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ARTICLE

The Unification of Contract Law and Commercial Usages

Miklos Kiraly*

1. Introduction

The international and European unification of contract law involves two inescapable tasks: The assessment of the role of commercial usages and the development of a common framework for their application. All the more so because commercial usages may determine, in a broad or narrow sense, the conduct of the contracting parties and the contents of their transactions, and they, as a type of private rule-making,[1] themselves unify, which may limit the application of uniform rules. In other cases, however, it is the unification of contract law that relies on commercial usages, sometimes incorporating them among its rules and sometimes codifying them.[2] Commercial usages are part of the intricate framework of various sources of regulations of transactions.[3]

The first part of this paper provides a general overview of the relevant provisions of uniform law instruments on usages, comparing their provisions, while the subsequent parts revisit some specific problems of the relationship between usages and the unification of contract law, in order to gain a concise view of the continuity or discontinuity in regulatory methods. It is instructive to follow how the relationship vis-à-vis commercial usages has evolved and changed in the past century. By analysing the different regulatory patterns of the past decades, the historical approach provides a better understanding of the evolution of the law as it stands today. Furthermore, it may contribute to the successful development of future

* Professor of Private International Law and European law, Eötvös Loránd University, Budapest. The paper was presented at the conference of the Transnational Commercial Law Teachers Meeting, 'When is Commercial Custom Law? The Dialogue between Commercial Practice and The Law' which was organised by the Centre for Commercial Law Studies, QMUL and hosted by Morgan, Lewis & Bockius LLP (London, 12-13 September 2019). The author is grateful to Andromachi Georgosouli and Miriam Goldby for the useful comments provided on an early draft; he is also grateful to Andrea Miglionico for editorial assistance. Any errors or omissions remain the sole responsibility of the author.

[1] Fabrizio Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships between Custom, Jura Mercatorum and Global Private Regulation' (2015) 36(4) *University of Pennsylvania Journal of International Law* 875.

[2] Roy Goode, 'Usage and its Reception in Transnational Commercial Law' (1997) 46(1) *International & Comparative Law Quarterly* 1, 19, 25-27.

[3] On the classification and hierarchy of sources see Loukas Mistelis, 'Is Harmonisation a Necessary Evil? - The Future of Harmonisation and New Sources of International Trade Law' in Ian Fletcher, Loukas Mistelis, Marise Cremona (eds), *Foundations and Perspectives of International Trade Law* (London: Sweet & Maxwell 2001) 3-27.

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solutions supported by a wider community of traders—in this way leading to economically beneficial results.

The discussions of the efforts to unify substantive contract law customarily focus on the Convention on the International Sale of Goods (the CISG, or the Vienna Sales Convention).[4] This is because, first, it is an instrument claiming universal application, having been drawn up under the aegis of the UN; and, second, its Working Group framed it as a classical convention, which was regarded as a foremost means of legal unification.[5] However, it had precedents going back several decades to at least 1930, when, on the initiative of Ernst Rabel, the then newly-established UNIDROIT[6] had started research with the purpose of the unification of the law of the sale of goods.[7] The yield of this work included the drafts for a uniform contract law published by UNIDROIT in 1935 and 1939.[8] Naturally, the discussions also included the examinations and comparisons of the Hague Conventions of 1964 (ULIS and ULFIS)[9], the Principles of European Contract Law (PECL),[10] the UNIDROIT Principles of International Commercial Contracts (UPICC),[11] the Draft Common Frame of Reference (DCFR)[12] and the Draft Regulation on Common European Sales Law (CESL)[13] with a view to the significance of commercial usages.

[4] United Nations Convention on Contracts for the International Sale of Goods, CISG, 1980.
[5] Gralf-Peter Calliess and Insa Buchmann, 'Global Commercial Law between Unity, Pluralism, and Competition: The Case of the CISG' (2016) 21(1) *Uniform Law Review*, 1–22, esp. 4.
[6] International Institute for the Unification of Private Law, established in Rome, 1926.
[7] For the early steps towards the unification contract law see: Frank Vischer, *Internationales Vertragsrecht* (Bern: Stämpfli & Cie, 1962) 275, 14–15.
[8] International Institute for the Unification of Private Law (UNIDROIT, Rome, League of Nations): *Draft of an International Law of the Sales of Goods* (La Libreria Dello Stato, 1935; the 1935 UNIDROT Draft) 131; see also 'Projet D'Une Loi Uniforme sur la Vente Internationale Des Objets Mobiliers Corporels' and 'Draft Uniform Law on International Sales of Goods (Corporeal Movables)' in *L'Unification du Droit; Unification of Law, A general survey of work for the unification of private law* (Drafts and Conventions) (UNIDROIT, 1948; the 1939 UNIDROT Draft) 103–159.
[9] Convention Relating to a Uniform Law on the International Sale of Goods (ULIS) and Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS), 1964.
[10] Ole Lando, Hugh Beale (eds), *Principles of European Contract Law, Parts I and II* (The Hague/London/Boston: Kluwer Law International 2000) ch.1; Ole Lando, André Prüm, Eric Clive, Reinhard Zimmerman (eds), *Principles of European Contract Law, Part III* (The Hague/London/Boston: Kluwer Law International 2003) 1.
[11] See its latest edition: *UNIDROIT Principles of International Commercial Contracts* (UNIDROIT, 2016), https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf.
[12] Christian von Bar, Eric Clive and Hans Schulte Nölke (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Outline edn, Munich: European Law Publishers 2009) 643. The complete results of the Study Group on European Civil Code and the Research Group on EC Private Law were published by Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Full edn, Volumes I–IV, Munich: European Law Publishers 2009).
[13] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels COM (2011) 635 final.

