similar way in similar circumstances.”

31. BIANCA & BONELL, *supra* note 6, at 106.

will not be bound if he notifies B of a change before B enters into a new contract. Further reliance by B may also become unreasonable when circumstances change.”<sup>32</sup>

According to Neumayer and Ming,<sup>33</sup> the notion refers to the practices established between the parties concerning their commercial relationship, so that, if there is no contrary agreement, the buyer and the seller are supposed to refer to them at the formation of the contract. Enderlein and Maskow state that “practices . . . can be interpreted as implied agreement between the parties and which frequently modify original agreements and should be considered as having priority in their relationship with agreed usages.” According to those writers, practices are “better geared to the particularities of a concrete relationship because they are of an individual and thus more specific character.”<sup>34</sup>

As far as their relationship with the rules of the Convention is concerned, the latter can be derogated from by practices, as was held by the Cour d’appel de Grenoble,<sup>35</sup> which decided “that the seller could not invoke the rule laid down in Article 18 CISG (providing that silence does not by itself amount to acceptance) because, according to practices previously established between parties, the seller [had been] performing the orders without expressly accepting them.” However, the Italian Supreme Court<sup>36</sup> stated in a case between an Italian seller and an Austrian buyer that “[a] mere practice between the parties, which may well depend on . . . tolerance on the part of the seller, is not sufficient to justify a derogation from the general rule” of the Convention regarding the place of payment.

It is difficult to set a general rule as to this conflict between rules of the Convention and parties’ practices. Courts should decide, having as criterion the legitimate expectation of the parties that they can in fact rely on legal certainty. In that sense, in my view, a practice between the parties is, on the one hand, more important, but on the other, less certain than a Convention rule and should therefore be applied only when the condition of the unquestionable common knowledge is met.

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32. HONNOLD, *supra* note 6, at 126.

33. Karl H. Neumayer & Catherine Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises, Commentaire*, 24 CEDIDAC 117 (1993).

34. ENDERLEIN & MASKOW, *supra* note 26, at 68.

35. CLOUT Case No. 313 [Cour d’appel de Grenoble, France, 21 Oct. 1999].

36. Corte Suprema di Cassazione, Italy, 7 Aug. 1998, available at <http://cisgw3.law.pace.edu/cases/980807i3.html>.

Collisions between general usages and practices exclusively valid between two parties are more likely to happen. Practices are more imbued with the details and context of the individual relationship between parties. “It seems logical that silent practices will have precedence over silent usages, because the practices are more closely related to the situation between the parties. As soon as parties have expressly made a usage applicable, it is logical that this usage has precedence over the silent practice, because by choosing for the usage the conflicting practice has been put aside.”<sup>37</sup>

As to *what* constitutes a practice there are many examples of practices established between parties in case law. One arbitral tribunal<sup>38</sup> stated that “a prompt delivery of replacement parts had become normal practice as defined in Article 9(1),” and therefore the seller was obliged to comply within a reasonable time. In another case, the Cour d’appel de Grenoble<sup>39</sup> held that since the Italian seller had been complying with the buyer’s orders for months, without inquiring about the buyer’s solvency, when the seller decided to assign its foreign receivables by means of a factoring contract and suspended its business relationship with the buyer, it should have taken into account the buyer’s interests; as a consequence, the Court “found the seller liable for abrupt discontinuance of business relations between parties bound by longstanding practices.” Another example can be found in the ruling of a Swiss Court,<sup>40</sup> which, “considering the exchange of correspondence between the parties . . . held that the conclusion of a contract through a letter of confirmation constituted . . . a practice established between the parties under Art. 9(1) CISG.” A Hungarian court<sup>41</sup> held that an offer between a German seller and a Hungarian buyer “was sufficiently definite . . . as the quality, quantity and price of the goods were impliedly fixed by the practices established between the parties, . . . whereby the German seller had *repeatedly* delivered the same type of goods ordered by buyer who had paid the price after delivery.” A Finnish court<sup>42</sup> “found that the warranty term in question

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37. Bout, *supra* note 7, § II(H).

38. Court of Arbitration of the International Chamber of Commerce, Case No. 8611, 23 Jan. 1997, available at <http://cisgw3.law.pace.edu/cases/978611i1.html>.

39. CLOUT Case No. 202 [Cour d’appel de Grenoble, France, 13 Sept. 1995], available at <http://cisgw3.law.pace.edu/cases/9950913f1.html>.

40. CLOUT Case No. 95 [Zivilgericht Kanton Basel, Switzerland, 21 Dec. 1992], available at <http://cisgw3.law.pace.edu/cases/921221s1.html>.

41. CLOUT Case No. 52 [Fovárosi Biróság Budapest, Hungary, 24 Mar. 1992] (emphasis added), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=19&step=Abstract>.

42. Court of Appeal of Turku, Finland, 12 Apr. 2002 (emphasis added), available at <http://cisgw3.law.pace.edu/cases/020412f5.html>.

had validly become part of the contract since, in the light of *practices* established between the parties, it could not be regarded as too harsh for or surprising to the buyer.”

