

TRADE USAGE: STILL LAW MADE BY MERCHANTS FOR MERCHANTS?

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I INTRODUCTION

Trade usage¹ has always played an important role in the legal regulation of international sales. For example, trade usage is used to define the concept of reasonable time in which the buyer or seller has to take certain actions as required by the substantive law,² to determine whether formalities are required for contract formation,³ whether an offer can be accepted through silence or conduct,⁴ a contract concluded where the

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¹ In this article, unless otherwise indicated, trade and mercantile custom are used as synonyms for trade usage. Also note that this article does not focus on trade practices or so-called courses of dealing between individual parties but is limited to a discussion of practices that have been recognised as usages of the trade and, thus, bind anyone who is active in that trade.

² For instance, where the buyer has to examine the goods for defects and notify the seller of any non-conformity, trade usage can determine the method or time of examination or when notice of non-conformity is to be given: CLOUT case no 892 (Kantonsgericht Schaffhausen, Switzerland 27 January 2004); CLOUT case no 423 (Oberster Gerichtshof, Austria 27 August 1999) (trade usage on method of examination), available at www.cisg.at/1_22399x.htm, accessed on 22 July 2015; Helsinki Court of Appeal (Steel plates case), Finland 29 January 1998 (usage of trade that seller should be present during examination), available at <http://cisgw3.law.pace.edu/cases/980129f5.html>, accessed on 22 July April 2015; CLOUT case no 292 (Oberlandesgericht Saarbrücken, Germany 13 January 1993) (usage on time within which notice of non-conformity is to be given).

³ OGH 10 Ob 518/95 (Austria 6 February 1996), available at <http://www.unilex.info/case.cfm?id=202>, accessed on 28 July 2015; *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc* 201 F. Supp. 2d 236 Federal District Court, United States 10 May 2002 (industry usage that contract can be concluded on the basis of implied supply commitments), available at <http://cisgw3.law.pace.edu/cases/020510u1.html>, accessed on 22 July 2015.

⁴ Rechtbank van Koophandel Veurne (Leeks case), Belgium 19 March 2003 (silence can amount to acceptance where agreement of the parties, practices or usage exist), available at <http://cisgw3.law.pace.edu/cases/030319b1.html>, accessed on 22 July 2015; Bezirksgericht Sissach (Summer cloth collection case), Switzerland 5 November 1998 (effect of silence as acceptance to a letter of confirmation even if that amounts to the modification of contractual terms), available at <http://cisgw3.law.pace.edu/cases/981105s1.html>, accessed on 22 July 2015; CLOUT case no 347 (Oberlandesgericht Dresden, Germany 9 July 1998) (buyer who sent commercial letter of confirmation did not establish existence of international usage by which silence constitutes assent), available at <http://cisgw3.law.pace.edu/cases/980709g1.html>, accessed on 22 July 2015; Appellate Court Frankfurt (Chocolate products case), Germany 5 July 1995 (no international trade usage of industry that silence would amount to acceptance of letter of confirmation), available at <http://cisgw3.law.pace.edu/cases/950705g1.html>, accessed on 22 July 2015; Civil Court Basel (Textiles case), Switzerland

goods or price is not certain or ascertainable,⁵ the price or time of payment revised after conclusion,⁶ or whether interest can be claimed in cases where there is no contractual agreement in this respect.⁷

The normative character of unwritten mercantile custom can be traced back to the Middle Ages when trade was regulated by the law of the merchants (the *lex mercatoria*).⁸ The ancient *lex mercatoria* consisted of norms or rules in the form of customs generated by merchants for their own use and, thus, as a form of independent self-regulation. These norms were adjudicated in specialised merchant courts by commercial judges.⁹ In the nineteenth century, due to an increased awareness of nationalism, commercial custom was absorbed into the laws of nation-states and for the rest predominantly continued to exist on the basis of party autonomy, either as express or implied contractual terms.¹⁰

As a result, business practices in trades such as those of the cotton brokers, the corn trade and the timber merchants started to compensate for the inadequacies of national law by means of standard contracts and

21 December 1992 (international trade usage in this trade that silence would amount to acceptance), available at <http://cisgw3.law.pace.edu/cases/921221s1.html>, accessed on 22 July 2015.

⁵ *Geneva Pharmaceuticals* (industry custom that order can be for commercial quantities).

⁶ ICC Arbitration case no 8324 of 1995 (Magnesium case) (international trade usage in this industry that provisional price can be revised after conclusion), available at <http://cisgw3.law.pace.edu/cases/958324i1.html>, accessed on 22 July 2015; District Court Hamburg (Textiles case), Germany 26 September 1990 (international trade usage that date of payment could be postponed until the date when the bill of exchange was due), available at <http://cisgw3.law.pace.edu/cases/900926g1.html>, accessed on 22 July 2015.

⁷ Juzgado Nacional de Primera Instancia en lo Comercial No 10 (Argentina 23 October 1991), available at <http://www.unilex.info/case.cfm?id=184>, accessed on 28 July 2015; Juzgado Nacional de Primera Instancia en lo Comercial No 10 (Argentina 6 October 1994), available at <http://www.unilex.info/case.cfm?id=178>, accessed on 28 July 2015 (rate of interest); Landgericht Bamberg (Plants case), Germany 23 October 2006, available at <http://cisgw3.law.pace.edu/cases/061023g1.html>, accessed on 22 July 2015; CLOUT case no 590 (Landgericht Saarbrücken, Germany 1 June 2004).

⁸ Some scholars hold that its roots go back to the *ius gentium* of the Romans. For a historical analysis of its development, see Wethmar-Lemmer 'The development of the modern *lex mercatoria*: A historical perspective' (2005) 11 *Fundamina* 183; Snyman-Van Deventer 'Die nuwe *lex mercatoria*' (2011) 22(2) *Stellenbosch LR* 247; Hatzimihail 'Genealogies of *lex mercatoria*' (studies in memoriam of Professor Antapasis, 2013) 321, available at <http://ssrn.com/abstract=2410223>, accessed on 22 July 2015.

⁹ Snyman-Van Deventer (2011) 22(2) *Stellenbosch LR* 247 at 253–255; Hatzimihail (2013) at 322; DiMatteo 'Soft law and the principle of fair and equitable decision making in international contract arbitration' 2013 *The Chinese Journal of Comparative Law* 1 at 6.

¹⁰ Dalhuisen *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* Vol 1 'Introduction — the new *lex mercatoria* and its sources' (Hart 2010) 156–157; Goode 'Usage and its reception in transnational commercial law' (1997) 46(1) *International and Comparative Law Quarterly* 1 at 8. These instances should be distinguished from those that meet the requirements of international customary law.

general conditions of trade based on trade custom and usage.¹¹ Today, the self-regulatory character of contractual trade usage continues to exist in the form of standard contracts formulated by private merchant and trade associations in highly organised branches of international trade, for instance in the commodity trade in wool, cocoa, grain and feed, fur, jute, rubber, sugar and many more.¹² International business organisations, such as the International Chamber of Commerce, furthermore provide standardised transnational formulations of international contractual trade usage.¹³ Even regional economic communities negotiate standard forms of contract for traders from their member countries to facilitate the sale of certain types of goods.¹⁴

National laws normally sanction the use of trade usage on the basis of the parties' assumed or constructive knowledge of such usage, on condition that certain requirements are met. South African law, for example, will imply usage as a term of the contract if such usage is 'universally and uniformly observed within the particular trade concerned, long-established, notorious, reasonable and certain, and does not conflict with positive law (in the sense of endeavouring to alter a rule of law which the parties could not alter by their agreement) or with the clear provisions of the contract'.¹⁵ Thus, trade usage is used as an

¹¹ Private merchant associations such as the Association of Corn Merchants of Hamburg (1868), also known as the Hamburg Bourse of Corn Traders; the Bremen Cotton Exchange (1872); the Silk Association of America (1873) and the London Corn Trade Association (1877) undertook these unification initiatives. See Cutler *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003) 208.

¹² Of the most well-known examples in international commodity trade are the London Commodity Merchants, the Grain and Feed Trade Association (GAFTA) and the Federation of Oils, Seeds and Fats Association (FOSFA). On the generation of uniform commercial norms and the exclusion of uniform sales laws such as the CISG in favour of English law, see, in general, Linarelli 'The economics of uniform laws and uniform lawmaking' (2003) 48 *Wayne LR* 1387 at 1439–1442.

¹³ For example, the Incoterms rules and the Uniform Customs and Practice for Documentary Credits (UCP).

¹⁴ For example, the United Nations Economic Commission for Europe, which negotiated standard forms of contracts for traders from their member countries, such as ECE Form 188 (General Conditions for the Supply of Plant and Machinery for Export. Standard contracts also exist for trade in cereals, citrus fruit and sawn softwood. The ECE General Conditions for Potatoes, for Fresh Fruit and Vegetables and for Dry and Dried Fruit contain different trade terms which parties should select from; the same applies for the ECE Contracts for the Sale of Cereals where separate forms are used for different trade terms.