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Comparing the various instruments for the unification of law, both then and now, the following aspects merit attention: Are the parties bound by usages without an agreement? How should lawmakers solve the potential conflict between usages and uniform rules; should usages or uniform law prevail? What is the relationship between usages and the interpretation of contract terms? Are the courts entitled to check the reasonability of usages or that of their application? Another question might be how far the soft law codifications of contract law, taking the shape of 'principles', can simultaneously be regarded as commercial usages. The overall purpose of the study is to assess whether there is a standard approach regarding the role of usages or if diversity still prevails in this area.

2. The concept of usage

When attempting to define commercial usage, we have several sources in the legal literature to refer to. It is typically described as customary practice[14] applied in transactions. This is consonant with the definition Goode adopts, according to which commercial usage is a practice or pattern of behaviour commonly observed by traders of a profession or market when entering into transactions.[15] Goode underscores that the impact of usages on the content and interpretation of contracts cannot be overestimated.[16] To be able to speak of customs, their observance in a defined but not necessarily long duration is required. This approach is also reflected in the definition of custom in the US Uniform Commercial Code (UCC)[17], the Restatement (Second) of Contracts[18] and the PECL Commentary.[19]

[14] Bryan A Garner, *A Dictionary of Modern Legal Usage* (2nd ed, Oxford: Oxford University Press 1995) 953, 905.
[15] Roy Goode (n 2) 7.
[16] Roy Goode, *Commercial Law* (2nd ed, London: Penguin Books 1995) 1264, especially 14, 'Of great importance as a source of obligation in commercial contracts are the unwritten customs and usages of merchants. The impact of these on the content and interpretation of contract cannot be overestimated.'
[17] The UCC was drafted by the National Conference of Commissioners of State Uniform Laws and the ALI and adopted by 50 states, DC and US Territories but not all states have implemented the entirety of the UCC, with Article 2 (Contracts) having been adopted everywhere.
[18] § 1–303 (c) UCC (USA): 'A "usage of trade" 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.'
§ 222 Restatement (Second) of Contracts (USA): Usages 'include a system of rules regularly observed even though particular rules are changed from time to time', as quoted by Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (UPICC)* (2nd edn, Oxford: Oxford University Press 2015) 234.
[19] Art 1:105 PECL Commentary: 'A usage may be described as a course of dealing or line of conduct which is and for a certain period of time has been generally adopted by those engaged in trade or in particular trade.'

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In English legal literature, Wortley had attempted to distinguish between two kinds of commercial custom earlier on, using trade custom for customs recognised by the courts and *usage* for customs (still) lacking that recognition.[20] Courts certainly contribute to the crystallisation of customary rules and trade usages, as Mistelis emphasises.[21] Cafaggi differentiates between usages and codified customs as well.[22] Others, however, do not follow this distinction, such as Goode in his commercial law textbook, which defines custom as a rule of locality while it describes usage as the settled practice of a trade or profession.[23] The author of the present paper accepts this latter concept of usage as a starting point for further analysis. Documents aiming at the unification of contract law typically apply the term *usage*.

3. Provisions in uniform law instruments

The 1935 UNIDROIT Draft had already a separate entry on commercial usages. According to Article 10 of the Draft,

> 'The parties shall be bound by usages, the existence of which is or ought to be known to them. The Court may disregard a usage which is unreasonable if its purport was unknown to one of the parties when he entered into the contract.'

In accordance with accepted commercial practice, therefore, a usage was enforced even if it had not been stipulated by the contract.[24] If terms and regulations used in a commercial sector were applied, the court proceedings had to interpret them in accordance with the usages. The Report attached to the Draft brought up as examples the establishment of the content of the prescription 'fair average quality' and the regulations of the Corn Trade Association of the period.[25] Where uniform law and usages were in conflict, usages prevailed. It should also be noted that the 1935 UNIDROIT Draft afforded significance to usages elsewhere too; thus, according to Article 24, they could obstruct claims of specific performance even if their conditions had been met under uniform law.[26]

[20] Ben Atkinson Wortley, 'Mercantile Usage and Custom' (1959) 24 *Rabels Zeitschrift*, 259–269.
[21] Mistelis (n 3) 8.
[22] Cafaggi (n 1) 921.
[23] On the abandonment of the distinction between customs and usages see Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas (eds), *UN Convention for the International Sales of Goods, A Commentary* (2nd edn., Oxford: C.H. Beck, Hart, Nomos 2018) 169.
[24] Article 24 of the 1935 UNDROIT Draft.
[25] Article 25 of the 1935 UNDROIT Draft.
[26] Article 24 of the 1935 UNIDROIT Draft states: 'Notwithstanding that the national law of the Court recognises his right to require delivery of the goods, the buyer shall not be entitled to require such delivery where it is in

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Close in approach yet slightly different, Article 13 of the 1939 UNIDROIT Draft provided that the parties were bound:

> 'a) by usages to which they had made express or implied reference;
>
> b) by usages which persons in the condition of the parties commonly considered applicable.'

In this way, the circle of usages that were binding, even in the lack of such intent by the contracting parties, was more precisely defined. However, the courts' entitlement to disregard unreasonable customs was omitted.

Article 13 of the 1939 UNIDROIT Draft continued to uphold the rule of interpretation according to which clauses of forms usual in trade were employed in the contract, the Court was to construe them as conforming to commercial usages.