According to a German court,<sup>43</sup> the place of payment shall be established in conformity with the practices between the parties. Finally, according to a Swiss court, past practices between the parties in prior transactions do not suffice to overcome the requirement that the forum selection provision must be express. In the case at hand, the Court held that “the mention of bank accounts and other commercial relationships in states other than where the delivery of goods occurs is insufficient to constitute a forum selection agreement in the absence of an express intent by the parties.”<sup>44</sup>

As to *when* it is possible to speak of practices established between the parties, there is no specific statement in the Convention. According to case law, for these practices to be binding on the parties pursuant to Article 9(1), it is necessary that the parties’ relationship must last for some time and that it has led to the conclusion of various contracts. This requirement was expressly emphasized by one court, which stated that the practice it has to decide upon “does not establish usage in the meaning of [Article 9(1)], which would require a conduct regularly observed between the parties and thus requiring a certain duration and frequency . . . Such duration and frequency does not exist where only two previous deliveries have been handled in that manner. The absolute number is too low.”<sup>45</sup> In a different case, a Swiss court dismissed the seller’s allegation that the indication on the invoice of the seller’s bank account established a practice between the parties under which the buyer was bound to pay at the seller’s bank. Although the Court left open the issue of whether the parties concluded one or two different contracts for the delivery of two ship cargoes, it held that under Article 9(1) of the

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43. CLOUT Case No. 363 [Landgericht Bielefeld, Germany, 24 Nov. 1998], available at <http://cisgw3.law.pace.edu/cases/981124g1.html>. In that particular case, “it was the parties’ general practice that the seller bore the transaction costs” and since under CISG the “law of the place of payment determines the bearing of costs, the Court concluded that if the seller usually had to bear the transaction costs, then the place of payment had to be the buyer’s place of business.” *Id.*

44. Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 34 *Nw. J. INT’L L. & BUS.* 299, 373-74 (2004). CLOUT Case No. 325 [Handelsgericht Zürich, Switzerland, 8 Apr. 1999], available at <http://cisgw3.law.pace.edu/cases/990408g1.html>. According to the Court, such usages would only serve to select the forum if it was widely known in the trade that certain actions undertaken by the parties to the transaction had the indelible effect of selecting an exclusive forum for the resolution of disputes between the parties other than as established by Article 57 CISG.

45. CLOUT Case No. 360 [Amtsgericht Duisburg, Germany, 13 Apr. 2000], available at <http://cisgw3.law.pace.edu/cases/000413g1.html>.

Convention two contracts were insufficient to establish a practice between the parties. “According to the Court, in order for a practice between the parties to be established, long lasting contractual relationships involving more sale contracts between the parties [are] required.”<sup>46</sup> Similarly, a German court stated that one prior dealing between the parties did not lead to “practices” in the sense of Article 9 of the Convention.<sup>47</sup> In another case, a Swiss court<sup>48</sup> “stressed that for a practice to be established, . . . it is necessary that the parties be in a long-lasting relationship, involving a number of sale agreements” and that “[t]o provide evidence of the practice it is sufficient to prove that the parties have adopted the same behaviour in comparable situations and that such behaviour has not been objected.” In that particular case, “the Court noted that within the business relationships between the parties, the buyer had in fact previously, in two occasions, cancelled or modified orders without the seller objecting to such behaviour, which the Court recognised as a valid practice established between the parties under Article 9(1).” However, “in the case at hand, the Court found that the buyer could not invoke such a practice since it was not able to prove that the seller had agreed to the modification of the order.”

In contrast to courts that require the element of a longstanding relationship, another Austrian court<sup>49</sup> held that:

It is generally possible that intentions of one party, which are expressed in preliminary business conversations only and which are not expressly agreed upon by the parties, can become “practices” in the sense of Art. 9 [of the Convention] already at the beginning of a business relationship and thereby become part of the first contract between the parties. This, however, requires in the least that the business partner realizes from these circumstances that his contracting party is only willing to enter into a contract under certain conditions or in a certain form.

We can conclude from this *aperçu* of the case law that the prevailing condition of a longstanding relation is correct. It is not even conceivable to speak of party practices if they have entered into a *circumstantial* relation.

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46. CLOUT Case No. 221 [Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 Dec. 1997], available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=372&step=Abstract>.

47. Landgericht Zwickau, Germany, 19 Mar. 1999, available at <http://www.cisg-online.ch/cisg/urteile/519.htm>, reported in UNCITRAL Digest of Case Law.

48. CLOUT Case No. 217 [Handelsgericht Aargau, Switzerland, 26 Sept. 1997], available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=404&step=Abstract>.

49. CLOUT Case No. 176 [Oberster Gerichtshof, Austria, 6 Feb. 1996], available at <http://cisgw3.law.pace.edu/cases/960206a3.html>.

The term “practice” evokes notions of a *partnership* relationship within a specific market.

As far as the *burden of proof* is concerned, case law would impose it on the party alleging the existence of practices established between them or usages agreed upon.<sup>50</sup> The U.S. District Court for New York<sup>51</sup> refused to conclude that the delivery “ex works” amounted to a course of dealing binding on the parties according to Article 9(1) CISG, since the seller had failed to submit sufficient evidence with regard to the terms of the other transactions successfully concluded with the buyer.

## II. BINDING INTERNATIONAL TRADE USAGES (ARTICLE 9(2))

Three main issues arise: when usages should be considered as impliedly agreed, who carries the burden of the proof and the relation to two major codifications of principles and rules UNIDROIT Principles and ICC.

### A. *Applicability Rule*

According to Article 9(2), the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage which the parties knew or ought to have known and which in international trade is widely known, and regularly observed in contracts of the type involved in the particular trade concerned.<sup>52</sup>

The provision sets two requirements for the identification of usages whose application is premised on the presumption of an implied intention of the parties.<sup>53</sup> The language used in this paragraph “invokes a pattern of

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50. CLOUT Case No. 360, *supra* note 44; CLOUT Case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998], available at <http://cisgw3.law.pace.edu/cases/980709g1.html>.

51. Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd., 96 Civ. 8052 (HB) (THK), 1998 U.S. Dist. LEXIS 4586, \*1 (S.D.N.Y. Apr. 6, 1998), CLOUT Case No. 413 [U.S. District Court, Southern District of New York, 6 Apr. 1998].

52. According to Neumayer & Ming, *supra* note 33, at 117, the “regularly observed” phrase is redundant, because this is inherent in the notion of the usage, otherwise the usage would have not had imposed itself. Also, it seems kind of *superfluous to require that the parties “knew” a usage “widely known and regularly observed.”* See also ENDERLEIN & MASKOW, *supra* note 26, at 69, who state that “this feature is largely redundant, because if usages fulfill this requirement the parties have to recognize them as a rule. Only in very rare, exceptional cases one will be able to permit that a party invokes that he did not know, nor ought to have known the rules, which meet the remaining requirements.”

53. According to BERNSTEIN & LOOKOFKY, *supra* note 14, at 45, these two limitations were designed primarily to accommodate and protect parties in less developed countries, but Article 9(2) is nonetheless regularly cited in the CISG decisions of national courts and arbitral tribunals worldwide.

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.”<sup>54</sup> The legitimate expectations of the parties as to the applicable rules are in my opinion the theoretical foundation of Article 9 in its entirety.<sup>55</sup>

The first requirement is based on a subjective element (usages that both parties *knew*), which is intended to protect parties from developing countries, and an objective element (*ought to have known*). “Through this provision, CISG significantly reduces the potential for, and cost of, future misunderstandings[—even] idiosyncratic parties [are well advised] to study trade usage. A party’s expectation that the other [contracting] party . . . knows of, and is bound by, the usage is protected.”<sup>56</sup>

This requirement is intended to make sure that there will always be an effective link between the application of a particular usage and the parties’ intentions. This will clearly be the case only when both parties actually knew of the usage, so as to legitimate the inference that, in the absence of any express statement to the contrary, they intended to incorporate it tacitly into their contract. The same cannot be said when a usage applies simply because both or one of the parties ought to have known it. In this case it is the law itself which confers the binding force on the usage. To explain its application on the basis of an implied agreement between the parties would amount to a legal fiction.

After all, only in this way, according to Bianca and Bonell, is it explicable that the rule laid down in Article 9(2) is expressly made subject to a contrary agreement between the parties. It would make little sense to provide that there is no contractual agreement concerning the application of the usages if the parties agreed otherwise. “Only if one accepts that the justification for the application of the usages lies in the law itself, can one understand why the law simultaneously provides that the parties in each case are free either to exclude entirely the envisaged application of the usages or to make it contingent upon stricter or less stringent conditions that those set forth in Article 9(2).”<sup>57</sup>

What if a party did not know a specific usage but ought to have known it, which is ultimately a matter of proof? Should the usage be applicable? In my

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54. HONNOLD, *supra* note 6, at 128.

55. *See, however*, Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc., 201 F. Supp. 2d 236 (S.D.N.Y. 2002) which goes beyond the requirements in holding that “the usages and practices of the parties or the industry are automatically incorporated into any agreement governed by the Convention, unless expressly excluded by the parties.”

56. Bainbridge, *supra* note 2, at 655.

57. BIANCA & BONELL, *supra* note 6, at 108.

opinion the application should ultimately depend on the parties' expectation, meaning, what a reasonable party would have expected.

The second requirement for trade usages to be applicable under Article 9(2) is an objective one: usages must be regularly observed within the particular trade to which the parties belong<sup>58</sup> and must be widely known in international trade.

This provision gives effect to a usage only if, under objective criteria, it constitutes part of the reasonable expectations of the contracting parties. "[T]he usage must have been 'regularly observed' for a period of time that would justify the conclusion that the parties 'knew or ought to have known' of it."<sup>59</sup> As to the requirement that any usage must be known or ought to be known to the parties in order to bind them, the Austrian Supreme Court<sup>60</sup> has stated that a usage can bind a party only if it either has "its place of business in the geographical area where the usage [is] applicable, or if the party permanently deals within the area where that usage is applicable." The same court, in an earlier decision, made a similar statement: "A party to an international sales contract has to be familiar only with those international trade usages that are commonly known and regularly observed by parties to that specific branch in the specific geographic area where the party in question has his or her place of business."<sup>61</sup> The position of the Court is reasonable. The requirement of knowledge induces us to search *the contact* with the parties' transaction and to localize it into the relevant geographical area. It is somehow a conflict of laws reasoning.

However, the formulation of Article 9(2) ("international trade") must "not be understood to prevent in all cases usages of a purely local or national origin from being applied without any reference thereto by the parties."<sup>62</sup> According to Honnold, "a usage that is of local origin (the local practices for packing copra or jute, or the delivery dates imposed by arctic climate) may be applicable if it is 'widely known to and regularly observed by' the parties."<sup>63</sup>

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58. According to Bianca and Bonell, this corresponds in substance to the solution already found in Article 9 (2) of ULIS.

