

INCOTERMS AND THE LEX MERCATORIA<sup>1</sup>

## INCOTERMS E LEX MERCATORIA

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## ABSTRACT

*Commercial custom fulfils a harmonization function in the law of international sales. This function is, however, limited in the context of trade terms. Trade terms reflect mercantile customs that were originally developed by merchants for use in contracts where goods are to be transported from one place to another. They replace the need for elaborate contract clauses regulating the obligations of the buyer and seller insofar as delivery and other antecedent obligations are concerned. However, as commercial customs and trade usages differ from one country to another or from one branch of the trade to the other, trade terms are interpreted differently in different contexts. The absence of a uniform understanding of trade terms vitiates the harmonization function of mercantile custom. This necessitates the standardization of trade term content. The ICC INCOTERMS provide such a form of standardization. Because of their limited scope of regulation and their inability to function independently of party agreement, INCOTERMS can, however, not operate as an independent system of law or a lex mercatoria. They need to function in conjunction with other forms of harmonized substantive law to regulate the rights and obligations of the parties to a sales contract in full. They should however be considered as an important source or element of the new law merchant.*

**KEYWORDS:** *INCOTERMS - commercial custom – trade usage – harmonization – standardization – international sales – Art. 9 CISG - lex mercatoria*

## RESUMO

*O costume comercial cumpre função harmonizadora do Direito das vendas internacionais. Esta função é, no entanto, limitada no contexto dos termos de comércio. Os termos de comércio refletem costumes mercantis que foram originalmente desenvolvidos por comerciantes para o uso em contratos nos quais as mercadorias serão transportadas de um lugar para outro. Eles substituem a necessidade de elaboração de cláusulas contratuais que regulem as obrigações do comprador e do vendedor, no que concerne à entrega e obrigações antecedentes. No entanto, como costumes e usos do comércio diferem de um país para outro ou de um ramo do comércio*

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*para o outro, os termos de comércio são interpretados de forma diversa em diferentes contextos. A ausência de um entendimento uniforme desses termos prejudica a função de harmonização do costume mercantil. Esta situação exige a padronização dos conteúdos dos termos comerciais. Os INCOTERMS CCI fornecem tal forma de padronização. Devido ao seu âmbito limitado de regulação e de sua incapacidade de funcionar independentemente do acordo das partes, os INCOTERMS não podem, no entanto, funcionar como um sistema independente de lei ou lex mercatoria. Eles precisam operar em conjunto com outros instrumentos de Direito material harmonizado para regular plenamente os direitos e obrigações das partes de um contrato de vendas. Devem, contudo, ser considerados como uma importante fonte ou elemento do Direito comercial.*

*PALAVRAS-CHAVE: INCOTERMS – costume comercial – usos do comércio – harmonização – padronização – compras e vendas internacionais – art. 9º Convenção de Viena - lex mercatoria.*

## 1. INTRODUCTION

Much has been written on the enigma of the lex mercatoria without reaching any conclusion on its role in modern international commercial law. This article is not an attempt to join the debate on whether the modern law merchant exists as an autonomous body of law, but to address an issue at the core of the law merchant, namely the role and function of international commercial custom,<sup>2</sup> and more specifically, its harmonization function in the law of international sales.

International commercial law is to a large extent shaped by the parties engaged in international trade.<sup>3</sup> Because contractual parties are rational maximizers of value, distinct customary ways of doing business have developed internationally. Customs embody homogeneous and harmonized practices that represent the rules most contract parties would apply in similar circumstances. As these practices are widely and regularly followed, they are presumed to be economically efficient as inefficient practices would not have stood the test of time.<sup>5</sup> To the extent that mercantile custom constitutes practices and usages which exist beyond physical and legal borders, it fulfils a harmonization function in the law.

One of the advantages of mercantile custom is that there is no need to agree on usages as one would in the case of other contractual terms, since one party to the contract expects that the other will comply with the custom of the trade.<sup>7</sup> Trade usage can aid the interpretation of a contract and fill gaps that

<sup>2</sup>Custom is perceived as either a source or an element of the law merchant. LANDO, Ole, "The Lex Mercatoria in International Commercial Arbitration," 34 I.C.L.Q. 747, pp. 748 et seq. (1985); GOODE Roy M., "Usage and Its Reception in Transnational Commercial Law," 46(1) I.C.L.Q. 1, (1997), p. 4. For purposes of clarity, it must be pointed out that this article refers to "mercantile custom" as an all-inclusive or "blanket" term, encompassing customs, usages of trade and trade practices.

<sup>3</sup>CUTLER, A. Claire, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*, (2003), Cambridge University Press, pp. 185-186.

<sup>4</sup>GILLETTE, Clayton P., "The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG," 5 Chi. J. Int'l L. 157, (2004), p. 160; GILLETTE, "Harmony and Stasis in Trade Usage for International Sales," 39 Va. Jnl. Int'l L. 707, (1999), p. 713.

<sup>5</sup>DALHUISEN, Jan H., "Custom and Its Revival in Transnational Private Law," 18 Duke J. Comp. & Int'l L. 339, (2008), p. 370.

<sup>7</sup>GILLETTE, 39 Va. J. Int'l L., (2004), pp. 707-708.

the parties failed to provide for.<sup>7</sup> To that degree, customs are part of the default rules governing the contract, and since they require no negotiation and clarification, they reduce transaction costs and increase the economic efficiency of the contract.<sup>8</sup> In the international context, mercantile custom is sometimes more cost effective than express contractual terms, since the latter still have to be translated into foreign languages, which can result in mistakes and misunderstanding.<sup>9</sup>

Trade usages also have certain advantages over statutory default rules. They represent superior practices<sup>10</sup> that are tailored to the needs and requirements of a particular trade and are more susceptible to change brought about by commercial needs than rules that have to be revised from time to time through the legislative process or by the courts.<sup>11</sup> Mercantile customs are dynamic in nature and constantly change to adapt to the needs of the trade.<sup>12</sup> This is especially so in the case of international trade where new practices are developing continually. Domestic rules are often out of touch with the economic reality of international sales. The ideal would be that rules which regulate international sales should be free from the political, social and ideological constraints of domestic laws and be focused primarily on the commercial needs of the parties to the contract.<sup>13</sup>