Both Drafts clearly signalled the recognition of the special role of the prevalence of usages (actually, a part of *lex mercatoria*),[27] in international trade. It was an interesting feature of the 1939 UNIDROIT Draft that, in Articles 104 and 105 of chapter VII, following the chapter on the transfer of risk, it specifically treated the impact of the clauses of FOB, CF, and CIF on delivery.[28] Presumably, this was in response to the work of the International Chamber of Commerce (ICC), which, paralleling the codification by UNIDROIT, published the first collection of the most commonly used commercial terms, the INCOTERMS, in 1936.

A few decades later, Article 9 of the 1964 Hague Convention (related to a Uniform Law on the International Sale of Goods, ULIS) essentially took over the provisions of the 1939

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accordance with the usage of the trade to repurchase the goods or where he can repurchase them without appreciable inconvenience or expense.'

[27] *Lex mercatoria* or 'merchant law' was originally a body of rules and principles developed by mediaeval merchants to regulate their transactions. The new *lex mercatoria*, gradually accepted over the past fifty years, includes commercial customs, but also covers a variety of other international norms that are regularly respected by international commercial actors. See Gilles, Cuniberti, 'Three Theories of Lex Mercatoria' (2014) 52(1) *Columbia Journal of Transnational Law* 369, 371. Similarly, Ralf, Michaels, 'The True Lex Mercatoria, Law beyond the State' (2007) 14(2) *Indiana Journal of Modern Legal Studies* 447. For a very detailed analysis of the emergence of modern *lex mercatoria*, see Jan H Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law*, Vol. 1 (Sixth Edition, Hart Publishing, Oxford and Portland, Oregon, 2016) ch.3.

[28] Article 104 of the 1939 UNIDROIT Draft states: 'Where goods are sold free on board, or on cost and freight, or cost, insurance and freight terms, delivery shall be effected when the goods are placed on board the vessel, even if, under the contract, the transit must commence by land. Where under the terms of the contract or by virtue of trade usage, the seller is entitled to tender a received for shipment bill of lading to the buyer, the delivery shall be effected when the goods are handed over to the ship owner'. Article 105 thereof continues: 'Where goods are sold on cost and freight, or cost, insurance and freight terms have to be dispatched in through transit commencing by land, and the seller, under the contract or by usage of trade, is entitled to tender to the buyer a through bill of lading or any other document of title covering the transit, delivery shall be effected by consigning the goods to the first carrier of forwarding agent'.

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UNDROIT Draft, although refining them in both substance and language. Accordingly, it reads:

> '(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. (3) 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.'

To sum up the changes, it can be said that, apart from usages, reference was also made to practices established between the parties, which was a new element. Persons in the same situation were qualified by the adjective 'reasonable', as an objective standard; in this way, the consideration of reasonableness, which had been embodied in the possibility of disregarding unreasonable usages under the 1935 UNIDROIT Draft, now recurred in another context, referring to persons. In the event of a conflict between law and usages, usages prevailed if the parties had not agreed otherwise. This was a reference to the opting-out nature of usages. Nevertheless, in some countries, ULIS was still criticised for the excessive role of usages and the (presumed) legal instability resulting from this.[29]

Furthermore, the twin Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) of 1964 provided for a definition of usages within its scope. In Article 13, it stipulated: 'Usage means any practice or method of dealing, which reasonable persons in the same situation as the parties usually consider to be applicable to the formation of their contract.' This was then supplemented by the provision on the interpretation of terms and provisions.[30] Furthermore, like ULIS, ULFIS Article 2.1 affirmed the practice and usage established by the parties between themselves as being

[29] Gyula Eörsi, 'The Hague Conventions of 1964 and the International Sales of Goods' (1969) 11 (3-4) *Acta Iuridica Academia Scientiarum Hungariae* 321, especially 337–338.
[30] Article 13.2 ULFIS 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.'

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prevalent over the convention.[31] Regarding the above cited definition of usages, it should be mentioned that it clearly refers to the phase of 'formation' of contracts, which makes the export of the concept to other fields of contract law regulated by ULIS difficult.

True, the application of commercial usages might lead to divergences as compared to uniform contract law rules. Under Article 9 of the Vienna Sales Convention of 1980, the parties

> '(1) are bound by any usage to which they had agreed and by any practices which they have established between themselves; and
>
> (2) 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 was widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.'

The legal antecedent of the Vienna Sales Convention, ULIS, and the more distant antecedents of the CISG, had included a similar provision, except, as already mentioned, they enabled a much wider scope for the application of usages, and affirmed their prevalence over uniform law when they conflict,[32] while the CISG had no explicit provision on settling such conflict.[33] Compared to its predecessors, it is an unfortunate element of the CISG regulation that it presumed an implied agreement between the parties for the application of usages unstipulated yet widely known and applied, thus including a seemingly subjective condition in the relevant provision.

The definition of usage is crucial, yet the Vienna Sales Convention failed to provide one.[34] What part of *lex mercatoria* is represented by usages? Might principles of contract law, UNDROIT Principles and PECL for example, be regarded as codified commercial usages? In any case, the concept of usage should be an autonomous one, independent from the notions

[31] Article 2.1 ULFIS reads: 'The provision of the following Articles shall apply except to the extent that it appears from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usage, that other rules apply.'

[32] Article 9.2 ULIS states: '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.'

[33] However, when the parties agree to apply a specific usage, CISG article 6 may be invoked, which states: '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.'

[34] Franco Ferrari, 'What Sources of Law for Contracts for the International Sale of Goods? Why One has to Look Beyond the CISG?' (2005) 25(3) *International Review of Law and Economics* 314, 333.

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applied by domestic laws.[35] This interpretation of Article 9 comes from Article 7 of the CISG, according to which, in the interpretation of the Convention, regard is to be paid to its international character and to the need to promote uniformity in its application.