59. HONNOLD, *supra* note 6, at 128.

60. CLOUT Case No. 425 [Oberster Gerichtshof, Austria, 21 Mar. 2000], available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=478&step=Abstract>

61. Willibald Posch & Thomas Petz, *Austrian Cases on the UN Convention on Contracts for the International Sale of Goods*, 6 VINDOBONA J. INT'L COM. L. & ARB. 1, 9-10 (2002); <http://cisgw3.law.pace.edu/cases/981015a3.html>.

62. BIANCA & BONELL, *supra* note 6, at 109.

63. HONNOLD, *supra* note 6, at 128. See also Bainbridge, *supra* note 2, at 658; Neumayer & Ming, *supra* note 33, at 119.

Case law confirms this position. According to an Austrian court,<sup>64</sup> “it is also possible that, in certain circumstances, a local usage may be applicable to the contract. This is particularly the case with respect to usage applied within local commodity exchanges, fairs and warehouses, provided that such usage is regularly observed also with respect to businesses involving foreign dealers.” The Court also held “that even a local usage [which is] applied only in a particular country may be applicable to a contract involving a foreign party, provided that the foreign party does business in the particular country on a regular basis and that it has concluded several contracts of the same manner in the same particular country.”

However, a German court<sup>65</sup> insisted on the requirement of internationality. According to the ruling of this court, “CISG requires a trade usage to be international in order to be applicable to the contract, absent an agreement by the parties.” The Court held that, in the case at hand, the German usage of concluding a contract through a letter of confirmation (‘Kaufmännisches Bestätigungsschreiben’) was not international, since it was recognized only at the receiver’s place of business (Germany), while in France such a usage was not habitual.<sup>66</sup> In that particular case the usage was not given effect since it was not international and the court held that for that reason the terms contained in the letter of confirmation had not become part of the contract. It is pointed out, however, that although there was no room for rules on silence in response to a letter of confirmation, “a letter of confirmation can have considerable importance in the evaluation of the evidence.”<sup>67</sup>

It must be noted that, since the Convention gives local usages very limited recognition, cases will seldom occur where a conflict between two or more such usages arises. In case of conflict between usages, according to which principles should it be resolved? First it seems to me that a *priority* rule in

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64. CLOUT Case No. 175 [Oberlandesgericht Graz, Austria, 9 Nov. 1995], available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=370&step=Abstract>.

65. CLOUT Case No. 276 [Oberlandesgericht Frankfurt, Germany, 5 July 1995], available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=169&step=Abstract>.

66. *Id.* Neumayer & Ming, *supra* note 33, at 119, refer to the local usage according to which the silence to a letter of confirmation implies the acceptance of its content. According to those writers, since this usage is expanded in a particular circle, one could presume that there is indeed a silent acceptance, but still under the condition that this usage is known in the place of business of both the seller and the buyer.

67. See also M.J. Bonell & Fabio Liguori, *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law*, 2 UNIF. L. REV. 583-97 (1997), who observe that the Court may have failed to consider that, in the case at hand, the letter of confirmation had been sent by a French seller to a German buyer and that the latter could not have been unaware of such a practice which is well established in Germany.

favour of the international usage has to be set. Local usage must come after the one of general application. Also a *relevance* rule concerning which usage is the most relevant to the parties' transaction should also be another criterion of resolving conflicts between usages.

However, in the exceptional case that such conflicting usages are equally applicable, they mutually exclude each other and the issue has to be resolved either according to the relevant provisions of the Convention or, in the absence thereof, according to the gap-filling principles of Article 7.<sup>68</sup>

Usages that are binding on the parties pursuant to Article 9(2) prevail over the conflicting provisions of the Convention.<sup>69</sup> In case of a conflict between the usages applicable by virtue of Article 9(2) and clauses contained in the contract, according to a German court,<sup>70</sup> the clauses prevail, given the pre-eminence of party autonomy as a source of the sales contract, which is also confirmed by the introductory language of Article 9(2). "However, when the parties do not clearly address and negate implicit expectations based on practices and trade usages the relationship between these implicit expectations and the terms of the contract present delicate problems of interpretation."<sup>71</sup>

In countries which admit the concept of custom, domestic legislation or case-law jurisprudence occasionally declares a commercial usage as being so firmly established that it has the force of law and is binding on the parties *regardless* of meeting the standards of Article 9(2). If such a norm is inconsistent with a provision of the Convention, does it, like usages established *in accordance with* Article 9(2), prevail over the Convention? John Honnold, who poses this question, answers in the negative, because the CISG governs the circumstances in which a usage may be part of the contract and thereby prevail over provisions of the Convention. The crucial point is that factual compliance with these international standards must be established for each case. "Many of the rules of domestic law may be thought to be supported by commercial usage: giving effect to domestic law on this ground would be inconsistent with the standards established by Article 9(2) and

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68. BIANCA & BONELL, *supra* note 6, at 109.

69. CLOUT Case No. 425, *supra* note 60.

70. CLOUT Case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 Jan. 1993], *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=180&step=Abstract>.