Another benefit of relying on custom is that it trumps national law, obviating the need to resort to the rules of private international law.<sup>14</sup> International contracts of sale are characterized by a myriad of legal systems which could potentially govern the contract. To determine the applicable law is one of the main problems that merchants trading internationally are faced with. Concerns of certainty, clarity and predictability of the governing law have been the driving factors for a unified sales law or, at least, greater harmonization between the sales laws of countries. The important role that commercial custom plays in the international context is acknowledged by international instruments of harmonization and unification such as the United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>15</sup> and the UNIDROIT Principles of International Commercial Contracts.<sup>16</sup>

## 2. THE ROLE AND FUNCTION OF CUSTOM IN THE CONTEXT OF INTERNATIONAL SALES

Merchants play an important role in the creation of commercial law. Apart from their input in the harmonization efforts of states,<sup>17</sup> they also engage in so-called “private rule-making” efforts through the application of their own practices and customs. The repetition of business transactions create commercial

<sup>7</sup>BAINBRIDGE Stephen, “Trade Usage in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions,” 24 Va. Jnl. Int’l L. 619, (1984), pp. 623-624; PAMBOUKIS, “The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods,” 25 J.L. & Com., 107 (2005-06); GILLETTE, 39 Va. Jnl. Int’l L., (1999), p. 707; GILLETTE, 5 Chi. J. Int’l L. (2004), p. 157.

<sup>8</sup>GILLETTE, 5 Chi. J. Int’l L., (2004), pp. 158 & 160; GILLETTE, 39 Va. Jnl. Int’l L., (1999), p. 708; BAINBRIDGE, 24 Va. Jnl. Int’l L., (1984), p. 651.

<sup>9</sup>GILLETTE, 39 Va. J. Int’l L., (1999), pp. 707 & 724.

<sup>10</sup>However, it does not always follow that a common practice allocates the risks inherent in a situation optimally. Sometimes network and learning effects preclude the use of an optimal practice in support of the status quo. GILLETTE, 39 Va. Jnl Int’l. L., (1999), pp. 709-712, 721-732.

<sup>11</sup>GILLETTE, 39 Va. Jnl. Int’l L., (1999), p. 708.

<sup>12</sup>DALHUISEN, 18 Duke J. Comp. & Int’l L. (2008), pp. 362-370

<sup>13</sup>SCHMITTHOFF Clive M., “The Law of International Trade” in CHENG, Chia-Jui, (ed.), Clive M Schmitthoff’s Select Essays on International Trade Law 219 (1988), Martinus Nijhoff Publishers, p. 220.

<sup>14</sup>GILLETTE, 39 Va. Jnl. Int’l L., (1999), p. 724.

<sup>15</sup>Art. 9 CISG.

<sup>16</sup>Art. 1.9 UNIDROIT Principles (2004).

CUTLER, Private Power and Global Authority, pp. 193-204 refers to a “transnational capitalist class” or “mercantocracy” that, because of their links to transnational capital as well as their expert knowledge and their influence on governments, function as the main drivers of the harmonisation process. See also, LEVIT Janet Koven, “A Bottom-up Approach to International Lawmaking: the Tale of Three Trade Finance Instruments,” 30 Yale J. Int’l

practices and customs, which in time harmonize the way in which international business is conducted.<sup>18</sup>

Already during medieval times, uniformity was achieved through the universality of merchant customs.<sup>19</sup> The earliest efforts to harmonize substantive commercial law date back to the late nineteenth century and consisted of self-regulatory initiatives, mostly undertaken by private merchant associations.<sup>20</sup> These associations were initiated by the business communities themselves with the aim of establishing uniform commercial norms to be adopted voluntarily by all members.<sup>21</sup> Standardized forms of contract developed by these associations often incorporated existing commercial customs or set the norms in a specific trade.<sup>22</sup> Standardized contracts are, therefore, a major factor contributing to the harmonization and unification of commercial law.<sup>23</sup>

International business organizations, such as the International Chamber of Commerce (ICC), individuals and transnational corporations all play a significant, and sometimes major, role in the harmonization process.<sup>24</sup> Being a private business organization, the ICC facilitates trade by drafting standard rules and procedures which parties adopt voluntarily. INCOTERMS and the Uniform Customs and Practices for Documentary Credits (the UCP 600 and e-UCP) are examples of rules aimed at standardizing trade usages and international commercial customs.<sup>25</sup>

Moreover, many rules of substantive commercial law originated in a course of dealing or practice which existed between individual parties who are also influential business enterprises. Over time, such courses of dealing developed into trade usages (custom or *Handelsbrauch*) and eventually became abstract rules of law.<sup>26</sup> In the legal order, trade usage or custom stands between the abstract rules of law and the fac-

L. 125, (2005); FAZIO, Silvia, *The Harmonization of International Commercial Law*, (2007), Kluwer Law, pp. 37-38.

<sup>18</sup>EISEMANN, Frédéric, "INCOTERMS and the British Export Trade," *J.B.L.* 114, (1965), p. 121.

<sup>19</sup>The so-called *lex mercatoria* or international law merchant.

<sup>20</sup>For example; the Association of Corn Merchants of Hamburg (1868), also known as the Hamburg Cotton Bourse, the Bremen Cotton Exchange or Bremen Cotton Bourse (1872), the Silk Association of America (1873), the London Corn Trade Association (1877), the Grain and Feed Trade Association (GAFTA) and the Federation of Oils, Seeds & Fats Association (FOSFA). See also FAZIO, *Harmonization*, pp. 41-44 for the history of merchant guilds.

<sup>21</sup>CUTLER, *Private Power and Global Authority*, p. 208.

<sup>22</sup>BASEDOW, Jürgen, "The State's Private Law and the Economy – Commercial Law as an Amalgam of Public and Private Rule-Making," 56 *Am. J. Comp. L.* 703, (2008), pp. 708-709 opines that commercial custom seldomly develops spontaneously, but that standard terms drafted by business associations may over time develop into custom.

<sup>23</sup>In general on standard contracts and terms, see GARRO, Alejandro M., "Rule-setting by Private Organisations," in FLETCHER, Ian et al., (eds.), *Foundations and Perspectives of International Trade Law*, ch. 22, (2001) §§ 22-001-22-002. LINARELLI John, "The Economics of Uniform Laws and Uniform Lawmaking," 48 *Wayne L. Rev.*, 1387, (2003), pp. 1439-1440, indicates that research conducted in the USA showed that traders prefer to use standard form contracts instead of relying on unwritten customs because they are more precise and better tailored to a particular trade and its needs. For a similar opinion, see BERNSTEIN Lisa, "Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms," 144 *U. Pa. L. Rev.* 1765, (1996).