Codified or formulated usages have acquired a permanent form in INCOTERMS elaborated by the ICC.[36] The applicability of usages and definitions included in INCOTERMS was raised as a specific issue in CISG jurisprudence. The UNCITRAL Digest 2016 refers to several judgments, where the courts asserted that INCOTERMS were incorporated into the CISG through Article 9 (2),[37] without the explicit reference of the parties.[38] Furthermore, the CIF and FOB terms applied by the parties were interpreted according to the INCOTERMS.[39] In scholarship not everyone supports these judgments.[40]

There is an obvious difference between the usages mentioned in Article 9 (1) and (2) of the CISG. The basis of applying a usage under point (1) is the agreement between the parties. In accordance with the freedom of contract, the parties may agree to apply any usage, which might even be a local, lesser-known one, because the basis of applying it is not its being widespread and recognised but the express will of the parties. Conditions are stricter however in point (2), because certain usages must be regarded as being '*impliedly* made applicable to their contract or its formation', where the usage was known or ought to have been known by the parties (a subjective condition) and is widely known in international trade and regularly observed by parties to contracts of the type involved in the particular trade concerned (conjunctive and objective conditions). This fine-tuned approach was the result of decades of

[35] Peter Mankowski (ed), *Commercial Law, Article by Article Commentary* (Oxford & Portland: Beck, Hart, Nomos, Baden-Baden 2019) 47.
[36] Mistelis (n 3) 9.
[37] UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016 Edition, UNCITRAL Secretariat, Vienna International Centre, 571. UNCITRAL Digest 2016, 66 and 68. U.S. District Court, Southern District of Texas, United States, 7 February 2006, www.cisg.law.pace.edu, stating that "[b]ecause Incoterms is the dominant source of definitions for the commercial delivery terms used by parties to international sales contracts, it is incorporated into the CISG through article 9 (2)"; for similar statements, see CLOUT case No. 575 [U.S. Court of Appeals (5th Circuit), United States, 11 June 2003]; Juzgado Comercial No. 26 Secretaria No. 51, Argentina, 30 April 2003 (docket No. 44766); Juzgado Comercial No. 26 Secretaria No. 52, Argentina, 17 March 2003.
[38] UNCITRAL Digest 2016, 66 and 68. U.S. District Court, Southern District of Texas, United States, 7 February 2006; CLOUT Case No. 447 [U.S. District Court, Southern District of New York, United States of America, 26 March 2002]. Furthermore, Corte d'Appello Genova, Italy, 24 March 1995, Unilex és Juzgado Comercial No. 26 Secretaria No. 51, Buenos Aires, Argentina, 2 July 2003.
[39] UNCITRAL Digest 2016, 66 and 68. Tribunal cantonal du Valais, Switzerland, 28 January 2009. Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation 6 June 2000. The relationship between the CISG and INCOTERMS is analysed by Dalhuisen (n 27) 262-265 and Viscasillas et al. (n 23) 179.
[40] Regarding the critical approach see Michael Bridge, *The International Sale of Goods* (4th edn, Oxford: Oxford University Press 2017) 620-621.

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development; simultaneously however, the role of usages was somewhat weakened alongside the refined approach.

In interpreting usages, if we examine the interplay between the UNIDROIT Principles (UPICC) and the Vienna Sales Convention, we may reach the following conclusion: That under Article 9 (1) of CISG,[41] the contracting parties might in principle decide to apply the UPICC as a whole as a codified commercial usage, to their contractual relationship, or may fill the gaps in the Convention with UPICC provisions. This would in turn require a greatly extended interpretation of the UPICC, because writers on the subject-matter tend to agree that although certain provisions of the UNIDROIT Principles may be regarded as commercial usages, this certainly does not hold for the entire document. It cannot be said that the Principles and all their elements represent long-recurrent commercial practice;[42] it is rather a soft harmonisation of commercial law in a broader sense.[43] Should the parties wish to subject their relationship to the UPICC, it would be simpler to exclude the CISG as per Article 6[44] and to choose (exercising the right of the parties to choose applicable law) the UNIDROIT Principles, naturally also taking into account the conflict-of-laws provisions of the forum, and relevant international and EU instruments such as the Hague Convention of 15 June 1955 on the law applicable to international sales of goods or Rome I Regulation[45] in the case of EU Member States.[46] In international arbitration procedure, there is nothing against stipulating the UNIDROIT Principles, which can be considered as 'rules of law'.[47]

As we have seen above, Article 9 (2) of the CISG imposes stricter conditions on usages impliedly made applicable conditions the UNIDROIT Principles as a whole do not meet. There are instances however of the UPICC having been qualified as commercial usage *in toto* and specific provisions in it have been repeatedly referred to by some—especially arbitration—

[41] Ingeborg Schwenzer (ed), *Schlectriem and Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford: Oxford University Press 2016) 196.
[42] Symeon C. Symeonides, 'The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments' (2013) 61(3) *The American Journal of Comparative Law* 873, 892; Goode (n 2) 22, 26.
[43] On soft harmonisation see Mistelis (n 3) 17.
[44] Ingeborg Schwenzer, Christiana Fountoulakis, Mariel Dimsey, *International Sales Law, A Guide to the CISG* (2nd edn, Oxford and Portland: Hart Publishing 2012) 81.
[45] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177) 6-16.
[46] As is well-known, article 3 of the Rome I Regulation provides for the choice of state laws in terms of conflict of law. In recital 13, it allows only for a choice of law in substantive law; in other words, the norms of UPICC may replace the dispositive norms of the governing law.
[47] For example, according to Article 28 of the UNCITRAL Model Law 'The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute.' This approach is confirmed by the explanatory note prepared by the UNCITRAL Secretariat, according to which 'by referring to the choice of "rules of law" instead of "law"', the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute.