71. See HONNOLD, *supra* note 6, at 130, who suggests that the "[a]nswer to this question must be consistent with the rule of Article 8(3) that in interpreting statements of the parties (including contract provisions) due consideration should be given to all relevant circumstances of the case including . . . any *practices* which the parties have established between themselves, *usages* any subsequent conduct of the parties."

would undermine the Convention's central goal to establish uniform law for international trade."<sup>72</sup>

As examples of courts resorting to usages consider the following cases. An arbitral tribunal held "that the revision of price is a usage regularly observed by parties to contracts of the type involved in the particular trade concerned" (minerals).<sup>73</sup> In another case, "the court held that the bill of exchange given by the buyer had validly modified the contract according to Article 29(1) CISG to the effect that the date of payment of the purchase price was postponed until the date when the bill of exchange was due. In reaching this conclusion, the court took into account the existence of an international trade usage to this effect and its relevance pursuant to Article 9(2) CISG."<sup>74</sup>

In yet another case, a court stated that a trade usage existed in the particular trade concerned with respect to the examination of the goods sold, according to which the buyer has to give the seller an opportunity to be present while checking the goods.<sup>75</sup> In another case, a Dutch court<sup>76</sup> held that "the buyer should have discovered the defects by examining all the goods as soon as practicable (Article 38 CISG) which under the circumstances was at the time of delivery or shortly afterwards." "This conclusion was reached after the court took into account the seller's standard terms applicable to the contract, which provided for short terms for notice for defects in frozen products, thereby also abiding to a usage in the fish market (Art. 9(2) CISG)."

Apart from the decision mentioned above<sup>77</sup> concerning the usage of sending a letter of confirmation, several courts have dealt with that same issue. Another German court<sup>78</sup> held that "it is an accepted trade usage that a tradesperson who receives a letter of confirmation has to object to the letter's content if he does not wish to be bound by it. If he does not object, the contract is binding with the content given to it in the letter of confirmation, unless the sender of the letter has either intentionally given an incorrect

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72. *Id.* at 131.

73. Court of Arbitration of the International Chamber of Commerce, Award No. 8324, 1995, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=240&step=Abstract>.

74. CLOUT Case No. 5 [Landgericht Hamburg, Germany, 26 Sept. 1990], available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=7&step=Abstract>.

75. Helsinki Court of Appeal, Finland, 29 Jan. 1998, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=490&step=Abstract>.

76. Arrondissementsrechtbank Zwolle, Netherlands, 5 Mar. 1997, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=332&step=Abstract>.

77. CLOUT Case No. 276, *supra* note 65.

78. CLOUT Case No. 446 [Oberlandesgericht Saarbrücken, Germany, 14 Feb. 2001], available at <http://cisgw3.law.pace.edu/cases/010214g1.html>.

account of the negotiations, or the content of the letter deviates so far from the result of the negotiations that the sender could not reasonably assume the recipient's consent. The recipient's silence causes the contract to be modified or supplemented in accordance with the letter of confirmation. In the event that a contract had not yet been concluded, it is formed with the content of the confirmation."

A Dutch court<sup>79</sup> has also dealt with the issue of the letter of confirmation. In that case, the Dutch buyer placed an order with a German seller who replied by telex and some days later sent a letter of confirmation referring to the standard terms of a German association, which provided for a conventional rate of interest in the case of late payment. The court held that the seller's standard terms had become part of the contract, by referring to Article 9 CISG, and by placing emphasis on the fact that the standard terms in question were regularly observed in the commodity sector concerned and that the same terms had already been included in previous contracts between the same parties. On the contrary, a French court<sup>80</sup> denied the binding force of the standard terms contained in a letter of confirmation. In that case, the French "buyer's standard terms, printed on the reverse side of the order form, contained a forum selection clause in favor of a French forum. The [Italian] seller had accepted the offer by countersigning the front page of the order," which had been sent back to the buyer. "Some days later, the seller sent a confirmation of order making an express reference to its own standard terms" on the reverse side of its letter of confirmation, containing a "forum selection clause in favor of an Italian forum." "The court held that as the buyer's standard terms were printed on the reverse side of the order form and [no] . . . reference to them had been made on the front side," the clause in question could not be considered as having been accepted by the seller. The forum selection clause invoked by the seller was likewise considered ineffective since the confirmation of order referring to his standard terms containing the clause had been sent to the buyer after the contract was concluded.

### *B. Burden of Proof*

As with the usages agreed upon by the parties or the practices established between them, the party that alleges the existence of any binding usage has to

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79. Gerechtshof's-Hertogenbosch, Netherlands, 24 Apr. 1996, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=224&step=Abstract>.

80. CLOUT Case No. 203 [Cour d'appel de Paris, France, 13 Dec. 1995], available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=174&step=Abstract>.

prove it,<sup>81</sup> at least in those legal systems that consider the issue as being one of fact.<sup>82</sup> However it can happen that a judge applies a usage by virtue of his office. This option is especially difficult in national courts because the applicable usages will almost always be very specialized within a certain trade. “In arbitration cases . . . more often a usage will be found applicable by virtue of its office, . . . [because] [t]he arbitrator who knows the trade concerned most likely has insight in the usages that are applicable in that trade. With this knowledge [the] arbitrator can declare certain usages from a particular trade or place applicable, and subsequently the existence of such a usage would no longer have to be proven by one of the parties.”<sup>83</sup>

“When proving practices only applicable between two particular parties, it will be enough to show that in previous cases under comparable circumstances parties acted in a certain way. [P]roof of a usage is not as easy to obtain, since there is no clear individual relation between two parties with clear examples in the past. If a usage is concerned, one has to deal with a more general rule followed in a certain place or trade.”<sup>84</sup>

Where the party that carries the burden of proof does not succeed in proving it, the usages will not be binding. A German court<sup>85</sup> found that since the buyer had not proven that an international trade usage existed, “which says that silence to a commercial letter of confirmation is sufficient for the contract to be concluded with the content of the letter, the contract was concluded with a different content.” The Austrian Supreme Court<sup>86</sup> noted that although usual

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81. “Whether it is up to the party claiming the relevance of a particular usage to prove both its existence and its content or whether usages may also be applied *ex officio* to be determined according to the law of procedure of the forum.” In most legal systems the first solution is adopted, it being understood that, once the existence of the usage has been proved by the party, the judge decides as a question of law whether the usage is applicable to the particular contract. BIANCA & BONELL, *supra* note 6, at 111.