<sup>24</sup>The ICC was founded in 1919 as a private non-governmental organisation representing business internationally. BASEDOW, 56 *Am. J. Comp. L.*, (2008), 709.

<sup>25</sup>Promulgation by an international agency or recognition by the international business community can determine the legitimacy of a set of standard terms or a standard contract as a source of law. It should, however, be noted that the ICC has no legislative powers and its instruments cannot automatically become part of the law of a state. Before a harmonisation initiative undertaken by the ICC can be enforced, a national government has to formulate laws giving effect to it or the instrument should be incorporated into a contract of sale through party agreement.

<sup>26</sup>SCHMITTHOFF Clive M., *International Trade Usages*, report published by the Institute of International Business Law and Practice (1987), ICC Publication No. 440/4, § 4; GARRO, "Rule-setting by Private Organisations," in *Foundations and Perspectives*, §§ 22-012-22-014. This transition takes place over a long period of time. Custom is the natural result of human nature to imitate and to resort to habit. Common law legal systems are largely based on custom. See BRAYBROOKE E.K., "Custom as a Source of English Law," 50 *Mich. L. Rev.* 71, (1951), pp 71 n. 4, 73, 86. Even statutes are often mere codifications of customary law.

tual practices or courses of dealing established between parties who do business with each other on a regular basis.<sup>27</sup>

Defining mercantile custom is no easy task. Some legal systems refer to trade usage or custom without attempting to define them.<sup>28</sup> Despite differing requirements in different legal systems and a general lack of clear definitions, it is safe to conclude that mercantile custom or trade usage consists of conduct or practices which have been in existence for a long time in a given geographical area or trade, are well-known and are regularly followed by merchants in that area or trade.

It is a common feature of many legal systems that established trade usages and practices provide a common basis for interpreting and performing the contract of sale. Trade usage fills the gaps in default rules which the parties fail to provide for contractually.<sup>29</sup>

Whether mercantile custom constitutes an essential part of the autonomous rules of international trade has, however, always been a matter of controversy.<sup>30</sup> The legislative history of the CISG shows that trade usage was one of the “political issues” that generated considerable debate,<sup>31</sup> and the incorporation of trade usages by courts of law has been viewed as “neo-colonialist” and contrary to the principles of party autonomy or economic efficiency.<sup>32</sup> Despite differing opinions, it is a fact that mercantile custom plays an important role in international commerce.<sup>33</sup>

The traditional *lex mercatoria*, or so-called international commercial law of the Middle Ages, consisted of a body of law based on usages created by the merchants’ courts in order to solve problems related to commerce.<sup>34</sup> Whether the law merchant as a supra-national law of international trade still exists in some

<sup>27</sup>SCHMITTHOFF, *International Trade Usages*, (1987), §§ 5 & 6.

<sup>28</sup>SCHMITTHOFF, *International Trade Usages*, (1987), § 9.

<sup>29</sup>BAINBRIDGE, 24 *Va. Jnl. Int’l L.* (1984) pp. 623-624; PAMBOUKIS, 25 *J.L. & Com.*, (2005-06), p. 107; GIL-

<sup>30</sup>LETTE, 39 *Va. Jnl. Int’l L.*, (1999), p. 707; GILLETTE, 5 *Chi. J. Int’l L.*, (2004), p. 157.

<sup>31</sup>PAMBOUKIS, 25 *J.L. & Com.* 107, (2005-06).

<sup>32</sup>BAINBRIDGE, 24 *Va. Jnl. Int’l L.*, (1984), pp. 635-641; BONELL Michael Joachim, “The CISG, European Contract Law and the Development of a World Contract Law,” 56 *Am. J. Comp. L.* 1, (2008), p. 2; GARRO, Alejandro M., “Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods,” 23 *Int’l Law.* 443, (1989), pp.446-449. CUTLER, *Private Power and Global Authority*, pp. 221, opines that trade terms can assist developed countries in dominating international trade, whilst for developing countries they may function as barriers preventing them from entering international trade. On the basis of its stronger commercial power, Britain was for a long time able to dictate CIF terms to its trade partners for the export of coal and the FOB term for the import of cotton. This way they expanded their merchant marine as they could choose the shipowner who was to ship the goods.

<sup>33</sup>CUTLER, *Private Power and Global Authority*, p. 216; GILLETTE, 5 *Chi. J. Int’l L.*, (2004)p. 158; KATZ Avery Wiener, “The Relative Costs of Incorporating Trade Usage into Domestic versus International Sales Contracts: Comments on Clayton Clayton P. Gillette, *Institutional Design and International Usages under the CISG*,” 5 *Chi. J. Int’l L.* 181, (2004), p. 182

BERMAN Harold J. & KAUFMAN Colin “The Law of International Commercial Transactions (*Lex Mercatoria*),” 19 *Harv. Int’l L.J.* 221, (1978), pp. 272-273. See also UNITED NATIONS, *Unification of the Law of International Trade Note by the Secretariat Official Records of the General Assembly 20th Session*, (1968), Doc. A/C6/L572, § 15; GOLDŠTAJN Aleksandar, “Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention,” in ŠARČEVIĆ Petar & VOLKEN Paul, (eds.), *International Sale of Goods: Dubrovnik Lectures 55*, (1986), Oceana Publications, p. 56; GILLETTE, 39 *Va. J. Int’l L.*, (1999) p. 710. DE LY Filip, “Sources of International Sales Law: An Eclectic Model,” 25 *J.L. & Com.* 1, (2005-06), p. 5, on the other hand, is of the opinion that custom and usage are increasingly losing relevance due to globalisation and technological changes and that they only apply in closed business environments. Courses of dealing between the same parties are much more relevant in the modern trade situation.