¹⁵ *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd* 1973 (2) SA 642 (C) at 645G. See also *Crook v Pedersen Ltd* 1927 WLD 62 at 71; *ABSA Bank Ltd v Blumberg and Wilkinson* 1995 (4) SA 403 (W) at 409I; *MV Delta Peace Maree NO v Registrar, Durban and Coast Local Division of the High Court & others* 2001 (4) SA 110 (D); *Tolgaz Southern Africa v Solgas (Pty) Ltd & another; Easigas (Pty) Ltd v Solgas (Pty) Ltd & another* 2009 (4) SA 37 (W) at 45H–I, 46F–H.

interpretative tool or to fill contractual gaps.¹⁶ International instruments regulating international commerce, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) or the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles), also recognise the binding effect of agreed usages and practices established between contractual parties on the basis of party autonomy and freedom of contract.¹⁷ By virtue of art 7(2) of the CISG, trade usage can be used to fill so-called ‘internal gaps’¹⁸ and, thus, give meaning to and develop the provisions of the convention in accordance with commercial practices. Trade usage can even trump the provisions of the CISG, unless the parties have agreed otherwise.¹⁹ Commentators and courts have viewed trade usage as a general principle on which the convention is based.²⁰ Scholars and arbitrators have also, on occasion, identified international trade conventions and

¹⁶ Gillette ‘Harmony and stasis in trade usage for international sales’ (1999) 39 *Virginia Journal of International Law* 707 at 707–708. Whether trade usage merely acts as an implied contractual term or whether it may also find application as independent and autonomous law is not entirely clear as differing opinions exist in this regard. Dalhuisen (Hart 2010) at 155, n 326 points out that, because of its ‘fluid nature’, custom can over time move from a contractual implied term to objective law. As for SA law, Kerr *The Principles of The Law of Contract* 6 ed (Butterworths 2002) 380–382 states that once the requirements for usage are met, usage operates as a residual term independent of party agreement, while Christie & Bradfield *Christie’s The law of contract in South Africa* 6 ed (LexisNexis 2011) 168–173 holds the opinion that, even where one party is unaware of the usage, its operation will be based on a presumed intention. According to Van der Merwe et al *Contract: General Principles* 4 ed (Juta 2012) 241–242, 246, trade usage may function as a *naturele* of the contract and, thus, a term implied by law. Such usage applies independent of whether the parties are aware of the usage or not. However, where knowledge is required for its operation, it may only apply as a tacit term. Policy considerations would ultimately determine when usages are to operate as terms implied by law and when as tacit terms. See also *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531–532; *Bredenkamp & others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) at 473 for the difference between tacit terms and terms implied by law. In *Coutts v Jacobs* 1927 EDL 120, the court supported the autonomous nature of trade usage and the plaintiff was held bound to a usage of which he had no knowledge. This aspect is, however, beyond the scope of this article and will therefore not be addressed in any detail.

¹⁷ Arts 8(3) and 9 CISG; art 1.9 UNIDROIT Principles.

¹⁸ These are terms which are in need of clarification, or issues which, in the words of art 7(2), are ‘governed but not settled’ by the convention.

¹⁹ Art 9(2) CISG.

²⁰ Andersen ‘General principles of the CISG — generally impenetrable?’ in Andersen & Schroeter (eds) *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds and Hill 2008) 29; Ferrari ‘Uniform interpretation of the 1980 uniform sales law’ (1994–1995) 24 *Georgia Journal of International and Comparative Law* 183 at 223; Tribunale di Padova (Agricultural products case), Italy 25 February 2004, available at <http://cisgw3.law.pace.edu/cases/040225i3.html>, accessed on 22 July 2015; Rechtbank Koophandel Ieper (Cooling installations case), Belgium 29 January 2001, available at <http://cisgw3.law.pace.edu/cases/010129b1.html>, accessed on 28 July 2015; UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012) art 7.

codifications, such as the CISG and the UNIDROIT Principles, as sources of international trade usage.²¹ Moreover, courts have ruled that Incoterms® constitute international trade usage as envisaged by art 9(2) of the CISG.²²

Trade usage has acquired its normative quality from the fact that it comprises consistent and uniform practices which are recognised and observed across geographical borders by traders in that trade.²³ These practices are applied with such regularity over a period of time that it is assumed that everyone active in that trade would know them.²⁴ Where practices are widely and regularly followed in international trade they are presumed to be economically efficient as inefficient practices would not have stood the test of time.²⁵ Furthermore, these practices would be of such a nature that most people involved in that trade would want to follow them.²⁶ Moreover, usages do not constitute practices which are simply followed out of habit but are practices which parties feel bound to follow even if the only sanction for non-observance would be reputational in nature.²⁷ At the same time, it is assumed that the content of such practices is certain and clear, otherwise they would not have

²¹ DiMatteo 2013 *The Chinese Journal of Comparative Law* 1 at 27, 34; Cuniberti 'Three theories of *lex mercatoria*' (2014) 52 *Columbia Journal of Transnational Law* 369 at 381–383, 394; Wasserstein Fassberg 'Lex mercatoria — hoist with its own petard?' (2004) 5 *Chicago Journal of International Law* 67 at 70–71. See also Goode (1997) 46(1) *International and Comparative Law Quarterly* 1 at 3 who refers to, but also criticises, this notion.

²² Higher Cantonal Court du Valais (Fiberglass composite materials case), Switzerland 28 January 2009, available at <http://cisgw3.law.pace.edu/cases/090128s1.html>, accessed on 22 July 2015; *Marc Rich & Co v Iritechna SpA* Appellate Court Geneva, Italy 24 March 1995, available at <http://cisgw3.law.pace.edu/cases/950324i3.html>, accessed on 22 July 2015; *St Paul Guardian Insurance Co v Neuromed Medical Systems & Support* 2002 WL 465312 (SDNY 2002) US Federal District Court, New York 26 March 2002, CLOUT case no 447, available at <http://cisgw3.law.pace.edu/cases/020326u1.html>, accessed on 22 July 2015; *China North Chemical Industries Corporation v Beston Chemical Corporation* WL 295396 (SD Tex 2006) US Federal District Court, Texas 7 February 2006, available at <http://cisgw3.law.pace.edu/cases/060207u1.html>, accessed on 22 July 2015; *BP Oil International v Empresa Estatal Petroleos de Ecuador* 332 F3d 333 (5th Cir 2003) 338, 200 ALR Fed 771 Federal Appellate Court (5th Circuit) United States 11 June 2003, available at <http://cisgw3.law.pace.edu/cases/030611u1.html>, accessed on 22 July 2015.

²³ Gillette (1999) 39 *Virginia Journal of International Law* 707 at 714; DiMatteo 2013 *The Chinese Journal of Comparative Law* 1 at 8.

²⁴ Gillette (1999) 39 *Virginia Journal of International Law* 707 at 708, 715, 721.

²⁵ Gillette (1999) 39 *Virginia Journal of International Law* 707 at 715–716; Dalhuisen 'Custom and its revival in transnational private law' (2008) 18 *Duke Journal of Comparative & International Law* 339 at 370.

²⁶ Gillette (1999) 39 *Virginia Journal of International Law* 707 at 713–714.

²⁷ Goode (1997) 46(1) *International and Comparative Law Quarterly* 1 at 8–9; Gillette (1999) 39 *Virginia Journal of International Law* 707 at 720; DiMatteo 2013 *The Chinese Journal of Comparative Law* 1 at 8.

become widely established.²⁸ Owing to its uniform nature, trade usage is observed across geographical borders and, thus, fulfils a harmonisation function, which brings a reduction in transaction costs.²⁹ Another advantage of trade usage is that it is generated within a particular trade or industry and, because of its dynamic nature, evolves in line with developments in that trade. To that extent, trade usage is better suited to the needs of the trade and to commerce in general than state-formulated law.³⁰

This article seeks to evaluate the traditional rationale for the self-regulatory role of trade usage in present-day international sales law³¹ in order to determine its overall efficiency in the modern commercial context. For one, the existence of the *lex mercatoria* as the historic basis for the normative character of trade usage is continuously debated. Many a scholar has contributed to the discourse, either in favour or against; so much so that it is questioned whether an autonomous legal system in the form of the medieval law merchant ever existed.³² Furthermore, studies conducted on the role of trade usage in the United States concluded that the traditional assumptions that unwritten trade usages are widely known in the trade, that courts can either take judicial notice of such usages or easily identify and determine their content, and that they represent what most people would want, are without any real substance. Moreover, it was found that business and trade associations no longer resort to trade usage on the same scale as before but rather

²⁸ See Gillette (1999) 39 *Virginia Journal of International Law* 707 at 724 on the benefits of trade usage if compared to explicit contract clauses.