82. See for example the above-mentioned case of the Austrian Oberster Gerichtshof, *supra* note 60, that stated that the question whether Austrian wood trade usages constitute commercial customs acknowledged by Austrian commercial law is a question of fact rather than law and therefore it could not be decided within appellate proceedings before the Supreme Court. The same applies, according to this Court, to the question whether these trade usages can be considered as widely known and regularly observed usages of international trade under Article 9(2). See also Farnsworth, *supra* note 30, at 86, who states that whether a usage exists is a matter of fact rather than law.

83. Bout, *supra* note 7, § II(G). See also BIANCA & BONELL, *supra* note 6, at 112, who feel that the application of usages by an arbitrator, by virtue of his office, through various rules of arbitration, is allowed and through some even required.

84. Bout, *supra* note 7, § II(G), suggesting that in case a usage has to be proven in national courts, a party could seek assistance of a chamber of commerce or consult an international expert.

85. CLOUT Case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998], available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=502&step=Abstract>.

86. CLOUT Case No. 176, *supra* note 49.

requirements for the formation of a contract under the Convention could be modified by usages, a usage to conclude contracts on the basis of rules different from those to be found in Articles 14 to 24 of the Convention had not been proven. Consequently the Court applied the formation rules of the Convention. The Supreme Court of Denmark<sup>87</sup> relied on the fact that the party alleging the trade usage by virtue of which the place of performance was located in that party's country could not prove the existence of such trade usage to rule that the place of performance was in the seller's country.

The European Court of Justice also referred to the issue of burden of proof in ruling that for silence in response to a letter of confirmation to amount to acceptance of the terms contained therein it is necessary to prove the existence of such a usage on the basis of the criteria set out in Article 9(2) of the Convention.<sup>88</sup>

### C. Article 9 CISG, INCOTERMS and UNIDROIT Principles

The most important "codifications" of usages and rules are undoubtedly the INCOTERMS and the Unidroit Principles. Their relation to the CISG and in particular to Article 9 will reveal the *relevance* to widely known standard rules and principles.

#### 1. INCOTERMS

In international trade, standardized abbreviations have been used for a long time to denote the obligations of buyer and seller, which are typical of the export and import business. The most commonly applied abbreviations are the INCOTERMS which are adopted by the International Chamber of Commerce and developed by its Commission on Commercial Law and Practice. They aim at providing international uniform rules for the interpretation of specific clauses and in the past sixty years they have been amended and adjusted every ten years to suit the development of technology. The INCOTERMS are commercial terms that have been established in the

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87. Højesteret, Denmark, 15 Feb. 2001, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=751&step=Abstract>.

88. Mainschiffahrts—Genossenschaft eb (MSG) v. Les Gravihres Rhinanes SARL, 20 Feb. 1997, E.C.R. I 927 n.34 (1997). This case involved an interpretation of Article 17 of the Brussels Convention (1968) and the binding effect of a statement of jurisdiction set out in a commercial letter of confirmation. See also *Transporti Castelleti Spedizioni Internazionali S.p.A. v. Hugo Trumpy*, 16 Mar. 1999, E.C.R. 228 (1999) (concerning the interpretation of Article 17 of the Brussels Convention of 1968).

field of international sales of goods. Because of their broad application, in my opinion, they should be regarded in principle as usages. Their nature is not mandatory and the International Chamber of Commerce determines their content and uniform application.<sup>89</sup> The INCOTERMS can alter and supplement the provisions of the CISG. It is principally Articles 6 and 9 of the Convention that provide this possibility.<sup>90</sup>

According to Enderlein and Maskow,<sup>91</sup> when a rule meets the requirements mentioned above (i.e. “knew or ought to have known,” widely known in international trade” and “regularly observed”), their application is fictitiously agreed. And since this refers to INCOTERMS, they are applied without taking a decision on whether they are usages at all. According to Bianca and Bonell, judges, before resorting to national criteria and meanings, should consider the interpretation of INCOTERMS to be silently agreed to by the parties under Article 9(1) CISG, because these rules are so widely known,<sup>92</sup> while other writers<sup>93</sup> prefer to interpret the terms according to Article 8 CISG.

In some cases, judges have incorporated INCOTERMS into the CISG. In a sweeping acceptance of international trade usage<sup>94</sup> the U.S. District Court of New York<sup>95</sup> read the INCOTERMS into the CISG by means of Article 9(2). Observing that “the aim of INCOTERMS, which stand for international commercial terms, is to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade,” and “these terms are used to allocate the costs of freight and insurance in addition to designating the point in time when the risk of loss passes to the purchaser.”<sup>96</sup> The court held that the INCOTERMS are incorporated into the Convention through Article 9(2) (in the specific case, the parties having

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89. Neumayer & Ming, *supra* note 33, at 120.

90. Burghard Piltz, *INCOTERMS and the CISG*, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 1998*, at 41-51 (Pace Int'l Law Review ed., 1999), available at <http://www.20jahre.cisg-library.org/piltz1.html>.