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courts. In this case, it is an encounter between and a joint application of two uniform laws; an international convention and a non-state set of rules invested with the power of usage. Thus, for example, Article 2.1.12 of the UNIDROIT Principles 2016 on the importance of commercial letters of confirmation (*Kaufmännisches Bestätigungsschreiben*) may acquire significance in deciding a legal dispute. The assessment of the role of these documents in contract formation differs in the various laws,[48] and the Vienna Sales Convention does not settle the issue. However, the UPICC does include a clear provision that may be construed as commercial usage, as Article 2.1.12 states:

> 'If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy'.

The UPICC 2016 themselves have provisions on commercial usages: Article 1.9 partly carries the norms set forth in the Vienna Sales Convention further, albeit with some differences, such as in point (2), it approaches the application of commercial usages with an objective measure, including (indeed, bringing back) the test of 'reasonableness'. Accordingly, as per Article 1.9 (1) of UPICC 2016, 'the parties are bound by any commercial usage which they have agreed to and any practice which they have established between themselves'. Furthermore, as per Article 1.9 (2) 'the parties are bound by a usage which 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 would be unreasonable'. One may recall that, according to the 1935 UNIDROIT Draft, a usage as such could be disregarded as unreasonable by courts. While ULIS treats *reasonableness* as an attribute of a *person*, UPICC views *reasonableness* as an aspect of the *application of usages.*

However, this likewise omits the provision that had been included in Article 9 (3) of ULIS on the interpretation commonly applied in trade of expressions, provisions or forms of contract.[49] Special articles refer to the practices and commercial usages established between the parties, namely in relation to the acceptance of the offer, the interpretation of the contract,

[48] Schwenzer (n 41) 193-195; Schwenzer, Fountoulakis, Dimsey (n 44) 78-80; Viscasillas et al. (n 23) 174-176.
[49] Article 9 (3) ULIS '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.'

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including relevant circumstances, and the sources of implied obligations.[50] Also among its special provisions, the UNIDROIT Principles thus recognise the role of commercial usages, and purports a general openness[51] towards the application of commercial usages. This is perhaps no coincidence, since the UPICC can itself be partly regarded as a codification of commercial usages. The recognition of commercial usages ensures flexibility, because they rapidly follow the changes in economy, commerce, and technology, as well as the expectations of the commercial community.[52] At the same time, the UNDROIT Principles fail to provide a general definition of commercial usages, Article 1.9 (2) merely setting forth the conditions of their application.

Article 1.9 of UPICC 2016 addresses the practices established between the parties and the usages they either a) stipulated or b) did not stipulate but are likewise binding. The first of the two actually implies the autonomy, the freedom of contract, of the parties. An arbitral award of the ICC International Court of Arbitration, applying CISG and UNIDROIT Principles jointly, expressly confirmed the binding character of the parties' established practices.[53] It is possible to deviate from usages and practices previously accepted and applied by the parties if the previous practices of the parties became irrelevant in the light of a new, specific situation.[54] Furthermore, the practices established between the parties have to be sufficiently proven. For example, the Australian Federal Court admitted that a course of dealing established between parties 'can provide […] for the drawing of interferences as to the actual terms on which the parties have contracted and […] for the imputation of implied terms in their contract', and in this context expressly referred not only to 'the domestic laws of common law countries […] e.g. Uniform Commercial Code § 1-303; Restatement of Contracts, Second, § 223 […]', but also to 'international instruments such as the CISG Art. 9 […] [and the] UNIDROIT Principles of International Commercial Contracts 2004, Arts. 1.9 and 5.1.2.' However, according to the

[50] See Articles 2.1.6, 4.3 and 5.1.2 UPICC 2016.
[51] Vogenauer (n 18) 232.
[52] Ibid., 232–233.
[53] ICC International Court of Arbitration, Paris, Arbitral Award, 8817, 00-12-1997, at http://www.unilex.info/principles/case/659 (accessed 8 February 2021). Similarly, Tribunal de Apelación en lo Civil y Comercial de Asunción, Sexta Sala, Paraguay, Ofelia Valenzuela Fernandez v. Paraguay Granos y Alimentos S.A., 66/2016, 06-10-2016, at http://www.unilex.info/principles/case/2134 (accessed 8 February 2021).
[54] ICC International Court of Arbitration, Paris, Arbitral Award, 13009, at http://www.unilex.info/principles/case/1661 (accessed 8 February 2021).

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Court, the respondent had not produced sufficient evidence as to the existence of a previous practice between the parties.[55]

Article 1.9 (2), however, goes further allowing the application of commercial usages irrespective of the will of the parties insofar as the usage 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 would be unreasonable. In this way, the INCOTERMS or the rules of UCP (600)[56] may easily come to be applied. By this formulation, the Principles broke with the complicated approach and compromise solution of Article 9 (2) of the Vienna Sales Convention discussed above, which had presumed an implicit agreement between the parties in such cases.[57] In a legal dispute between a Belgian and a Romanian company an Arbitral Tribunal applied the UNIDROIT Principles as general principles of law recognised in international trade law and relied on article 1.8(2) [now Art. 1.9(2)] of the UNIDROIT Principles.[58]