²⁹ Gillette (1999) 39 *Virginia Journal of International Law* 707 at 715–716; Cuniberti (2014) 52 *Columbia Journal of Transnational Law* 369 at 384; Mak ‘According to custom ... ? The role of “trade usage” in the proposed Common European Sales Law (CESL)’ (Legal Studies Research Paper Series No 02/2014, Tilburg Law School, 2014) 8–11, available at <http://ssrn.com/abstract=2364427>, accessed on 22 July 2015. See, however, the discussion under III(c) on the interpretational challenges connected to trade usage.

³⁰ Gillette (1999) 39 *Virginia Journal of International Law* 707 at 708; DiMatteo 2013 *The Chinese Journal of Comparative Law* 1 at 8.

³¹ Although this article focuses on international sales law, it should be noted that trade usage plays a significant role in all areas of commercial law and that the issues discussed here will equally apply to those areas of the law. See, in general, Dalhuisen (Hart 2010) at 159–161.

³² Michaels ‘The true *lex mercatoria*: Law beyond the state’ (2007) 14 *Indiana Journal of Global Legal Studies* 447 at 448–54; Snyman-Van Deventer (2011) 22(2) *Stellenbosch LR* 247 at 256, 261; Fassberg (2004) 5 *Chicago Journal of International Law* 67 at 68–69; Donohue ‘Medieval and early modern *lex mercatoria*: An attempt at the *probatio diabolica*’ (2004) 5 *Chicago Journal of International Law* 21; Kadens ‘The myth of the customary law merchant’ (2012) 90 *Texas LR* 1153.

elect to make use of written contracts, which are to be interpreted in a formalistic manner.³³

The question that this article seeks to answer is whether, in modern times, trade usage still constitutes efficient law created by merchants for merchants. Because empirical studies on the use of trade usages in practical contexts are generally scarce,³⁴ it would be prudent to take note of the aforementioned study, even though it was conducted in the context of national law, namely the American Uniform Commercial Code (UCC). Scholars regularly compare the provisions of the Uniform Commercial Code with those of the CISG as they both provide a uniform sales law and, furthermore, display strong similarities in content.³⁵ Thus, criticisms directed towards the assumptions in the UCC could be equally relevant for the international context. Furthermore, even though this contribution focuses on international contracts of sale, domestic law will often apply as the applicable law of the contract, either as an express or tacit choice of law or as the assigned proper law of the contract. In some instances, these rules will point towards the application of South African law; hence, the need to refer to South African scholars' criticisms of the traditional requirements for trade usage as

³³ National and international law subscribe to the use of trade usage as an interpretative tool to interpret the terms of a contract or to fill contractual gaps. Standard contracts are often the product of usages of the trade, and where trade organisations have internal structures which adjudicate these matters, they are ideally suited to apply usages of the trade in the interpretation of their contracts. However, Bernstein's research found that contextual interpretation is not so popular with trade organisations and bigger business due to the uncertainties that surround usage, but that they prefer literal interpretation where no resort is made to usage to ensure greater contractual certainty. It is her opinion that interpretative error costs might not justify the application of trade usage in these contexts. See, in this regard, Bernstein 'Merchant law in a modern economy' (Coase-Sandor Institute for Law and Economics Working Paper No 639, University of Chicago, 2013) 2–3, available at <http://ssrn.com/abstract=2242490>, accessed on 22 July 2015; Bernstein 'Custom in the courts' (2015) 110 *Northwestern University LR* 63 at 67; Bernstein 'Merchant law in a merchant court: Rethinking the code's search for immanent business norms' (1996) 144 *University of Pennsylvania LR* 1765 at 1769–1770.

³⁴ Cuniberti 'The merchant who would not be king — unreasoned fears about private lawmaking' (Law Working Paper No 2014–07, University of Luxembourg, 2012) 6, available at <http://ssrn.com/abstract=2504439>, accessed on 22 July 2015; Bernstein (2013) at 3. See also Cuniberti (2014) 52 *Columbia Journal of Transnational Law* 369 at 396–397 on the lack of empirical data available as a result of the confidentiality with which international commercial arbitration awards are treated. Apart from Bernstein's studies, which were restricted to specific trades, a study by Schmitthoff *International Trade Usages* (ICC 1987) is to date one of the most comprehensive studies on trade usage in the international context as it covered a wide range of legal jurisdictions and international instruments of harmonisation.

³⁵ Bernstein (2013) at 1. See, for example, Saunders & Rymysz 'Contract formation and performance under the UCC and CISG: A comparative case study' (2015) 32(1) *Journal of Legal Studies Education* 1; DiMatteo 'Global challenge of international sales law' in DiMatteo (ed) *International Sales Law: A Global Challenge* (Cambridge University Press 2014) 4–5.

applied by the courts in light of developments in technology, documentation, as well as methods of communication and transportation. At the same time, it should be noted that the absence of uniform usages in the domestic trades under investigation in the American study is comparable to the international position regarding some of the traditional trade terms.³⁶ For that reason, this article will make constant reference to the position under trade terms and compare that to the findings of Bernstein's American study in order to come to an own conclusion on the efficiency of trade usage in present-day international sales law.

The article will commence with a brief discussion on the origins of the self-regulatory nature of mercantile custom as found in the *lex mercatoria*. This will be followed by a critical discussion of the traditional assumptions on which trade usage is based and how these assumptions apply to the current trade context in order to reach a conclusion on whether trade usage is still law made by merchants for merchants.

II HISTORICAL ROOTS: THE LEX MERCATORIA

The historical basis for the normative function of unwritten trade usage is usually sought in the *lex mercatoria*, a private system of law based on commercial custom and adjudicated by specialised tribunals which was introduced in medieval times to deal with international finance and trade matters.³⁷ However, over the years, the concept and understanding of the law merchant have changed considerably. Little agreement exists on whether it existed at all, and in which form it continues to exist in present-day international trade, if at all.³⁸ Due to the constraints of this article, it will be impossible to deal with these aspects in any detail. Thus,

³⁶ It is very difficult to identify consistent usage or customs in so far as the traditional maritime terms, FOB and CIF terms are concerned. See, for example, Schmitthoff (ICC 1987) at para 37 on the differences in the trade usages surrounding the FOB term. The understanding of the term depends on the trade, the port or the country where it is used. Trade terms reflect merchant practices, which developed in the context of the delivery of goods, the repeat use of which gave rise to standard forms of contract. Trade terms are also known as sales terms, delivery terms or commercial terms. Differences in the meaning of trade terms necessitated the standardisation of the respective parties' obligations. The ICC Incoterms are today the most well-known codifications of international trade terms. The latest revision, Incoterms 2010, recognises the flexibility of the FOB rule by significantly changing the wording of the term. See Lorenzon *C.I.F. and F.O.B. Contracts* 5 ed (Sweet & Maxwell 2012) para 9–10.

³⁷ Bainbridge 'Trade usages in international sales of goods: An analysis of the 1964 and 1980 sales conventions' (1984) 24 *Virginia Journal of International Law* 619 at 624–625; Wethmar-Lemmer (2005) 11 *Fundamina* 183; Bernstein (2013) at 4.

³⁸ Hatzimihail (2013) at 311; Snyman-Van Deventer (2011) 22(2) *Stellenbosch LR* 247 at 260 et seq.

these issues will only be discussed in broad terms in so far as they are relevant to the topic under discussion.

In essence, the literature identifies three stages in the development of the law merchant, namely a relatively autonomous set of rules, the so-called ancient *lex mercatoria*, followed by the incorporation of these transnational customs into the national laws of Europe, and, subsequently, the new law merchant of the twentieth century.³⁹ Essentially, there are two approaches to the new law merchant, namely the positivist approach and the autonomist approach.⁴⁰ The former holds that the new law merchant is dependent on recognition by the state or party agreement. International legislation, such as conventions and model laws which are introduced into national law through ratification or adoption, and international commercial custom, such as standard form contracts, general conditions of trade or formulations by international business organisations, for example, those of the International Chamber of Commerce (ICC), provide the sources of the new law merchant.⁴¹ The autonomous approach, on the other hand, suggests that the law merchant is an a-national, self-generating system of soft law, mostly applied by arbitral tribunals.⁴²

Opinions on the existence of an a-national law differ from total dismissal to unconditional support. Whether the law merchant can exist as an autonomous set of rules regulating commercial exchange is a question that is much debated, and equally as much has been written on it.⁴³ Predominantly, the question concerns a theoretical debate on whether law can exist outside the confines of the state,⁴⁴ which is

³⁹ Bainbridge (1984) 24 *Virginia Journal of International Law* 619 at 624; Snyman-Van Deventer (2011) 22(2) *Stellenbosch LR* 247 at 251–259. In general on the evolution of the law merchant, see also Hatzimihail (2013); Wethmar-Lemmer (2005) 11 *Fundamina* 183; Schmitthoff (ICC 1987) paras 64–74; Michaels (2007) 14 *Indiana Journal of Global Legal Studies* 447 at 453–460.

⁴⁰ See Hatzimihail (2013) at 318–337 for a comparative discussion of the positivist approach as formulated by Schmitthoff and the autonomist approach as developed by Goldman.