<sup>34</sup>SCHMITTHOFF, *International Trade Usages*, (1987), §§ 64-74; Franco Ferrari, “Uniform Interpretation of The 1980 Uniform Sales Law,” 24 *Ga. J. Int’l Comp. L.* 183, 183-186 (1994-95); Stephen Brainbridge, 24 *Va. Jnl. Int’l L.* 624-628 (1984); DALHUISEN, 18 *Duke J. Comp. & Int’l L.*, (2008), pp. 340-341; BASEDOW, 56 *Am. J. Comp. L.*, (2008), p. 703-706.

form or other is an issue of much debate.<sup>35</sup> Opinions range from support for an independent and autonomous body of international commercial law based on mercantile customs and usages,<sup>36</sup> to those who restrict the operation of custom to party agreement, municipal law or the ratification of international conventions.<sup>37</sup> For present purposes, it is sufficient to say that there are a number of scholars who believe in the existence of such an independent and autonomous body of international commercial law.<sup>38</sup> It should also be noted that there is a practice amongst international commercial arbitrators to resort to a so-called new *lex mercatoria*, consisting of internationally accepted principles of international trade, based on mercantile customs and usages.<sup>39</sup>

Although there is little agreement on what the sources or elements of the international law merchant are,<sup>40</sup> it is clear that its goal is to provide a universal conception of international trade law that is driven by the business community in an effort to move away from the unsuitability of national law in the international context and the arbitrariness and impracticability of private international law rules. These rules are characterized by being uniform, a-national or transnational rules consisting of customs and usages that are developed by merchants for the use of merchants. They can provide a common frame of reference for negotiations, which can save time and money and at the same time they provide flexibility as they are bound by the principle of party autonomy. They are furthermore adaptable to changing commercial needs.

### 3. LIMITATIONS TO THE HARMONIZATION FUNCTION OF MERCANTILE CUSTOM IN THE CONTEXT OF TRADE TERMS

Insofar as mercantile customs and trade usages reflect consistent and homogeneous practices which are uniformly followed in a specific area or in a particular trade, they fulfill a harmonization function. However, this function is not always achieved with equal success. The judicial recognition of and the interpretation of custom can present an obstacle to the pursuit of harmonization. Where a particular custom is restricted to a particular trade, or even to a geographic area or region, it is not always easy to define and understand the practice if you are not familiar with it.<sup>41</sup> Interpretation is furthermore complicated by the fact that the common understanding of custom tends to shift as commercial practices evolve in reaction to changing commercial realities. This is particularly true for trade terms,<sup>42</sup> which are commonly used in international sales.

Trade terms are based on mercantile customs and were developed by merchants for merchants. They represent trade usages in respect of the delivery obligations of the parties and the allocation of risk of loss of or damage to the goods resulting from events outside the control of the parties. The majority of

<sup>35</sup>Pierrick Le Goff, "Global Law: A Legal Phenomenon Emerging From the Process of Globalisation," 14 *Ind. J. Global Legal Stud.* 119, 125-126 (2007).

<sup>36</sup>BERMAN & KAUFMANN 19 *Harv. Int'l L.J.*, (1978), pp. 272-277.

<sup>37</sup>MANIRUZZAMAN Abdul F.M., "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration," 14 *Am. U. Int'l L. Rev.* 657, (1999), pp. 671-672; SCHMITTHOFF, Clive M., "The Unification of the Law of International Trade," in Cheng, Chia-Jui, (ed.). *Clive M Schmitthoff's Select Essays on International Trade Law* (1988) 170, Martinus Nijhoff Publishers, pp. 171-172; SCHMITTHOFF *International Trade Usages*, (1987), §§ 64-74.

<sup>38</sup>DALHUISEN, 18 *Duke J. Comp. & Int'l L.*, (2008), p. 348.

<sup>39</sup>BERMAN & KAUFMANN, 19 *Harv. Int'l L.J.*, (1978), pp. 276-277; Abdul F.M. Maniruzzaman, 14 *Am. U. Int'l L. Rev.*, (1999), p. 706.

<sup>40</sup>GOODE 46(1) *I.C.L.Q.* 1, (1997), pp.4-5; DALHUISEN Jan H. Dalhuisen on *International Commercial, Financial and Trade Law*, (2000), Hart Publishing 98-117.

<sup>41</sup>BERMAN & KAUFMANN, 19 *Harv. Int'l L.J.*, (1978), pp. 254, 275; GILLETTE, 5 *Chi. J. Int'l L.* (2004), pp. 158, 164-166; GILLETTE, 39 *Va. Jnl. Int'l L.*, (1999), pp. 711-712

<sup>42</sup>Also known as delivery terms or price terms.

commercial sales contracts, including standard contracts used by specific branches of trade, contain trade terms. To the extent that they replace elaborate contract clauses and are consistent with the customs and usages commonly applied in certain types of trade or in particular ports, trade terms reduce transaction costs and increase the overall efficiency of the contract.

However, because terms appear in abbreviated form in a contract of sale they need to be defined or interpreted to be legally relevant. Trade term meanings are not immutable. They are by nature dynamic and susceptible to development in commercial practice.<sup>43</sup> Moreover, the dynamic nature is not always self-initiated. Parties tend to adapt trade terms to suit their particular needs, for example by adding the stowing or trimming obligation to the FOB term. Such modifications are often attended with great uncertainty as people attribute different meanings to the terms so modified.<sup>44</sup>

Differences may also occur between definitions adhered to by national jurisdictions within the same legal family. For example, the traditional meaning of FOB as defined by the English courts<sup>45</sup> is followed in the United Kingdom, Canada and Australia, but in the United States of America, FOB is used in other contexts as well.<sup>46</sup>

Inconsistency in commercial practice causes their meanings to differ from country to country or from one branch of the trade to another, depending on the practice in that particular trade or locality.<sup>47</sup> Sometimes trade usages are limited to a particular trade<sup>48</sup> or port.<sup>49</sup> Even standard contracts of different tra-

<sup>43</sup>Trade terms evolve as transportation practices develop, such as in reaction to the container revolution or the advent of multimodal transport for example.

<sup>44</sup>See KLOTZ J.M. & BARRETT J.R. Jr, *International Sales Agreements: An Annotated Drafting and Negotiating Guide*, 1st ed, (1998), Kluwer Law, pp. 69-73 for a discussion on the modifications of the FOB term. In English law, for example, different FOB “variants” or “types” have developed over time. ZELLER Bruno, “Is the Ship’s Rail Really Significant?,” 2 N.J.C.L. 1 (2005), p. 3. See also, REYNOLDS Barney, “Stowing, trimming and their effects on delivery, risk and property in sales ‘fobs’, ‘fobt’ and ‘fobst’ ” 1 L.M.C.L.Q. 119-130, (1994). LIGHTBURN James J & NIENABER Gawie M, “Out-turn clauses in cif contracts in the oil trade,” L.M.C.L.Q. 177-187 (1987).

<sup>45</sup>According to the traditional view, FOB functions as a shipment term.