91. ENDERLEIN & MASKOW, *supra* note 26, at 70.

92. BIANCA & BONELL, *supra* note 6, at 115.

93. See Bout, *supra* note 7, § II(F). According to Bout, “the best solution is that whenever parties mention a trade term they . . . also mention which rules of interpretation should apply. . . . Should a national Court decide to use an international interpretation to a trade term on delivery, it would be best to make a connection to INCOTERMS.” *Id.*

94. Di Matteo et al., *supra* note 44, at 299.

95. *St Paul Ins. Co. v. Neuromed Medical Systems*, No. 00 Civ. 9344 (SHS), 2002 U.S. Dist. LEXIS 5096 (S.D.N.Y. Mar. 26, 2002), CLOUT Case No. 447 [U.S. District Court Southern District of New York, 26 Mar. 2002], available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=730&step=FullText>.

96. *Id.*

stipulated CIF-delivery) and should thus be applied to the contract, despite the lack of an explicit reference to that effect. A similar ruling was made by an important U.S. appeals court.<sup>97</sup> “Even if the usage of INCOTERMS is not global, the fact that they are well known in international trade means that they are incorporated through Art. 9(2).”

In its turn, the High Arbitration Court of the Russian Federation<sup>98</sup> used Article 9(1) in order to rule that the parties had to abide by the INCOTERMS. The reference to CIF in the contract meant that the parties had agreed to be bound by these terms, which represented usage of international trade.

An Italian court,<sup>99</sup> in a case that concerned a contract between an Italian seller and a Swiss buyer, that contained an FOB clause as well as an express reference to the NIOC standard terms, made an express reference to the CISG, even though the contract was not governed by the Convention. “It held that the FOB’s clause scheme was binding as an international usage under Art. 9 CISG, as well as under the NIOC standard terms referred to in the contract.”<sup>100</sup>

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97. BP Oil International and BP Exploration & Oil Inc. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333 (5th Cir. 2003), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=924&step=FullText>. The Fifth Circuit notably covers Texas and Louisiana, i.e. the important trade centers of Houston, Dallas, and New Orleans.

98. Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 25 Dec. 1997, available at <http://cisgw3.law.pace.edu/cases/971225r1.html>.

99. Corte di Appello di Genova, Italy, 24 Mar. 1995, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=198&step=Abstract>. “Without making any other reference to the CISG, the Court decided on the grounds that, under the FOB clause and the NIOC standard terms, the seller performs its obligation of delivery when the oil enters the ship’s tanks, thereby bearing the risk of any loss or damage to the goods that may have occurred before that moment.” *Id.*

100. *Id.* See also two Dutch decisions by the Gerechtshof’s-Hertogenbosch (District Court), concerning the incorporation of standard terms. In the first case, Gerechtshof’s-Hertogenbosch, Netherlands, 24 Apr. 1996, “the Court found that the standard terms had become part of the contract, though there was no evidence of the buyer having received the confirmation of order referring to them. In reaching this conclusion the Court took into account that standard terms are regularly used in the particular trade concerned [and] [o]wing to its experience as a businessman in the trade concerned, the buyer could not have been unaware of the widespread use of the standard terms referred to by the seller. . . .” In the second case, Gerechtshof’s-Hertogenbosch, Netherlands, 16 Oct. 2002:

[T]he court held that, although in the case at hand the application of seller’s standard terms had not expressly been agreed upon by the parties, the standard terms nevertheless were incorporated into the contract. According to the Court, the applicability of seller’s standard terms could be regarded as a usage according to Article 9(2) CISG with the consequence that the standard terms formed part of the contract of sale concluded [by] the parties.

See also Oberster Gerichtshof, Austria, 17 Dec. 2003, available at <http://cisgw3.law.pace.edu/cases/031217a3.html>, according to which:

[T]he CISG does not contain specific requirements for the incorporation of standardized business terms, [t]he rules for a valid incorporation are to be derived from Articles 8 and 14. A valid incorporation requires that the general terms are deliberately made part of the contract offer and that such deliberation of the offeror was apparent to the offeree. This can also result from a trade custom

A Chinese court,<sup>101</sup> in a case where the parties had agreed to include an FOB clause in the contract, “held that the case was to be decided according to the Foreign Economic Contract Law of China, CISG and international usage,” and relied on the FOB clause to conclude that “the buyer had to bear all the risks from the moment the cargo passed the railing of the ship.”

Finally, in an earlier decision, an arbitral tribunal<sup>102</sup> “found that the contract contained a reference to the clause CFR of the INCOTERMS 1990. In holding that such a clause was binding upon the parties, the Tribunal recalled that according to Article 9(1) CISG the parties are bound by any usage to which they have agreed. The Tribunal concluded that the CFR clause had become part of the agreement and would be taken into account to interpret the wording of the contract. . . .”

It is a fact that INCOTERMS enjoy wide and overwhelming international recognition in the world of commerce. Parties to sales contracts ought to know them.

## 2. UNIDROIT Principles<sup>103</sup>

Both the Convention and the UNIDROIT Principles recognize the normative value of international usages and practices in contracts of international trade.<sup>104</sup> Article 1.9 of the UNIDROIT Principles provides a

between the parties.