⁴¹ See Schmitthoff ‘The Unification of the Law of International Trade’ in Cheng (ed) *Clive M. Schmitthoff’s Select Essays on International Trade Law* (Martinus Nijhoff/Graham & Trotman 1988) at 171–172; Schmitthoff (ICC 1987) paras 64–74; Maniruzzaman ‘The *lex mercatoria* and international contracts: A challenge for international commercial arbitration?’ (1999) 14(3) *American University International LR* 657 at 671–672.

⁴² See Berman & Kaufmann ‘The law of international commercial transactions (*lex mercatoria*)’ (1978) 19 *Harvard International LJ* 221 at 272–277.

⁴³ Snyman-Van Deventer (2011) 22(2) *Stellenbosch LR* 247 at 260–268; Hatzimihail (2013) at 311; Wethmar-Lemmer (2005) 11 *Fundamina* 183 at 183; Michaels (2007) 14 *Indiana Journal of Global Legal Studies* 447 at 448–449.

⁴⁴ See, in general, Michaels (2007) 14 *Indiana Journal of Global Legal Studies* 447 for a discussion of this controversial debate.

essentially beyond the scope of this article. Research has cast doubt on whether a truly autonomous ancient law merchant ever existed in the Middle Ages.⁴⁵ And if it did exist, it is equally controversial whether it managed to survive as autonomous law after trade usage was absorbed into national law in the nineteenth century and also codified in various forms in an effort to make it more accessible.⁴⁶

Those opposed to the autonomous nature of the law merchant, furthermore, point out that the *lex mercatoria* never functioned as a system of substantive law but only as procedural law.⁴⁷ Moreover, it is said that there is no real historical basis for a customary law of international sales but that custom covered very specific contexts, such as those of bills of exchange, insurance, maritime shipping, surety and agency.⁴⁸ The notion that the *lex mercatoria* was purely customary in nature and that it constituted transnational law is also refuted by the fact that these customs were geographically limited to application within a confined network of repeat players.⁴⁹ Another view is that the *lex mercatoria* was ‘a mixture of official laws and established mercantile customs and institutions, of official courts and quasi-private local tribunals’⁵⁰ and, thus, never a true autonomous law. Furthermore, it is questioned whether the new law merchant can operate as an independent legal system enforced through international arbitration in light of the relative inaccessibility of arbitral awards, the lack of a precedent system and uncertainty on the enforceability of such awards.⁵¹

Although its existence as a separate legal order might be in dispute, it cannot, however, be denied that merchants continue to rely on trade usage to regulate their commercial relationships and that national and international law still recognise this role. It is therefore necessary to investigate the reasons for this phenomenon in more detail.

⁴⁵ Donohue (2004) 5 *Chicago Journal of International Law* 21; Kadens (2012) 90 *Texas LR* 1153; Michaels (2007) 14 *Indiana Journal of Global Legal Studies* 447 at 448–454; Hatzimihail (2013) at 313; Bernstein (2013) at 4, 10; Snyman-Van Deventer (2011) 22(2) *Stellenbosch LR* 247 at 256.

⁴⁶ Fassberg (2004) 5 *Chicago Journal of International Law* 67.

⁴⁷ Fassberg (2004) 5 *Chicago Journal of International Law* 67 at 68.

⁴⁸ Bernstein (2013) at 4; Kadens (2012) 90 *Texas LR* 1153 at 1169; Kadens ‘The medieval law merchant: The tyranny of a construct’ *Journal of Legal Analysis* at 6, available at <http://jla.oxfordjournals.org/content/early/2015/06/25/jla.lav004.full>, accessed on 29 June 2015.

⁴⁹ Bernstein (2013) 4; Kadens (2012) 90 *Texas LR* 1153 at 1177.

⁵⁰ Michaels (2007) 14 *Indiana Journal of Global Legal Studies* 447 at 454.

⁵¹ Michaels (2007) 14 *Indiana Journal of Global Legal Studies* 447 at 456; Snyman-Van Deventer (2011) 22(2) *Stellenbosch LR* 247 at 261–262.

III RATIONALE FOR THE NORMATIVE CHARACTER OF INTERNATIONAL TRADE USAGE

The self-regulating nature of trade usage is essentially based on the premise that usage originates in the trade as practices that are certain and that are consistently and regularly followed over a period of time by those engaged in that trade who then consider these practices as binding on them. Thus, usage functions as rules made by merchants for the use of merchants.⁵² As they represent the most optimal practices of the trade, usages are geared to the needs of merchants and represent what most traders would want; thus, they are widely known and regularly observed in the trade concerned. Trade usages, furthermore, save transaction costs as parties do not have to negotiate their content and their meaning transcends geographical and legal boundaries.

But is this traditional rationale beyond reproach and does it still apply to the trade environment of the twenty-first century? In what follows, the assumptions on which the rationale is based will be analysed.

(a) Trade usage represents the most optimal practice and is geared to the needs of merchants

It is believed that usage facilitates economic and commercial exchange as it is created by merchants for the use of merchants. While uniform law is often a compromise between different legal systems and offers abstract rules that are potentially suitable to a myriad of situations, trade usage cuts across national boundaries and differences in legal philosophies, political and other socio-economic structures, and speaks to the needs of merchants and the trade per se. Thus, trade usage adapts the rules of law to the way that business is actually carried on.⁵³

Economically efficient practices are generated through an evolutionary process and their origins are often found in the individual relationship of two contractual parties.⁵⁴ As merchants gravitate towards the most optimal practices, an efficient trade practice that exists between two parties may over time be taken over by other merchants active in that trade.⁵⁵ Once the practice is regularised as a trade usage, everyone

⁵² Dalhuisen (Hart 2010) at 159; DiMatteo 2013 *The Chinese Journal of Comparative Law* 1 at 8.

⁵³ Bernstein (2013) 1; DiMatteo 2013 *The Chinese Journal of Comparative Law* 1 at 11.

⁵⁴ Gillette 'The law merchant in the modern age: Institutional design and international usages under the CISG' (2004) 5 *Chicago Journal of International Law* 157 at 160.

⁵⁵ Gillette (1999) 39 *Virginia Journal of International Law* 707 at 708, 721; Dalhuisen (Hart 2010) at 159; Dalhuisen (2008) 18 *Duke Journal of Comparative & International Law* 339 at 370.

active in that trade is expected to know and follow it. When trade associations observe how transactions of a relatively similar nature are conducted on a repeat basis over long periods of time, they codify these customs into written trade rules and industry-specific standard terms and conditions.⁵⁶

However, studies conducted on the evolution of codified trade usage in certain domestic trades in the United States of America, such as the trade in grain, hay, textiles and silk, have challenged these traditional assumptions, so much so that it is questioned whether the rules of trade associations always represent actual customs and usages which have developed in the trade.⁵⁷ These studies have revealed that at the time the trade associations under investigation formulated their industry rules there was little agreement on how common aspects of those trades were conducted or on the content of usages and the meaning of terms typically used in those trades. Trade practices were so divergent that they were incapable of being codified. Thus, the industry rules in those trades rarely represent actual practice.⁵⁸ Moreover, where it was impossible to identify a single uniform custom, it resulted in different rules being formulated for different situations.⁵⁹ Initiatives to codify were mostly driven by those groups which exerted the most power or influence. The ultimate goal these groups pursued was to promote trade in general and not so much to codify existing customs of the trade. The conclusion is that trade associations largely failed to harmonise existing practices and usages, but in an effort to ensure certainty, uniformity and to avoid misunderstandings, they generated rules (or usages) of their own. Therefore, efforts to codify existing practices often gave way to standardising usages in a quasi-legislative manner.⁶⁰ As far as modern trade industries are concerned, the study concluded that it was equally difficult to find evidence of uniform trade usages within a fairly closed network of repeat players in the Texas cattle feed industry.⁶¹

These findings have not been received without objection and some scholars regard them as highly controversial and without substance.⁶²

⁵⁶ Bernstein (1996) 144 *University of Pennsylvania LR* 1765 at 1805–1806.

⁵⁷ Bernstein (2013).

⁵⁸ Bernstein (2013) 5–6.

⁵⁹ Bernstein (2013) 6. That is today still the case under GAFTA and FOSFA where different FOB terms are available.

⁶⁰ Bernstein (2013) 6.

⁶¹ Bernstein (2013) 8–10. See also Fassberg (2004) 5 *Chicago Journal of International Law* 67 at 79, who argues that all commercial custom she has come across is covered by rules of national law and, thus, is not unique at all.