<sup>46</sup>Before the 2003 revision, “FOB vessel” referred to the regular understanding of FOB as a shipment term, whilst “FOB place of destination” defined FOB as an arrival contract and “FOB place of shipment” did not require the seller to load the goods onto the vessel, which is required under the traditional FOB term. See §§ 2-319(1)(a) & (b) UCC (2001); GABRIEL Henry, “International Chamber of Commerce INCOTERMS 2000: A Guide to Their Terms and Usage,” 5 V.J. 41, (2001), p. 52. See also, MURRAY Daniel E., “Risk of Loss of Goods in Transit: A Comparison of the 1990 INCOTERMS with terms from other voices,” 23 U. Miami Inter-Am. L. Rev. 93, (1991), pp. 105-106 for a discussion on the American case law dealing with FOB variants. According to American trade usage, shipping costs are also allocated differently depending on the FOB variant. On trade terms in American law, see in general, KLOTZ & BARRETT, *International Sales Agreements*, (1998), pp. 70-71. Although these definitions were repealed by the 2003 revision of the American Uniform Commercial Code, it seems that there is a general reluctance amongst the American states to enact these revisions into their domestic law.

<sup>47</sup>SCHMITTHOFF, *International Trade Usages*, (1987), § 37; KLOTZ & BARRETT, *International Sales Agreements*, (1998), pp. 72-73.

<sup>48</sup>The meaning of FOB in the international oil trade differs from that in the Swedish lumber trade, for example. SCHMITTHOFF, *International Trade Usages*, (1987), § 37. In the steel industry, a CIF contract that calls for shipment “September-October” means delivery in October or November. MURRAY, 23 U. Miami Inter-Am. L. Rev., (1991), p. 115. In the oil trade, a trade usage exists according to which an FOB buyer has to give the seller timely notice of loading. *Scandinavia Trading Co A/S v Zodiac Petroleum SA and William Hudson Ltd: The Al Hofuf*, [1981] 1 Lloyd’s Rep. 81, 84.

<sup>49</sup>In the port of Stockholm, a trade usage exists which determines that if wood products are sold “FOB Stockholm,” the buyer has to bear the loading costs into the vessel. Through this trade usage the FOB delivery is converted into an FAS delivery. SCHMITTHOFF, *International Trade Usages*, (1987), § 27; KLOTZ & BARRETT, *International Sales Agreements*, (1998), pp. 72-73. In the port of Bristol, on the other hand, the point to which the shipper bears

de organizations often treat trade terms and their incidental obligations differently.<sup>50</sup>

In many cases merchants are unaware of the differences in trading practice between their respective countries. Divergent interpretations cause uncertainty and misunderstanding and pose a serious impediment to international trade. The outcome of a dispute on the meaning of a trade term will often depend on the place where the dispute is to be resolved and the law applicable at that specific place. In other words, despite the general harmonization role and function of trade terms, differences in meaning detract from their efficacy as an instrument of harmonization. There is clearly a need to standardize or codify trade term definitions. The ICC INCOTERMS endeavor to fulfill such a standardization function.

#### 4. INCOTERMS AS A METHOD OF STANDARDIZING DIVERGENT MERCANTILE CUSTOM

INCOTERMS represent a codification of the international mercantile customs and usages applicable to the delivery obligations of the seller and buyer where goods have to be transported from one place to another. Because international sales cover a vast range of trade sectors and goods, it is often difficult to find consistent commercial practice in different countries and trades.<sup>51</sup> INCOTERMS can therefore merely reflect the most common or dominant practice. In the absence of sufficient precision, INCOTERMS often have to be supplemented by the governing law of the contract or through customs and trade usages prevalent in a particular trade or port or even through a previous course of dealing between the parties to the contract. Moreover, INCOTERMS recognize that parties may have specific needs which can only be addressed through their own arrangement. The principle of party autonomy is therefore recognized and supported.

Because INCOTERMS represent a set of rules reflecting the current practice of a majority of the businessmen engaged in international trade, they are more effective than national legal rules that regulate the delivery obligations of the seller and buyer.<sup>52</sup> INCOTERMS manage to take the latest trade practices into account, such as providing for multi-modal and container transport in the form of the FAS, CPT and CIP terms, but at the same time they respect long-established practices such as the “ship’s rail” in the case of the FOB and CIF terms.

INCOTERMS, furthermore, enhance their overall efficiency by following a pragmatic model, whi-

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the costs depends on the customs of the various shipping companies’ conferences. Some of the charges form part of the freight costs to be borne by the buyer. Similarly, in the port of Glasgow, delivery from transit shed to alongside the vessel, making up slings, hooking up and hoisting to the rail of the vessel, are all considered to be part of the freight costs. In the port of Seattle, where the seller pays the cost of handling the goods on the docks, the cost of stevedoring or transferring the cargo from the dock to the ship is also considered to be part of the freight which is paid by the buyer. On the other hand, in the port of Liverpool, the seller is responsible for the goods until placed on board the vessel, including the costs for carriage to Liverpool, cartage, haulage and lighterage as well as wharf handling charges applied by certain conferences together with certain duties. SASSOON David M., *CIF and FOB Contracts*, 4th ed, (1995), Sweet & Maxwell, §§ 468-470; BRITISH ASSOCIATION OF CHAMBERS OF COMMERCE “FOB Vessel” (1971).

<sup>50</sup>DASSER Felix, *INCOTERMS and Lex Mercatoria: Applicability of INCOTERMS in the Absence of Express Party Consent*, LL M thesis, Harvard, (1995), p. 41. The UK Grain and Feed Association (GAFTA), for example, has five FOB contracts in the United Kingdom. One of these contracts provide that the buyer has to take out insurance on the goods and supply the seller with conformation thereof at least five days before the vessel should be ready, failing which the seller shall have the right to take out such insurance at the expense of the buyer. See also, ADEMUNI-ODEKE, “Insurance of FOB Contracts in Anglo-American and Common Law Jurisdictions Revisited: The Wider Picture,” 31 Tul. Mar. L.J. 425, (2007), p. 456.

<sup>51</sup>Practices in the loading of ships under the FOB term and the unloading from ships under CFR and CIF terms are examples where it has been difficult to identify consistent practices. RAMBERG, *ICC Guide to INCOTERMS 2000*, (1999), ICC Publication No. 620, p. 14. See also the discussion under 3 supra.