The UPICC 2016 Commentary to Article 1.9 (2) is justified in emphasising that it is only usages widely known to and regularly observed in international trade by parties in the particular trade concerned to which parties are bound; in other words, the wording excludes local usages limited to domestic transactions. An exception to this may be when usages existing on certain commodity exchanges, in trade exhibitions and ports, are applied to foreigners.[59] The Commentary also makes it clear that the commercial usages applied in the way discussed above prevail over the UPICC, the only exception being those provisions that are specifically declared by the Principles to be of a mandatory character, such as good faith and fair dealing under Article 1.7.[60] Again, it is only the Commentary that mentions the issue of prevalence of usages: ‘they prevail over the Principles, the only exception being those provisions which are specifically declared to be of a mandatory character’.[61]

[55] Federal Court of Australia, Hannaford (trading as Torrens Valley Orchards) v Australian Farmlink Pty Ltd, ACN 087 011 541 [2008] FCA 1591, 24-10-2008 at http://www.unilex.info/principles/case/1366 (accessed 8 February 2021).
[56] The Uniform Customs and Practice for Documentary Credits (UCP 600).
[57] Vogenauer (n 18) 236–238.
[58] Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania, Arbitral Award, 261, 29-09-2005 at http://www.unilex.info/principles/case/2038 (accessed 8 February 2021). Similarly, Arbitrazh Court of Primorsky territory, Russian Federation, A51-10752/2007, 30-11-2007, where the Arbitral Tribunal tacitly accepted the claimants argument partly based on Article 1.9 (2) of UNIDROIT Principles at http://www.unilex.info/principles/case/1775 (accessed 8 February 2021).
[59] UPICC 2016 Commentary 25.
[60] UPICC 2016 Commentary 26.
[61] Point 6 of the Commentary to Article 1.9 UPICC 2016.

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As far as the requirement of reasonableness is concerned, it applies to the given circumstances. In exceptional situations, it might be unreasonable to follow the norm included in the commercial usage. According to the illustration of the UPICC Commentary, a usage exists in a commodity trade sector, according to which the purchaser may not rely on defects in the goods if they are not duly certified by an internationally recognised inspection agency, namely if a buyer takes over the goods at the port of destination, the only internationally recognised inspection agency operating in that port is on strike and to call another from the nearest port would be excessively costly.[62]

The burden of proof in respect of commercial usages is a vexing question, particularly on whether their existence is to be proved in terms of law or fact. How can it be proved that a usage is widely known and regularly observed? Again, this question rips the texture of unified law, because it will be answered by the applicable procedural law or the rules of arbitration procedure in a specific dispute.[63]

The draft Common European Sales Law (CESL) affords a limited role to usages, as it seeks to also regulate consumer transactions and to pay particular attention to consumer protection. Even so, reference to usages is made at the beginning of the document, in Article 5, although only for the sake of assistance, to help define the concept of 'reasonableness', which is to be objectively ascertained having regard to the nature and purpose of the contract, to the circumstances of the case and to the usages and practices of the trades or professions involved. Likewise, Article 66 refers to usages as the source of contract terms, and it is clear from the reference added that the contracts concerned are between traders.[64] In its turn, Article 67 is devoted to usages and practices in contracts between traders. The first sections of the article (more or less following the regulatory model of the CISG, Article 67 (2) of the CESL) however introduce a wording simpler than Article 9 (2) of the Vienna Sales Convention concerning the objective, and not agreement-based, applicability of usages. It simply states that the parties are bound by a usage that would be considered generally applicable by traders in the same situation as the parties. The reference to the reasonableness of application of usages is however again

[62] UPICC 2016 Commentary 26. There are no cases available addressing the issue of the reasonableness of a usage.
[63] See Vogenauer (n 18) 240.
[64] Article 66 CESL reads: 'Contract terms. The terms of the contract are derived from: (a) the agreement of the parties, subject to any mandatory rules of the Common European Sales Law; (b) any usage or practice by which parties are bound by virtue of Article 67; (c) any rule of the Common European Sales Law which applies in the absence of an agreement of the parties to the contrary; and (d) any contract term implied by virtue of Article 68.'

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omitted, in contrast to the UNIDROIT Principles and even to the provisions of the DCFR, the academic EU antecedent of the draft regulation.[65]

The text of the CESL diverges in the assessment of usages by stating that usages and practices do not bind the parties to the extent to which they conflict with contract terms that have been individually negotiated or any mandatory rules of the Common European Sales Law. This formulation represents a departure from predecessors regarding the role of usages. In either their legislative texts, or at least their justifications, several of the instruments discussed above declare the prevalence of usages over uniform law. This tradition is broken here, and the primacy of EU law is projected on this matter, too.[66] It is debatable whether this new approach is really required in transactions concluded between traders, even though the framers of the CESL had the protection of small and medium enterprises in mind. In this regard, the CESL follows the provisions of its direct intellectual antecedent, the DCFR,[67] the Commentary of which had already pointed out that usages enjoy no prevalence over the mandatory provisions of law.[68]

There are no references to usages in the special rules on consumer transactions; the CESL presumably had no intention of ascribing them any role in this regard. The legal situation however is contradictory because, among the general provisions and with regard to interpreting the contract between the parties, Article 59 of the CESL nevertheless mentions usages that would be considered generally applicable by parties in the same situation as 'relevant matters',[69] and Article 68 also mentions usages as a source of solving disputes between the parties.[70]

[65] II.– 1:104 DCFR.
[66] Article 67 CESL reads: 'Usages and practices in contracts between traders 1. In a contract between traders, the parties are bound by any usage which they have agreed should be applicable and by any practice they have established between themselves. 2. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties. 3. Usages and practices do not bind the parties to the extent to which they conflict with contract terms which have been individually negotiated or any mandatory rules of the Common European Sales Law.'
[67] II. – 1:104 DCFR: 'Usages and practices (1) The parties to a contract are bound by any usage to which they have agreed and by any practice they have established between themselves. (2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable. (3) This Article applies to other juridical acts with any necessary adaptations.'
[68] DCFR Commentary, Article II. – 1:104, 189. 'B. Priority of usages and practices over the rules of law.
Both usages and practices will, when applicable, preclude the application of default rules of law which are designed to fill gaps in a contract. However, although not stated, it is implicit in the Article that usages and practices are only valid in so far as they do not violate mandatory rules of the law applicable to the contract or to the particular issue in question.'
[69] Article 59 CESL.
[70] Article 68 CESL.