⁶² Bernstein (2013) 7–8. Some of the criticisms are that the studies are limited to certain trades and, therefore, not necessarily representative of business in general, and that the time

Although these objections are not to be disregarded, the conclusions of the American study are also not to be rejected categorically as many of them are plausible, especially when considered in the context of present-day international trade. Trade associations operate in a completely different setting from that of the nineteenth century, which was characterised by guilds and other small merchant associations. In the twenty-first century, business transactions are no longer exclusively conducted within the closed environment of a particular trade but increasingly take place via a chain of production and distribution links.⁶³ In this more complex setting, it would be very difficult, if not impossible, to regulate transactions on the basis of unwritten usages and customs. Moreover, in those trades where organised trade associations exist and practices are codified, the process of codification differs from that used in the past. Trade associations no longer consist exclusively of merchants who codify informal and unwritten trade practices which were developed by merchants for the use of merchants. Instead, business practice is now formulated by people with business degrees or lawyers according to their perception of best practices.⁶⁴ Some commentators, therefore, argue that in our day and age, commercial custom seldom develops spontaneously, but that business associations draft standard terms which over time may develop into custom.⁶⁵ As Goode remarks in the context of international trade conventions, what harmonisation projects 'seek to achieve is best solutions to typical problems' and, thus, they will reflect existing practices but in the process also modify some of these practices.⁶⁶ That would be equally true of standard form contracts.

Because business practice is no longer formulated exclusively by merchants as a reflection of what most traders would want, the traditional assumptions of efficiency are being challenged. What is formulated as the standard or norm might even be influenced by lobby groups and multinational corporations to protect their own interests and no longer aimed at addressing the needs of merchants and the trade

period covered by the studies might not be long enough to warrant any conclusions on the existence of usage. See, for example, Gillette (1999) 39 *Virginia Journal of International Law* 707 at n 10.

⁶³ Bernstein (2013) 16, 22; De Ly 'Sources of international sales law: An eclectic model' (2005–2006) 25 *Journal of Law and Commerce* 1 at 5.

⁶⁴ Fassberg (2004) 5 *Chicago Journal of International Law* 67 at 80–81; Basedow 'The state's private law and the economy — commercial law as an amalgam of public and private rule-making' (2008) 56 *American Journal of Comparative Law* 703 at 708.

⁶⁵ Basedow *ibid* at 708–9. See also Dalhuisen (Hart 2010) at 160. For a contrary opinion, see Fassberg (2004) 5 *Chicago Journal of International Law* 67 at 78–79.

⁶⁶ Goode (1997) 46(1) *International and Comparative Law Quarterly* 1 at 19.

per se.⁶⁷ Moreover, codifications and statements of international principles are predominantly formulated by lawyers and academics.⁶⁸

On an international level, a parallel for the findings of Bernstein's study can be found in the ICC's treatment of international trade terms. By means of the Incoterms rules, the ICC standardise mercantile customs and practices in the context of the delivery of goods. These rules are the product of consultation with business organisations and local chambers of commerce. However, not all of the rules represent a codification of existing mercantile customs. The modern Incoterms rules, namely FCA, CPT, CIP and the D-terms (DAT, DAP and DDP), are often perceived as mere formulations of the ICC, created to cater for changing international transportation practices.⁶⁹

Although the formulation of standardised practices reduces transaction costs by promoting uniformity and legal certainty, whether it constitutes best or optimal practice is another question. The answer to that is to a large extent dependent on the benchmark against which efficient practices are measured. Traditionally, consistent practices which had stood the test of time and were widely and regularly followed by the majority in that trade would be considered efficient. In the modern context, the requirement that usage should be long established is not feasible any longer due to the globalised nature of international trade, the way that it is regulated and the pace against which technology develops. This has led to this requirement being increasingly watered down.

South African law, for instance, no longer requires that the usage should have existed for a long time. If all the other requirements are met, recent origin of a trade usage will not per se prevent it from having binding effect.⁷⁰ This approach was already accepted by Kotze CJ in *African Mining and Financial Association v De Catelin and Muller*.⁷¹ According to Kerr, if the parties to a contract expressly or impliedly (tacitly) incorporated a trade usage or custom into their contract, it is not a requirement that the usage must have existed for a period of time. However, if the usage is implied by law, 'sufficient time must have

⁶⁷ Gillette (2004) 5 *Chicago Journal of International Law* 157 at 160–161; Gillette (1999) 39 *Virginia Journal of International Law* 707 at 738. This can give rise to monopolies or cartels that can impose inefficient practices.

⁶⁸ Fassberg (2004) 5 *Chicago Journal of International Law* 67 at 80–81.

⁶⁹ De Ly *International Business Law and Lex Mercatoria* (Emerald 1992) 174–175; Ramberg 'Incoterms® 2010' (2011) 29 *Penn State International LR* 415 at 422. See Dalhuisen (Hart 2010) at 160–161 who is of the opinion that trade organisations and associations, such as the ICC, may help in keeping these rules dynamic.

⁷⁰ Christie & Bradfield (LexisNexis 2011) at 170–171.

⁷¹ (1897) 4 OR 334 at 348.

elapsd to entitle a court to find that in the circumstances of the particular case the party who is ignorant of the usage or custom had every opportunity of knowing of it and ought to have known of it'.⁷² Trade usage is in a constant process of development, which makes it increasingly difficult to meet the traditional requirement that the usage should be long established. The efficiency of usage is, therefore, not so much found in the fact that it withstood the test of time, but in that the parties to the contract ought to have known of its existence. Here time can have a direct bearing on the notoriety of such usage.⁷³ The Appellate Court in *Van Breda & others v Jacobs & others*⁷⁴ held that Roman Dutch law differed from English law in so far as there is no requirement that custom must have existed for time immemorial and that it would suffice that it is simply old. Roman Dutch authorities, furthermore, did not prescribe how long the usage should have existed, but simply left the question to the discretion of the judge.⁷⁵ It would, therefore, seem that the other requirements, namely that the usage must be certain, reasonable, notorious as well as universally and uniformly observed within the particular trade concerned, will be decisive and that the time period the practice existed will only have effect to the extent that it influences the other requirements.⁷⁶ Van Niekerk finds the solution not to be in 'a stiffening of the duration requirement but rather [in] a stricter application of the reasonableness test'.⁷⁷

It should, however, not automatically be assumed that all customs which have stood the test of time reflect the most efficient practice or, on the other hand, that all rules generated by merchant associations and international business organisations are inefficient. Trade practice is by its nature dynamic and, therefore, constantly evolving. Usage is more susceptible to change than domestic laws and international conventions, which have to be revised through time-consuming legislative processes.

⁷² Kerr (Butterworths 2002) at 381.

⁷³ Christie & Bradfield (LexisNexis 2011) at 171.

⁷⁴ 1921 AD 330. In *Catering Equipment Centre v Friesland Hotel* 1967 (4) SA 336 (O) at 339 the court held that Roman Dutch law made no difference between custom and trade usage. In SA law, these two terms are for all practical purposes used interchangeably.

⁷⁵ Schorer *Aanteekeningen ad Grotium* 1.2.21 n 6; Van der Linden *Koopmans Handboek* 1.1.7.

⁷⁶ See *Tropic Plastic and Packaging Industry v Standard Bank of SA Ltd* 1969 (4) SA 108 (D) which places the emphasis on the other requirements. For a discussion on the time requirement, see in general Du Toit 'Reflections on the South African Code of Banking Practice' 2014 *TSAR* 568 at 571–572; Hugo 'The legal nature of the uniform customs and practice for documentary credits: Lex mercatoria, custom, or contract?' (1994) 6 *SA Merc LJ* 143 at 162–64.

⁷⁷ Van Niekerk 'Some thoughts on custom as a formative source of South African law' (1968) 85 *SALJ* 279 at 285.

Usage, furthermore, is more efficient because it is aimed at a specific trade, as opposed to default rules of law which are formulated to apply to a wide range of transactions.⁷⁸ The converse may also be true, though. The ability to adapt to changes in mercantile practice has its advantages but also a downside. Trade usage is dependent on consistent and certain practices which are regularly observed over a period of time by those engaged in the trade and is therefore indirectly challenged by the concept of globalisation, which is mostly spurred by rapidly changing technology. It takes some time for a practice to meet the requirements of certainty and uniform observance in the trade and by that time, a new and more efficient practice might have developed already. Moreover, to establish a new usage might be difficult where an old, albeit less efficient, practice is still used on a regular basis. Often a practice remains in force simply because traders are better acquainted with it compared to one they do not know. Fear of transaction costs in the form of network and learning effects is one of the main reasons for practices becoming 'locked in'.⁷⁹ This is especially so where traders act in closed circles, such as in groups or networks. If some of the traders in that group would informally start to follow a new and more effective practice, it would mean that the group as a whole or the representative body or association regulating that trade has to be convinced of the superiority of this practice. Even after having been convinced of its efficiency, a network may still be reluctant to follow a new practice due to the transaction costs it will have to incur in educating its members on its use. This could result in a well-known and frequently-used practice remaining in force long after a new and more efficient practice has been introduced to the market.⁸⁰

The continued use of the FOB and CIF trade terms in contexts where they no longer represent optimal trade usage provides an example of locked-in practices. FOB, the oldest trade term known to international trade, is still one of the most frequently used trade terms worldwide.⁸¹ Since its inception in the early nineteenth century,⁸² transportation

⁷⁸ Gillette (1999) 39 *Virginia Journal of International Law* 707 at 708; Bernstein (2013) at 1.