<sup>52</sup>EISEMANN, “INCOTERMS and the British Export Trade,” J.B.L., (1965), p. 115.



ch provides for regular revisions<sup>53</sup> of the rules to keep them in line with modern commercial practices and transportation techniques. INCOTERMS also acknowledge the use of technology to facilitate communication.<sup>54</sup> As an organization concerned with international business, the ICC has the necessary incentive to search for and correct inefficiencies in existing trade usages. Moreover, the wide range of INCOTERMS enable parties to choose a term best suited to their individual situation.<sup>55</sup>

However, INCOTERMS have their own limitations that prevent them from functioning as the governing law of the contract. In the first place, they have a limited scope of regulation. They do not regulate all the aspects of a sales contract and apply only to the primary obligations of delivery and related issues, such as risk, costs, insurance and matters incidental to the export and import of goods such as consular and customs formalities or packaging and marking of the goods.<sup>56</sup> INCOTERMS do not regulate those substantive aspects common to all contracts of sale, such as mistake and other matters affecting the validity of contracts, transfer of property, impossibility of performance, misrepresentation, duties of the seller regarding eviction or the qualities of the goods, the buyer's duty to pay, impediments against performance caused by unforeseen and unavoidable events, breach and remedies for breach of contract. INCOTERMS have to function in conjunction with other stipulations of the contract or the governing law to regulate the contractual rights and obligations of the parties to the contract in full.<sup>57</sup>

Secondly, it is not entirely clear whether they are capable of enjoying a form of autonomous application independently of party agreement. Unless incorporated into the municipal legislation of a country, INCOTERMS do not enjoy the status of a statutory instrument.<sup>58</sup> It is generally accepted that INCOTERMS will only be applicable when incorporated into the contract of sale as a contractual term.<sup>59</sup> If the parties have a longstanding business relationship and routinely have made use of INCOTERMS to define the trade term used in their contract in the past, INCOTERMS could be inferred as part of the tacit consensus of the parties even if not expressly mentioned in a later transaction. Courts often use INCOTERMS as an "interpretative aid" which provides information on the possible intention of the parties and they, therefore, function as a subsidiary source of interpretation.<sup>60</sup> In the absence of any express reference to the codifica-

<sup>53</sup>Note that INCOTERMS 2000, which are currently in force, will be replaced by the revised INCOTERMS 2010 as from 1 January 2011.

<sup>54</sup>The A8 and B8 clauses of all the INCOTERMS provide for electronic transport documents.

<sup>55</sup>GABRIEL, 5 V.J., (2001), p. 43; RAMBERG, *Guide to INCOTERMS 2000*, (1999), pp. 19-20 for other considerations that could come into play when considering the appropriate trade term.

<sup>56</sup>ICC INCOTERMS 2000 (the official rules), (1999), ICC Publications No.166., § 1; RAMBERG, *ICC Guide to INCOTERMS 2000*, (1999), pp. 11-13.

<sup>57</sup>ICC INCOTERMS 2000, Introduction, § 1; EISEMANN, J.B.L., (1965), p. 117; RAMBERG, *ICC Guide to INCOTERMS 2000*, (1999), pp. 11-13; BERGAMI Roberto, "INCOTERMS 2000 as a Risk Management Tool for Importer," 10 V.J. 273, (2006), pp. 274-275; HONNOLD John O., "Uniform Law and Uniform Trade Terms – Two Approaches to a Common Goal," in HORN Norbert & SCHMITTHOFF Clive M., (eds.), *The Transnational Law of International Commercial Transactions II* 161, (1982), Kluwer, p. 171.

<sup>58</sup>SCHMITTHOFF, *International Trade Usages*, (1987), § 39; SCHMITTHOFF, "The Law of International Trade," in Clive M Schmitthoff's *Select Essays* pp. 219, 224; GABRIEL, 5 V.J., (2001), p. 41, n. 6.

<sup>59</sup>ICC Incoterms 2000, Introduction, § 4; CLOUT Case No. 104 (ICC International Court of Arbitration Case No. 7197 of 1992), <http://cisgw3.law.pace.edu/cases/937197i1.html> (last visited 18-07-2009) and <http://www.unilex.info/case.cfm?pid=1&do=case&id=37&step=Abstract> (last visited 18-07-2009); High Arbitration Court (or Presidium of Supreme Arbitration Court) of the Russian Federation 25 December 1996: Information Letter 10, <http://cisgw3.law.pace.edu/cases/961225r1.html> (last visited 02-06-2009); Russian Arbitration proceedings 220/1996 of 11 April 1997, <http://cisgw3.law.pace.edu/cases/970411r1.html> (last visited 02-06-2009); Russian Arbitration proceedings 27/2001 of 24 January 2002, <http://cisgw3.law.pace.edu/cisg/cases/020124r1.html> (last visited 02-06-2009); ICC Arbitration Case No. 7645 of March 1995 <http://cisgw3.law.pace.edu/cases/957645i1.html> (last visited 23-07-2009).

<sup>60</sup>ERAUW Johan, "CISG Articles 66-70: The Risk of Loss and Passing It," 25 J.L. & Com., 203, (2005-06), p. 213; VALIOTI Zoi, *Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention for the International Sale A comparative examination of the rules on risk*

tion, courts and arbitral tribunals also refer to INCOTERMS on the basis of them being consistent with and representative of international trade practices and usages.<sup>61</sup>

Courts and arbitral tribunals furthermore rely on Article 9(1) CISG as the basis for applying INCOTERMS to a contract. Where the parties clearly refer to them, INCOTERMS apply as “codified” trade usage which the parties have agreed to.<sup>62</sup> Even when the parties make no express reference to such usages, they will nevertheless be “embodied” in their contract of sale as part of their implied agreement. Contract terms that arise from practices under Article 9(1) prevail over the Convention by virtue of Articles 6 and 8.<sup>63</sup> An analysis of the case law on the CISG shows that this approach has been followed by a number of courts and arbitral tribunals when dealing with the meaning of trade terms.<sup>64</sup> Although such a practice does not necessarily have to be widely known, a well established practice of contractual dealings involving more than one contract is required.<sup>65</sup>

The question, however, remains whether INCOTERMS can have application beyond the express or tacit (implied) intent of the parties. Customs acquire a normative function when they meet certain stringent criteria.<sup>66</sup>

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under the United Nations Convention for the International Sale of Goods (Vienna 1980) and INCOTERMS 2000, LL M thesis, Kent, (2003), <http://cisg3.law.pace.edu/cisg/biblio/valioti.html> (last visited 01-04-2009), text accompanying n. 45. DASSER, *INCOTERMS and the Lex Mercatoria*, (1995) p. 76; German BGH 18 June 1975, VIII ZR 34/74 NW 917. See also BASEDOW, 56 Am. J. Comp. L., (2008), p. 709. OLG München, NJW 1957 426, AWD 1958 79.