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4. Applications of usages without the agreement of the parties

It is worth having a closer look at the application of usages without the express agreement of the parties. According to the 1935 UNIDROIT Draft, the parties were bound by usages, the existence of which was or ought to have been known to them. At that time, reference to the agreement of the parties, as the other source of applying usages, was completely missing from the text.[71] The 1939 UNIDROIT Draft introduced a slightly different language, according to which the parties were bound by those usages which persons in the conditions of the parties commonly considered applicable.[72] This approach—focusing on the situation of the parties—reduced the number of potentially applicable usages to be taken into account. The requirement of the applicability of usages by persons in the same position is a somewhat higher threshold than the existence of a usage merely known or which ought to be known to the parties, as was provided earlier in the 1935 UNIDROIT Draft. In 1964, the ULIS amended this precondition with the reference to a 'reasonable person', who, in the same situation as the parties, would 'usually consider' the usages to be applicable.[73] In 1980 the CISG, in a fairly complicated provision, again added to these requirements: the aggregation of conditions led to a more restrictive approach. The usage had to be widely known and regularly observed in international trade by parties to contracts of the type involved in the particular trade concerned. In addition, the concept of implied agreement of the parties was introduced as a rebuttable presumption, which, from a dogmatic point of view, was quite unnecessary. However, this was the compromise which was hammered out to tackle the concerns of the developing and communist countries. The adjective 'reasonable' was dropped as a requirement of persons concluding the contracts.[74]

The UNIDROIT Principles have followed, to a significant extent, the pattern of the CISG, with the exception that the concept of implied agreement has been abandoned, at least in the black-letter rules. The condition of reasonability has returned to the text, since the parties are not bound by a usage 'where the application of such a usage would be unreasonable'.[75] This is the approach of PECL as well.[76] The DCFR has preserved this requirement, but otherwise it provided a somewhat simpler rule (the wording of the CISG cast aside, including the reference

[71] Article 10 of the 1935 UNDROIT Draft.
[72] Article 13 of the 1939 UNIDROIT Draft.
[73] Article 9 ULIS.
[74] Article 9 CISG.
[75] Article 1.9 UPICC 2016.
[76] Article 1:105 (ex art. 1.103) PECL.

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to international trade and particular trade).[77] Parties bound by a usage are expected to be in the same situation, just like in the wording of ULIS. The solution has prevailed in the CESL as well; however, the requirement of reasonable application has been abandoned again.[78] It therefore seems that there is no generally accepted standard formula regulating the application of usages without the express agreement of the parties.

5. Usages as interpretive tools

The role of usages as interpretative tools is covered by several uniform law instruments. According to the 1935 UNIDROIT Draft, the clauses and regulations used in a trade had to be interpreted in accordance with the usage of the trade.[79] This rule of construction was repeated in the 1939 UNIDROIT Draft as well,[80] just like in the ULIS.[81] The CISG did not contain any general rule on the issue of usages and interpretation, although it did refer to the role of usages in relation to offer and acceptance, more precisely to the offeree indicating assent by performing an act.[82] The PECL listed, in a separate article, the relevant circumstances from the point of view of interpreting the contracts, which included usages.[83] A general rule was also included in the UPICC, prescribing that during the interpretation of the contract, statements and other conduct, regard shall be paid to all circumstances, including usages as well.[84] The CESL had a corresponding provision, according to which, in interpreting a contract, regard may be paid, in particular, to usages which would be considered generally applicable by parties in the same situation,[85] which was based on the relevant text of the DCFR.[86] So, one can claim that with the exception of the CISG, there is an unbroken regulatory tradition giving weight to usages as a source of interpretation.

[77] II- I:104 DCFR.
[78] Article 67 CESL.
[79] Article 10 of the 1935 UNIDROIT Draft.
[80] Article 13 of the 1939 UNIDROIT Draft.
[81] Article 9 ULIS.
[82] Article 18 (2) CISG.
[83] Article 5:102 (ex art. 7.102) PECL.
[84] Article 4.3 UPICC 2016.
[85] Article 59 CESL.
[86] II.–8:102: DCFR.

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6. Usages versus uniform laws?

The next focal point is the potential clash between usages and uniform laws and the question of primacy in such a situation. The 1935 and 1939 UNIDROIT Drafts contained straightforward provisions according to which, in the event of any conflict, the usage shall override the uniform law. This very clear answer, according to which usages were considered superior to uniform law, might have been related to the fact that these Drafts did not differentiate between mandatory rules and dispositive rules; more precisely, they contained only default rules. This was clear from Article 9 of the 1935 UNIDROIT Draft, which expressly authorised the parties to exclude entirely the application of its provisions, provided that they expressly designate the law of the country that was to govern their contract. Alternatively, the parties had the right to derogate in part from its rules, provided that they agreed on other norms, either by expressly mentioning them or by referring to specific rules. The ULIS followed the path of primacy of usages, although expressly authorised the parties to agree otherwise. However, the ULIS again contained only default rules, as was obvious from its Article 3, according to which the parties to a contract of sale were free to exclude the application of its provisions, either entirely or partially, in an express or implied way. Surprisingly enough, the CISG simply ignored the issue of potential conflicts between usages and the Convention: it did not assign normative power to usages. However, Article 6 CISG can still have a role in this respect, since it authorises the parties to exclude the application of the Convention or (subject to Article 12), derogate from or vary its effect. This means that the parties may opt into the usages, excluding the application of the default rules of the CISG. If an agreement to an opposing usage exists, this derogates the respective rule of the CISG.[87] However, this is not a normative primacy of usages, but one based on the agreement of the parties.