⁷⁹ Gillette (1999) 39 *Virginia Journal of International Law* 707 at 712; Gillette (2004) 5 *Chicago Journal of International Law* 157 at 161.

⁸⁰ According to Gillette (1999) 39 *Virginia Journal of International Law* 707 at 726 '[w]hat binds the parties to a custom is not the alleged superiority of the practice, but the expectations that others will follow it'.

⁸¹ Griffin *Day & Griffin: The Law of International Trade* 3 ed (Butterworths LexisNexis 2003) 65.

⁸² Großman-Doerth *Überseeskauf* I 44; Renck 'Der Einfluß der INCOTERMS auf das UN-Kaufrecht: Eine Untersuchung zu den rechtlichen Wirkungen der INCOTERMS 1990 im Recht des internationalen Warenkaufs' (published LLM thesis, Hamburg University, 1995)

practices have developed in reaction to the container revolution and the advent of multimodal transport. The practice that risk passes when the goods cross the ship's rail originated in times when the seller was present when his goods were placed on board the vessel; in many cases he even chartered the ship and accompanied the cargo. Today the seller relinquishes all control over the goods when they are delivered to the port or container terminal, which might be days or weeks before the ship departs or is even loaded. Notwithstanding, under the traditional trade terms, the seller remains responsible for the risk in the goods until they are delivered on board the ship. This practice is no longer in line with modern international policy considerations underlying the passing of risk, which entail that delivery should take place, and, consequently, the risk of loss of and damage to the goods should transfer to the buyer when the goods are handed to the carrier or any entity in the transportation link which is controlled by the carrier, such as a container terminal or a freight forwarder.⁸³ As a result, trade practices connected to the delivery of goods started to change. The ICC, as the standardising authority, took the initiative to formulate the FCA and CPT Incoterms rules in line with these considerations and practices. However, despite the availability of rules that resemble more efficient trade practices, manufactured or containerised goods are still being sold on the basis of the traditional FOB and CIF terms, even though they are no longer the optimal practices in these types of trade. In many instances, the use of locked-in practices can be attributed to a lack of knowledge or simply because old habits die hard. In others, however, the main reason for the continued use of the old terms is the costs of learning effects. In 2010, both the FOB and CIF Incoterms rules were also revised. The revised rules display a new, critical point for the passing of risk and costs in line with current delivery practices. They now do away with the ship's rail as the dividing point and stipulate that delivery takes place when the goods are placed on board the vessel; costs and risks to follow. However, despite its inherent arbitrary nature, the ship's rail as the traditional dividing point

5. The first English judicial pronouncement dealing with the FOB clause dates back to 1812. See *Wackerbarth v Masson* (1812) 3 Camp 270; *Craven v Ryder* (1816) 6 Taunt 433; *Ruck v Hatfield* (1822) 5B & Ald 632. The German High Court also dealt with the FOB term from early on; see RGZ 106, 213. However, it is possible that the origins of these practices might go back even earlier. In this regard, see Sassoon 'The origin of FOB and CIF terms and the factors influencing their choice' 1967 *Journal of Business Law* 32 at 33; Ramberg 'Incoterms in the era of electronic data interchange' (published public lecture at the Forum Internationale, Kluwer 1988) 5.

⁸³ Enderlein & Maskow *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods* (Oceana 1992) 257–258.

for FOB and CIF terms has the potential to become a locked-in practice if traders continue to follow the traditional position.

The danger of lock-in can be countered by merchant associations and international standardisation organisations, such as the ICC, which can play a valuable role to disseminate information and provide support for new practices.⁸⁴ However, although one would expect codified trade usage to reflect efficient and current international trade practices, that is not always the case. For example, until its revision in 1993, a rule of the Uniform Customs and Practice for Documentary Credits (the UCP) stated that all documentary credits were deemed to be revocable unless otherwise indicated. Users of the UCP consistently contracted out of this rule, which meant that as it stood, the rule did not reflect the actual practice of the mercantile community to issue irrevocable instruments. The ship's rail as the division point for risk and costs under the FOB and CIF Incoterms provides another example of inefficient practices. Despite the fact that the inherent uncertainty of the rule and its potential for creating disputes were pointed out in the case of *Pyrene Co Ltd v Scindia Navigation Co Ltd*,⁸⁵ and different practices were already in place in different ports of the world, the ICC only revised this point in 2010. The argument was that they could not find evidence of a consistent practice that deviates from the traditional position. That would require the introduction of a number of variants, which would result in even more uncertainty.⁸⁶

(b) Widely known, regularly observed and what most people would want

Where a practice in a particular trade has become harmonised to the extent that it has developed into a trade usage or custom, it is no longer necessary for contractual parties to assess the risks and predict the likely outcomes for each situation and, thus, to negotiate and agree to each term explicitly. This saves transaction costs.⁸⁷ When a usage is widely known and followed over a geographically large area, contractual parties are expected to know and follow such usage, even where they do not

⁸⁴ The ICC advises traders on the optimal use of each rule with reference to the type of transportation method used and the nature of the goods being transported. See also Gillette (2004) 5 *Chicago Journal of International Law* 157 at 161, 174; Gillette (1999) 39 *Virginia Journal of International Law* 707 at 737.

⁸⁵ [1954] 2 QB 402 at 419.

⁸⁶ Ramberg 'Why revise Incoterms?' in Ramberg et al (eds) *Incoterms 2000: A forum of experts* (ICC 2000) 11–12; Incoterms 2000 (the official rules), 'Introduction' para 9.2.

⁸⁷ Mak (2014) at 8–11; Gillette (1999) 39 *Virginia Journal of International Law* 707 at 715–716; Cuniberti (2014) 52 *Columbia Journal of Transnational Law* 369 at 384.

have specific knowledge of it.⁸⁸ Through its gap-filling function, usage protects the expectations of parties who anticipate compliance with it from others engaged in the same trade.⁸⁹ These expectations are based on policy considerations of good faith and reasonableness, but also on the assumption that the custom represents what most traders in those circumstances would contract for. Very often the parties to a contract deliberately fail to provide for all contingencies of the contract, leaving so-called ‘gaps’ to be filled by the default law or by trade usage. That happens mostly in circumstances where the likelihood or risk that the contingency would materialise is significantly smaller than the ex post facto costs if it would. In those circumstances, the parties are content that either the default law of the contract or trade usage would provide an efficient gap-filler as it represents what most parties would contract for if they had the opportunity to do so.⁹⁰

Doubts over contractual parties’ awareness of trade usage and whether it is what most parties would want are nothing new. During the drafting stages of the CISG, socialist and developing countries expressed this as their main concerns. Their argument was that commercial usages are formed by a small group of countries, mainly from the developed and industrialised world, and, therefore, did not express worldwide practices. These countries feared that, as the economically weaker party, imperialistic customs would be forced onto them.⁹¹ History has shown that trade usage can indirectly prevent developing countries from entering into international trade transactions while, at the same time, it can protect the developed countries’ dominance of the trade. Because of its stronger commercial power, Britain was, for example, able to dictate that the export of coal should take place on CIF terms and the import of cotton on FOB terms. By structuring their contracts with their trade partners in this manner, they could, in both instances, choose the carrier and, thus, were placed in a position to expand their merchant marine.⁹²

Due to the fact that most traders tend to contract out of usages they

⁸⁸ Pamboukis ‘The concept and function of usages in the United Nations Convention on the International Sale of Goods’ (2005–2006) 25 *Journal of Law and Commerce* 107 at 111.

⁸⁹ Gillette (1999) 39 *Virginia Journal of International Law* 707 at 708; Gillette (2004) 5 *Chicago Journal of International Law* 157 at 163.

⁹⁰ Mak (2014) at 11; Gillette (2004) 5 *Chicago Journal of International Law* 157 at 157; Bernstein (2015) 110 *Northwestern University LR* 63 at 95; Bernstein (2013) 12.

⁹¹ Bonell ‘Art 9 — usages and practices’ in Bianca & Bonell (eds) *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Fred B Rothman & Co 1987) 105. This was the reason for the compromise reached in art 9(2) CISG. See also Goode (1997) 46(1) *International and Comparative Law Quarterly* 1 at 16; Gillette (1999) 39 *Virginia Journal of International Law* 707 at 718–719.