A similar statement with regard to the same matter was made by the Oberlandesgericht Duesseldorf, Germany, 30 Jan. 2004, *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=969&step=Abstract>. According to that Court (that based this opinion on Article 8 CISG), “it must be clear to the addressee that the offeror wants to include its standard terms in the contract.” *Id.*

101. Xiamen Intermediate People’s Court, People’s Republic of China, 5 Sept. 1994, *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=211&step=Abstract>.

102. Court of Arbitration of the International Chamber of Commerce, Award No. 7645, March 1995, *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=455&step=Abstract>.

103. For a decision that referred in general to the connection between CISG and UNIDROIT principles, see Court of Arbitration of the International Chamber of Commerce, Award No. 9117, March 1998, *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=399&step=Abstract>. The Court “corroborated the provisions of CISG with the reference to the UNIDROIT Principles, stating that, although the UNIDROIT Principles of International Commercial Contracts shall [not] directly be applied, it is nevertheless informative to refer to them because they are said to reflect a world-wide consensus in most of the basic matters of contract law.”

104. Article 1.9 of the UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2004) reads as follows:

- (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 bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage

wider formula,<sup>105</sup> to which one may turn for assistance in interpreting and applying Article 9(2) CISG.

This reasoning can be found in an arbitral award concerning a contract that was governed by the CISG.<sup>106</sup> “After having found that CISG is silent on the issue that arose in that case, the arbitral tribunal decided to resort to the UNIDROIT Principles in order to fill the gap. In doing so, the Tribunal invoked first of all the Preamble of the UNIDROIT Principles stating that “[they] may be used to interpret and supplement international uniform law instruments.” Yet in that case “the recourse to UNIDROIT Principles was also justified on the ground that they reflect usages of which the parties knew or ought to have known and which are widely known to in international trade and are therefore applicable under Article 9(2).” Thus, according to this case, UNIDROIT Principles constitute usages of the kind referred to in Article 9(2). Similarly, an arbitral tribunal<sup>107</sup> stated that the UNIDROIT Principles echo international trade usages under Article 9(2).

#### CONCLUSION

In general, the Convention is quite complex and constitutes rather an open *ensemble* of rules, which is not entirely systematic.

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would be unreasonable.

For a comparative analysis of the provisions of CISG and UNIDROIT Principles on trade usages, see Jorge Oviedo Albán, *Remarks on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement CISG Article 9* (Oct. 2004), available at <http://www.cisg.law.pace.edu/cisg/biblio/oviedoalban5.html>. For a detailed analysis on the relation between UNIDROIT Principles and CISG, see M.J. Bonell, *The UNIDROIT Principles and CISG*, in AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW (2d ed. 1997), available at <http://www.cisg.law.pace.edu/cisg/biblio/bonell.html>; M.J. Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG: Alternatives or Complementary Instruments?*, 26 UNIFORM L. REV. 26-39 (1996).

105. For example, the UNIDROIT Principles do not require that the parties to the contract knew or ought to have known the applicable usage.

106. Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 5 June 1997, available at <http://cisgw3.law.pace.edu/cases/970605r1.html>. Another decision, *Gerechtshof's-Hertogenbosch*, Netherlands, 16 Oct. 2002, also expressly referred to the UNIDROIT Principles as means for interpreting the CISG.

107. Court of Arbitration of the International Chamber of Commerce, Award No. 9333, 1998, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=400&step=Abstract>. According to the tribunal:

In reaching this conclusion, it pointed out that such an exclusion would have been difficult to reconcile with the usages of international trade which are echoed by, among others, the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention) or again the UNIDROIT Principles of International Commercial Contracts.

Article 9 is a provision appropriate to the goals of the Convention. Admittedly, its formulation is imprecise and gives rise to questions of interpretation. Article 9 fails to define the concept of usages and does not deal with questions of proof and validity of usages.<sup>108</sup> Generally speaking, its application requires judges and arbitrators of high caliber, familiar with the international commercial environment. In fact, both Article 9 and the other provision concerning trade usages, Article 8, enhance the interpretative function of the usages alongside their normative one. They are characterized by elasticity and increase the adjudicators' power. Moreover, Article 9 resolves problems on subjects not unified, such as interest rates, as indicated by some cases.<sup>109</sup>

Above all, the provision of Article 9 stands for the recognition by states of the paramount importance of commercial practice, to which the Convention gives, as it is also indicated by their place in the hierarchy of sources the force of law. This Convention has been made by international practice for international practice—and this explains its success.

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108. BIANCA & BONELL, *supra* note 6, at 110-11, who note some problems concerning the provision. They nevertheless state that this article refers to usages in the widest possible sense and that the concept of usages in the context of this article is certainly to be determined in an autonomous and internationally uniform way.

109. Tribunale di Padova, Italy, 31 Mar. 2004, available at <http://cisgw3.law.pace.edu/cases/040331i3.html>, referred to the lack of criteria according to which the rate of interest is to be determined. See for example three cases decided by the Argentinean Court Juzgado Nacional de Primera Instancia en lo Commercial (Decision of 23 Jan. 1991; CLOUT Case No. 21 [20 May 1991]; Decision of 6 Oct. 1994). In the first case, the court stated that payment of interest “at an internationally known and used rate such as the Prime Rate” constituted “an accepted usage in international trade, even when it is not expressly agreed by the parties.” In the second case it was held that accrual of interest during the agreed period in case of deferred payment constitutes a usage widely known and regularly observed in international trade. In the third case, the same court held the same view but in doing so, it also stated that the “Convention attributes to international trade usages a hierarchical position higher than that of the provisions of the Convention.”