<sup>61</sup>Xiamen Trade v. Lian Zhong (Xiamen Intermediate People’s Court China 5 September 1994) <http://cisgw3.law.pace.edu/cases/940905c1.html> (last visited 23-07-2009) and <http://www.unilex.info/case.cfm?pid=1&do=case&id=211&step=Abstract> (last visited 31-07-2009); CIETAC Arbitration proceeding (PVC suspension resin case) China 7 April 1999, <http://cisgw3.law.pace.edu/cases/990407c1.html> (last visited 02-06-2009); CLOUT Case No. 549 (Cherubino Valsangiacomo S.A. v. American Juice Import Inc. Appellate Court Valencia, Spain 7 June 2003, <http://cisgw3.law.pace.edu/cases/030607s4.html> (last visited 02-06-2009); Arbitration proceeding 406/1998 Russia, 6 June 2000, <http://cisgw3.law.pace.edu/cases/000606r1.html> (last visited 02-06-2009); Arbitration proceeding 62/1998 Russia, 30 December 1998, <http://cisgw3.law.pace.edu/cases/981230r1.html> (last visited 02-06-2009).

<sup>62</sup>ERAUW Johan, “Observations on the passing of risk,” in FERRARI Franco et al, (eds.), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention*, 292, (2004) Sweet & Maxwell, p. 304; PAMBOUKIS, 25 J.L. & Com., (2005-06), p. 112; SCHMIDT-KESSEL Martin “Article 9,” in SCHLECHTRIEM Peter & SCHWENZER Ingeborg, (eds.), *Commentary on the UN Convention on the International Sale Of Goods (CISG)*, 2nd ed., (2005), Oxford University Press, § 6; BONELL Michael Joachim, “Article 9” Bianca Cesare Massimo & Bonell Michael Joachim, (eds.), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, (1987), Guifrè, § 2.3; HONNOLD John O., *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed., (1999), Kluwer Law, §§ 114 & 118.

<sup>63</sup>Schmidt-Kessel, “Article 9,” in Schlechtriem/Schwenzer Commentary, (2005), § 10; BONELL Michael J., “Article 9,” in Bianca/Bonell Commentary, §§ 1.3.1 & 2.1.2.

<sup>64</sup>Presidium of Supreme Arbitration Court of the Russian Federation 25 December 1996: Information Letter 10, <http://cisgw3.law.pace.edu/cases/961225r1.html> (last visited 02-06-2009); ICC Arbitration Case No. 7645 of March 1995 (crude metal case), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/957545i1.html> (last accessed 23-07-2009); Arbatax S.A. Reorganization Proceeding (Juzgado Comercial Argentina [Commercial Court] Buenos Aires 2 July 2003), <http://cisgw3.law.pace.edu/cases/030702a1.html> (last visited 19-05-2009); Marc Rich & Co. v. Irtechna SpA ([Corte di Appello di Genova] Appellate Court Geneva Italy 24 March 1995), <http://cisgw3.law.pace.edu/cases/950324i3.html> (last visited 28-08-2009) and <http://www.unilex.info/case.cfm?pid=1&do=case&id=198&step=Abstract> (last visited 28-09-2009).

<sup>65</sup>SCHMIDT-KESSEL, “Article 9,” in Schlechtriem/Schwenzer Commentary, (2005), § 8; BONELL, “Article 9,” in Bianca/Bonell Commentary, (1987), § 2.1.1; HONNOLD, *Uniform Law*, (1999) § 116; PAMBOUKIS, 25 J.L. & Com., (2005-06), pp. 116-118.

<sup>66</sup>Custom usually requires uniformity in substance, behavior or application; constant repetition as well as public notoriety of the custom. ALBÁN Jorge Oviedo, “Remarks on the Manner in which the UNIDROIT Principles May be Used to Interpret or Supplement CISG Article 9,” <http://cisgw3.law.pace.edu/cisg/text/anno-art-09.html> (last visited 07-03-2009), text accompanying n. 5.

By virtue of Article 9(2) CISG the parties are considered to have impliedly made applicable to their contract usages which the parties knew or ought to have known<sup>67</sup> and which are widely known in international trade and regularly observed in the particular trade concerned, unless the parties have agreed otherwise. A usage must be internationally known, at least in the particular trade to which it applies.<sup>68</sup> It must also be known and observed by the majority of those involved in the particular industry or trade.<sup>69</sup> Inasmuch as a usage must be “widely known” and “regularly observed”, it can be assumed to be part of the expectations of the parties. To that extent the requirements of Article 9(2) are premised on the presumption of the implied intention of the parties.<sup>70</sup> However, where one or both of the parties to the contract had no knowledge of the usage but ought to have known of it, the question has to be asked whether it is not the law itself, rather than the implied agreement of the parties, that confers binding force on the usage.

Whether the CISG attributes a normative function to trade usages is controversial. Some scholars are of the view that Article 9(2) grants a normative value to trade usages,<sup>71</sup> whilst others argue that in the scheme of the Convention trade usage can function merely as gap-fillers to supplement the intention of the parties where they failed to make alternative arrangements.<sup>72</sup> The applicable usage then “has the same effect as a contract” between the parties.<sup>73</sup> However, the supporters of the latter view admit that, by virtue of Article 9(2) the parties to an international sales contract may be bound by specific trade usages, even in the absence of party agreement. Both requirements, namely that that the parties knew or ought to have known of the trade usage, as well as that the usage should be well known and regularly observed in international trade in that specific type of trade, should be satisfied though. To that extent, the provision confers legal effect on the objective expectations of the parties.

An American court<sup>74</sup> construed Article 9(2) differently by not limiting the applicable usages to the ones that meet the aforementioned requirements. It held that “the usages and practices of the parties or the industry are automatically incorporated into any agreement governed by the Convention, unless expressly excluded by the parties.” This judgment seems to border on a normative approach.

INCOTERMS as a codification of international trade usages may therefore enjoy automatic application if they constitute trade usage as understood by Article 9(2) CISG.<sup>75</sup> This view is reinforced by the case law on the CISG.<sup>76</sup> Rulings by the Russian Tribunal of International Commercial

<sup>67</sup>This phrase introduces the objective theory that accept usages as applicable to the contract even if unknown to one or both of the parties. This requirement could possibly confer an objective normative function to usage.