⁹² See Cutler (Cambridge University Press 2003) at 221 for the arguments of Alan Cafruny.

are aware of, Bernstein found that the assumption that trade usage represents what most traders would contract for if they had the opportunity to do so is false.⁹³ Moreover, data obtained from the ICC Arbitration Court on the number of arbitration cases that indicate the *lex mercatoria* as a choice of law accounts for less than 1 per cent of matters heard by the tribunal.⁹⁴ Thus, it cannot be said that trade usage routinely represents what most people want, especially if one takes into consideration the scale on which standard form contracts are used in the context of commercial transactions.⁹⁵ Standard contracts and industry rules formulated by trade organisations regulate the contractual relationship between the parties in detail and for the most part replace the default law and other gap-fillers such as trade usage.⁹⁶ These contracts are more precise and better tailored to a particular trade and its needs. They also provide for private dispute resolution systems, which are better geared to the trade and are mostly conducted by arbitrators.⁹⁷ Furthermore, when it comes to the use of trade usage for interpretative purposes and gap-filling, Bernstein's study found that traders are not in favour of contextualised interpretation as that is more than often based on a fictional intent. Courts often overwrite the written provisions of their contracts with usages that are inconsistent with the express words of the contract.⁹⁸ Consequently, traders prefer a formalistic interpretation that keeps to the express wording and plain meaning of the words. In the context of trade associations, it was found that arbitrators also prefer a more formalistic approach.⁹⁹ On the other hand, it has been said that, in the context of the CISG, arbitrators have managed to invoke trade usages that are less controversial as here the application of usage is limited to customs that are easily verifiable, considered legally binding and that do not replace the intentions of contractual parties.¹⁰⁰

⁹³ Bernstein (2013) 12–14.

⁹⁴ Cuniberti (2014) 52 *Columbia Journal of Transnational Law* 369 at 403.

⁹⁵ Linarelli (2003) 48 *Wayne LR* 1387 at 1439–1440; Bernstein (2013) at 21.

⁹⁶ Bernstein (2013) 14. See also, in general, Bernstein (1996) 144 *University of Pennsylvania LR* 1765 at 1765 as regards commodity contracts.

⁹⁷ Bernstein (1996) 144 *University of Pennsylvania LR* 1765 at 1770–1771.

⁹⁸ Bernstein (2013) 21; Bernstein (2015) 110 *Northwestern University LR* 63 at 69–70. Moreover, Mak (2014) 12 and Gillette (2004) 5 *Chicago Journal of International Law* 157 at 169–170 refer to a 'homeward trend' that occurs when judges define trade usage in an international context.

⁹⁹ Bernstein (1996) 144 *University of Pennsylvania LR* 1765 at 1769–1770.

¹⁰⁰ Gillette (2004) 5 *Chicago Journal of International Law* 157 at 178–179.

(c) Trade usage is certain in content, clear and saves transaction costs

One of the main features of custom is that it represents an ‘international language’ that transcends geographic borders. It trumps national law and even conflicting interpretations of international law and obviates the need to resort to the rules of private international law, which saves transaction costs.¹⁰¹ Trade usage and custom are more cost-effective than express contractual terms which, often at the risk of mistakes and misunderstandings, have to be translated into foreign languages.¹⁰²

However, despite its harmonisation function, international usage does not operate universally and can differ from country to country or from one trade to the next. Often there is little agreement on the content of trade usage, even where it had its origins in closed groups.¹⁰³ This is illustrated by trade terms where the understanding of the oldest and most well-known terms, FOB and CIF, is dependent on the applicable law, the trade sector or even the port where it is applied. These differences in understanding give rise to different forms of FOB and CIF terms as is evident from the different standard form contracts available in the commodity trade.¹⁰⁴ Moreover, the common understanding of usage tends to shift as commercial practices evolve in reaction to changing commercial realities. Also, the modern economy is no longer characterised by homogeneous ways of doing business as in the past, which makes it more difficult for consistent practices to generate and, at the same time, for merchants to become aware of such practices.¹⁰⁵

Certainty is one of the basic prerequisites for custom or trade usage. Where commercial parties disagree about the content of a usage and the obligations that it entails, the rule-making function of trade usage is moved from the mercantile community to the courts and tribunals. In these instances, judges and arbitrators have to establish the common understanding of such usage in the trade. Unless a judge or arbitrator is familiar with the particular custom, expert evidence is required to give

¹⁰¹ Michaels (2007) 14 *Indiana Journal of Global Legal Studies* 447 at 463; Cuniberti (2014) 52 *Columbia Journal of Transnational Law* 369 at 392.

¹⁰² Gillette (1999) 39 *Virginia Journal of International Law* 707 at 724.

¹⁰³ See, in general, Bernstein (2013) and Bernstein (1996) 144 *University of Pennsylvania LR* 1765.

¹⁰⁴ Such as those available under the GAFTA and the FOSFA standard contracts. For criticism on the vagueness, lack of precision and comprehensiveness of commercial custom, see in general Cuniberti (2014) 52 *Columbia Journal of Transnational Law* 369 at 390–391 and Fassberg (2004) 5 *Chicago Journal of International Law* 67 at 77.

¹⁰⁵ Bernstein (2013) 22–29; Mak (2014) 10; De Ly (2005–2006) 25 *Journal of Law and Commerce* 1 at 5.

meaning to it. This is often easier said than done. The trade context in which the usage originated and developed plays an important role in its understanding.¹⁰⁶ There is no international court which presides on disputes of this nature and one is to rely on national courts to determine the content and meaning of international commercial practices, and thereby protect the harmonisation function of trade usage.¹⁰⁷ Interpretation costs could, thus, affect the efficiency of trade usage adversely.

Where disputes are heard by arbitrators who have special knowledge of the trade or by a specialised court such as a commercial court, the danger of divergent interpretation can be reduced. Judges, arbitrators and legal scholarship can fulfil a ‘spokesman’ function.¹⁰⁸ In the context of international sales, arbitrators often deduce existing international trade usage from international conventions such as the CISG,¹⁰⁹ or from uniform rules such as the UNIDROIT Principles.¹¹⁰ However, because international conventions are primarily state endeavours, drafted by lawyers and academics and negotiated by diplomats, they do not always reflect practices and usages of the commercial community.¹¹¹ As unwritten usage is inherently uncertain and develops and changes over time, it is questionable whether usage could ever be effectively reduced to writing. Can a convention as a relatively static document truly reflect or express usage? Furthermore, does a convention always express usage as is, or does it become changed in the drafting process? Is the notion of codifying existing usage, especially on the international level, perhaps purely a myth?¹¹²

The main difficulty with unwritten and uncodified usage is to

¹⁰⁶ Gillette (2004) 5 *Chicago Journal of International Law* 157 at 165; Gillette (1999) 39 *Virginia Journal of International Law* 707 at 716.

¹⁰⁷ Gillette (1999) 39 *Virginia Journal of International Law* 707 at 711–712. See also Mak (2014) 12 for the dangers of a ‘homeward’ interpretation.

¹⁰⁸ Dalhuisen (2008) 18 *Duke Journal of Comparative & International Law* 339 at 366–367; Dalhuisen (Hart 2010) 161, n 344; DiMatteo 2013 *The Chinese Journal of Comparative Law* 1 at 7; Goode (1997) 46(1) *International and Comparative Law Quarterly* 1 at 6; Gillette (2004) 5 *Chicago Journal of International Law* 157 at 179.

¹⁰⁹ Cuniberti (2014) 52 *Columbia Journal of Transnational Law* 369 at 381, 394. See also ICC arbitration case no 5713 of 1989 as discussed by Goode (1997) 46(1) *International and Comparative Law Quarterly* 1 at 18 et seq.

¹¹⁰ Goode (1997) 46(1) *International and Comparative Law Quarterly* 1 at 26; Cuniberti (2014) 52 *Columbia Journal of Transnational Law* 369 at 394.

¹¹¹ Goode (1997) 46(1) *International and Comparative Law Quarterly* 1 at 22. In the context of the international carriage of goods by sea, the Hamburg Rules provide an example of an international convention that was not favourably received by the international mercantile community for that reason. See also, in general, the discussion under III(a).

¹¹² Goode (1997) 46(1) *International and Comparative Law Quarterly* 1 at 19.

establish its existence and whether it is regularly observed.¹¹³ Where unwritten trade usage is well known and regularly observed by merchants over a long period of time, courts take judicial notice of the usage and there is no need to prove its existence or content.¹¹⁴ However, where a judge or arbitrator cannot take judicial notice of the usage, expert evidence is required. Often that is not available and reliance is to be made on cursory evidence by employees who sometimes testify in a manner that suits the employer, resulting in the usage being to the benefit of only one party. Unwritten usage, therefore, creates an opportunity for strategic behaviour from the party who claims to rely on the usage.¹¹⁵

As was mentioned already, arbitrators are more successful in interpreting contracts with reference to trade usage.¹¹⁶ Moreover, as international business organisations and trade associations are increasingly involved in the creation, formulation and development of mercantile customs and usages they are becoming more easily accessible. This facilitates both their recognition and application, and simplifies the issue of proof.¹¹⁷ These organisations are in the position to collect and investigate practices and usages, evaluate their efficiency and then codify the most optimal practice into clear and certain language, either in the form of standardised rules or standard form contracts that keep up with the inherent dynamic nature of international custom.¹¹⁸ This would mean that standardising authorities not only have to codify usages but also have to standardise their meanings.