The rise of soft law instruments created a new situation regarding the interface between usages and unification since, unlike the previous draft conventions and conventions, they typically contain some mandatory provisions as well,[88] although taking into account the non-obligatory or opt-in character of these instruments, the non-observance of these mandatory rules may not have consequences. According to Article 1.5 of UPICC 2016, the parties may exclude the application of the Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided therein. The Commentary of the UPICC cites among these the provisions on good faith, on certain issues of validity of the contract and the rules on

[87] Mankowski (n 35) 48.
[88] Goode (n 2) 26-27.

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price determination or on limitation periods.[89] The presence of mandatory provisions sheds new light on the relationship between usages and uniform law. The UPICC 2016 addressed the consequences only in the Commentary to its Article 1.9, on the one hand emphasising that usages prevail over the Principles, but on the other reiterating the exception of those provisions that were specifically qualified as being of a mandatory character.[90] Similarly, according to the Comment to Article 1:105 of the PECL, it is implicit that usages and practices are only valid insofar as they do not violate mandatory rules of the law applicable to the contract.[91] In addition, the PECL itself contains a mandatory provision on good faith and fair dealing: as it is clearly prescribed in Article 1:201 (2), the parties may not exclude or limit this duty. The DCFR has remained on the same path. Its Commentary to Article II.-1:104 stated the priority of usages, precluding the application of default rules. However, it emphasised that 'it is implicit in the Article that usages and practices are only valid in so far as they do not violate mandatory rules of the law applicable to contract or to the particular issue in question'.[92] Thus, in this sense, the priority of usages is only a limited priority confined between the walls of mandatory rules.

We may add that the DCFR refers not only to its own mandatory provisions but all provisions of such character of the law applicable to contracts. The DCFR and its Commentary mention the terms 'mandatory rules' and 'provisions' more than ninety times and devote specific articles to contracts infringing fundamental principles (II. – 7:301) and contracts infringing mandatory rules (II. – 7:302). This can be explained partly by the broad scope of the DCFR, covering consumer transactions and proprietary security rights. Finally, the CESL is already based on a reverse approach. Instead of stating the priority of usages over its provisions, with the exception of mandatory rules, it emphasises in its Article 67 that usages and practices do not bind the parties to the extent to which they conflict with the individually negotiated contractual terms or any mandatory rules of CESL. In this text, the non-binding nature of usages gained greater attention. Nevertheless, one must not forget that the CESL covers consumer transactions as well, just like its academic predecessor, the DCFR.

In conclusion, one may ask: Are we experiencing the declining power of usages or just the rules of uniform law instruments becoming more sophisticated? According to the 1935 and 1939 UNIDROIT Drafts, the ULIS usages definitively prevailed over the provisions of uniform

[89] UPICC 2016 Commentary 14.
[90] UPICC 2016 Commentary 26.
[91] PECL 104.
[92] DCFR 189.

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law instruments. The CISG has remained silent on the issue**.** While the UPICC 2016 Commentary, DCFR Commentary and the CESL—confronting a new problem, the increasing number of mandatory provisions—accepted the prevalence of usages only over their default rules, they are opt-in instruments themselves, the application of which depends on party autonomy.

7. Reasonableness and usages

In a number of legal systems, unreasonable usages do not bind the parties.[93] The problem of reasonableness and usages was tackled by several uniform instruments, but in different ways. At the outset, the 1935 UNIDROIT Draft addressed this issue, authorising the courts to disregard a usage that was unreasonable. This solution disappeared from the 1939 UNIDROIT Draft. It returned in the 1964 ULIS and ULFIS conventions, although reasonableness became a standard applied to persons, considering certain usages applicable to their contract. This approach was abandoned by the CISG, despite the fact that it utilised the reference to 'a reasonable person of the same kind' in other provisions.[94] The PECL and UPICC fine-tuned the original approach of 1935, introducing the exception of those usages with an *application* that would be unreasonable. This is a justified avenue, because it is difficult to imagine that a usage itself, developed and accepted by practical businessmen, could be unreasonable. It is much more probable that the application of usages under specific circumstances may become unreasonable. This regulatory pattern was imported by the DCFR as well but dropped—without any explanation—by the CESL. Here, in a somewhat reverse way of thinking, a usage can be the tool for ascertaining reasonableness instead of testing the reasonability of the application of usages.[95]

8. Conclusions

Reviewing the past eight decades of evolution, it is clear that the provisions concerning commercial usages in uniform law have become more detailed and sophisticated. However, no standard solution has emerged. Although it is generally accepted that usages are sources for the interpretation of contracts, the definition of usages is missing from most of the uniform law

[93] PECL 107.
[94] Article 8 and 25 CISG.
[95] Article 5 CESL.

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instruments. All uniform law instruments recognise the significance of commercial usages, and they all state that, when certain conditions are met, they may be applied in the lack of any agreement thereto between the parties; even so, these criteria remained slightly different.

Divergences have survived concerning the prevalence of usages or the express requirement of the reasonableness of usages and their application. In addition to this, some instruments refer to international trade in the context of usages—others do not. The impact of different domestic legal traditions might have infiltrated uniform laws in this field, leading to a variety of regulatory patterns, even under the umbrella of unification.

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