IV CONCLUSION

National laws, international conventions and other instruments of harmonisation all recognise the interpretative and gap-filling role of trade usage. Trade usage even takes precedence over the dispositive

¹¹³ Goode (1997) 46(1) *International and Comparative Law Quarterly* 1 at 12–13. See also the observations of Corbett J in *Golden Cape Fruits* at 646A–C, which was cited and applied by Eksteen J in *Emadyl Industries CC t/a Raydon Industries (Pty) Ltd v Formex Engineering* 2012 (4) SA 29 (ECP) paras 50–52.

¹¹⁴ (Note) ‘Custom and trade usage: its application to commercial dealings and the common law’ (1955) 55 *Columbia LR* 1192 at 1206.

¹¹⁵ Bernstein (2013) 17; Bernstein (2015) 110 *Northwestern University LR* 63 at 67.

¹¹⁶ Gillette (2004) 5 *Chicago Journal of International Law* 157 at 179; Wiener Katz ‘The relative costs of incorporating trade usage into domestic versus international sales contracts: Comments on Clayton Gillette, institutional design and international usages under the CISG’ (2004) 5 *Chicago Journal of International Law* 181 at 186–187.

¹¹⁷ On the advantages of self-regulation, see Mak (2014) 15. See also, in general, Berger *The Creeping Codification of the New Lex Mercatoria* 2 ed (Kluwer Law International 2010).

¹¹⁸ Dalhuisen (Hart 2010) 161.

substantive law of the contract. The rationale for this role lies in assumptions of legal efficiency. Trade usage developed as a form of self-regulation by the commercial community itself and, thus, as a uniform set of optimal and efficient practices that the participants in that trade regard as binding on them. Because these practices are well known and regularly observed in a particular trade across geographical and legal boundaries there is no need to agree to them explicitly. This reduces transaction costs.

This article has set out to challenge the traditional assumptions on which this rationale is based in order to come to a conclusion on whether trade usage still constitutes law made by merchants for merchants that most traders would prefer to be bound to, or whether this is simply an illusion.

The analysis has found that, although these assumptions may still have merit, the fact that they originated in a different time must be considered. The way business is conducted has changed significantly since medieval times when the *lex mercatoria* functioned as an independent system of law based on mercantile custom. Apart from the fact that the existence of the ancient law merchant has been placed in dispute, in a globalised world international sales transactions no longer take place in closed circles or networks. Traditional seller–buyer relationships are increasingly replaced by contracts concluded over the internet or by more complex contracts such as supply-chain, value added, just-in-time, out-sourcing and other collaborative forms of contracting. In these contexts, standard contracts often regulate the contractual relationship. Due to rapid developments in technology it is more difficult for trade usage to become established in these contexts.¹¹⁹ At the same time, it would inhibit the use of trade usage to interpret the terms of these standard forms of contract.

Furthermore, international trade of the twenty-first century is characterised by fierce competition which requires that players should be innovative. Competition precludes businesses from sharing their practices with competitors, which means that it is less likely that international trade usage will develop spontaneously or become established.¹²⁰ While usage is defined as trade practices which are followed within a particular trade on a regular basis for a certain period of time, the new

¹¹⁹ Bernstein (2015) 110 *Northwestern University LR* 63 at 100–104. According to De Ly (2005–2006) 25 *Journal of Law and Commerce* 1 at 5, as a result of globalisation and technological changes, custom and usage are becoming less relevant and will be replaced by courses of dealing between the same parties.

¹²⁰ Bernstein (2013) 28.

face of international sales is hardly suitable for the development of practices over time. However, the analysis has shown that the traditional requirement that usage must be long established is no longer strictly applied.¹²¹ The time requirement is not completely irrelevant, though, as recentness in origin might have a negative bearing on the other requirements, namely whether the practice is well known and regularly observed.

As international trade is conducted across a wider scope on a global scale it makes it even more difficult to identify trade usage and prove its content.¹²² Where the content of usage is uncertain or in dispute, it is difficult to prove that a trade usage exists and transaction costs will be increased rather than reduced. As with all instruments of harmonisation, uniform interpretation is paramount for the achievement of legal certainty.¹²³ This end depends on the judiciary and the arbitrators who have to apply trade usage. The dynamic nature of trade usage and its ability to evolve in reaction to change increases its efficiency but at the same time creates legal uncertainty that can reduce the efficiency of the contract.¹²⁴ Trade usage, therefore, often presents as a dichotomy of legal flexibility and certainty. Moreover, the fear of network and learning costs can deter merchants from parting with the status quo in favour of a new, albeit more efficient, practice.¹²⁵

Whether international trade conventions and other instruments of commercial harmonisation express trade usage is questionable as they are relatively static documents,¹²⁶ but that their provisions are based on general principles of international trade is not to be denied. However, as a gap-filler trade usage can supplement the provisions of conventions so that they will manage to remain relevant long after trade conditions that existed at the time of their drafting have changed.

It can be concluded that, apart from the role that it continues to play in commercial arbitration, unwritten trade usage will become less significant in international sales transactions due to problems of proof and the fast-changing nature of modern commercial practices. The

¹²¹ Dalhuisen (Hart 2010) 155, n 325; 160–161 even suggests that custom can change overnight and still be binding.

¹²² Gillette (2004) 5 *Chicago Journal of International Law* 157 at 167–168; Katz (2004) 5 *Chicago Journal of International Law* 181 at 183.

¹²³ A uniform law per se is no guarantee that its provisions will be interpreted or applied uniformly. See Andersen 'The global jurisconsultorium of the CISG revisited' (2009) 13(1) *Vindobona Journal of International Commercial Law and Arbitration* 43 at 45.

¹²⁴ Mak (2014) 8–9.

¹²⁵ Gillette (2004) 5 *Chicago Journal of International Law* 157 at 160.

¹²⁶ Goode (1997) 46(1) *International and Comparative Law Quarterly* 1 at 3 is of the opinion that conventions do not 'reproduce the status quo, they change it'.

harmonisation function of trade usage has moved from unwritten usage to codified trade usage and standard form contracts formulated by international business organisations and trade associations. Dalhuisen regards the role of trade organisations as increasingly important. These organisations are in a position to identify efficient practices and to standardise them into standard contracts or rules that recognise the dynamic role of mercantile custom. This way they need not wait for the practices to become long established and widely recognised before rules that are efficient and desirable find application in international trade.¹²⁷ Organisations such as the ICC standardise mercantile custom to ensure legal certainty and clarity and address the problems of proof connected to unwritten usages.¹²⁸ At the same time they disseminate information and educate merchants on the use of the most efficient customs and practices, which can prevent inefficient practices from becoming locked-in.¹²⁹ Moreover, contractual parties do not have to carry the burden of high transaction costs brought about by network and learning effects as these costs are now largely carried by the standardising organisation. Where the law-making function of trade usage is transferred to institutions, they can formulate trade usage proactively to facilitate efficient trade instead of merely reacting to and standardising existing practices. Standardised and codified usages are therefore no longer restricted to usages and customs that have developed spontaneously in the trade over time. Business organisations can identify and even anticipate efficient practices to facilitate international trade in an organised and responsible manner through regular revisions that enhance the efficiency of trade usage. In the context of standard contracts formulated by trade associations, the application of trade usage is furthermore facilitated by internal systems for dispute resolution, which are better equipped for this task than the court system.

Whether trade usages still solely constitute rules made by merchants for their own use and benefit is therefore questionable. However, the answer to this question might also depend on how you interpret the notion of law made by merchants for merchants. Codified trade usages, such as those formulated by the ICC, function as a contractual opt-in mechanism, which means that merchants are free to use these rules to regulate their contractual relationships as and when they prefer to do so.

¹²⁷ Dalhuisen (Hart 2010) 160–161. Also see n 342 where he refers to the notion of ‘instant customary law’ as a source of public international law.

¹²⁸ For example, the Incoterms and the UCP. Other examples are the ICMA in the Eurobond market.

¹²⁹ Gillette (2004) 5 *Chicago Journal of International Law* 157 at 161, 174.

In this context, trade usage functions on the basis of party autonomy and by electing to make use of codified usages to regulate their contracts, merchants still play an active role in the legal regulation of their own contracts even though these usages are no longer exclusively made by merchants for their own use. In the end, codified usages are formulated for the use and benefit of merchants with the main aim of harmonising and facilitating international trade. As for unwritten usages, parties are free to exclude their operation contractually if they do not want to be bound by them.

Through the ages merchants have supplemented the substantive law of their contracts by means of the self-regulating quality of mercantile custom. This will continue to happen in the future, albeit in a different and more structured form. As international business organisations and transnational companies increasingly become involved with the formulation of privately-generated law to supplement the law of the state, trade usage will no longer be restricted to law made by merchants for merchants but will be used to facilitate international trade as part of 'a law for commerce' which moves beyond the state.¹³⁰

¹³⁰ Michaels (2007) 14 *Indiana Journal of Global Legal Studies* 447 at 466–468.