<sup>68</sup>SCHMIDT-KESSEL, “Article 9,” in Schlechtriem/Schwenzer Commentary, (2005), §§ 16 & 18; BONELL, “Article 9,” in Bianca/Bonell Commentary, (1987), §§ 2.2.2-2.2.3; HONNOLD, Uniform Law, (1999), § 120.1. This does not mean that the usage should be an international usage. Domestic usages will suffice if they are internationally known and observed.

<sup>69</sup>SCHMIDT-KESSEL, “Article 9,” in Schlechtriem/Schwenzer Commentary, (1995), § 16.

<sup>70</sup>PAMBOUKIS, 25 J.L. & Com., (2005-06), pp. 118-119; GOLDSTAJN, “Usages of Trade and Other Autonomous Rules of International According to the UN,” in International Sale of Goods, p. 97; HONNOLD, Uniform Law, (1999), §§ 120.1 & 121.

<sup>71</sup>PAMBOUKIS, 25 J.L. & Com., (2005-06), pp. 118-119; BONELL “Article 9,” in Bianca/Bonell Commentary, (1987), § 2.2.1; BOUT Patrick X., “Trade Usages: Article 9 of the Convention in Contracts for the International Sale of Goods”, (1998), <http://cisgw3.law.pace.edu/cisg/biblio/bout.html> (last visited 12-10-2009), text accompanying n. 23; ALBÁN “Remarks” n. 2; PERALES VISCASILLAS Pilar, “Comments on the draft Digest relating to Articles 14-24 and 66-70” in FERRARI Franco et al (eds.), The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention 259, (2004), Sweet and Maxwell, p. 290.

<sup>72</sup>SCHMIDT-KESSEL, “Article 9,” in Schlechtriem/Schwenzer Commentary, (2005), §§ 1 & 12; BAINBRIDGE, 24 Va. Jnl. Int’l L., (1984), p. 659.

<sup>73</sup>HONNOLD, Uniform Law, (1999), § 122.

<sup>74</sup>CLOUT Case No 579 (Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc. - United States Federal District Court New York, 10 May 2002), <http://cisgw3.law.edu/cases/020510u1.html> (last visited 21-08-2009).

<sup>75</sup>HONNOLD, Uniform Law, (1999), § 119; PERALES VISCASSILLAS, “Comments on the draft Digest” in The Draft UNCITRAL Digest and Beyond, (2004), p. 290. According to Bout, “Trade Usages”, (1998), § II F, INCOTERMS are so widely known and widespread in international trade, that it may be assumed that they are part of the

Arbitration<sup>77</sup> and an Argentinean court<sup>79</sup> support this view. Courts in the United States, amongst them an important appellate court, have also relied on Article 9(2) to imply INCOTERMS into a contract.<sup>79</sup> The United States Court of Appeal<sup>80</sup> held that “[e]ven if the usage of INCOTERMS is not global, the fact that they are well known in international trade means that they are incorporated through Art. 9(2).” A Texas court<sup>81</sup> also held that INCOTERMS are “the dominant source of definitions for the commercial delivery terms used by parties to international sales contracts” and are incorporated into the CISG through Article 9(2) CISG.

However, Article 9(2) CISG not only requires a usage of which the parties “knew or ought to have known” or which is “well-known”, but also one which is “regularly observed by parties to contracts of the type involved in the particular trade concerned”. The absence of regular observance can therefore present a problem for the application of INCOTERMS on the basis of Article 9(2).<sup>82</sup> Some scholars argue that INCOTERMS in toto are not widely known in every kind of trade and therefore cannot satisfy the requirements of Article 9(2) CISG.<sup>83</sup> However, it should be pointed out that Article 9(2) does not require that a usage should be internationally known and observed across the full spectrum of international trade for it to find automatic application.<sup>84</sup> Therefore, INCOTERMS will apply in those trades where they are indeed known and regularly observed.<sup>85</sup>

expectations of the parties.

<sup>76</sup>SCHMIDT-KESSEL, “Article 9,” in Schlechtriem/Schwenzer Commentary, (2005), § 26; ALBÁN, “Remarks”, text accompanying n. 16.

<sup>77</sup>Russian Federation Chamber of Commerce and Industry Arbitration Award No 406/1998, Russia 6 June 2000, <http://cisgw3.law.pace.edu/cases/000606r1.html> (last visited 02-06-2009).

<sup>78</sup>CLOUT Case No. 21 (Juzgado Nacional de Primera Instancia en lo Comercial No. 7, Argentina 20 May 1991), <http://www.unilex.info/case/cfm?pid=1&do=case&id=14&step=Abstract> (last visited 21-08-2009). See also the ruling of the Commercial Court of Argentina, *Arbatax SA Reorganization Proceeding* (Juzgado Comercial Argentina [Commercial Court] Buenos Aires 2 July 2003), <http://cisgw3.law.pace.edu/cases/030702a1.html> (last visited 19-05-2009).

<sup>79</sup>CLOUT Case No 447 (St Paul Guardian Insurance Co v Neuromed Medical Systems & Support 2002 WL 465312 (SD NY 2002), judgment aff’d, 53 Fed Appx 173 (2d Cir 2002), 2002 US Dist LEXIS 5096 (SDNY March 26 2002), United States Federal District Court New York 26 March 2002) <http://cisgw3.law.pace.edu/cases/020326u1.html> (accessed 20-08-2009).

<sup>80</sup>CLOUT Case No. 575 (B.P. Oil International v. Empresa Estatal Petroleos De Ecuador 332 F. 3d 333 (5th Cir. 2003) 338, 200 A.L.R. Fed. 771, Federal Appellate Court [5th Circuit] United States, 11 June 2003), <http://cisgw3.law.pace.edu/cases/030611u.html> (last visited 21-08-2009). This ruling was made by an important American appellate court, the 5th circuit. This court covers the states of Texas and Louisiana, where the important trade centres Houston, Dallas and New Orleans are located.

<sup>81</sup>China North Chemical Industries Corporation v. Beston Chemical Corporation W.L. 295396 (S.D. Tex. 2006), U.S. Federal District Court Texas, 7 February 2006, <http://cisgw3.law.pace.edu/cases/060207u1.html> (last visited 02-06-2009).

<sup>82</sup>SCHMIDT-KESSEL, “Article 9,” in Schlechtriem/Schwenzer Commentary, (2005), § 26. See, however, *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*, United States Federal District Court New York, 10 May 2002), <http://cisgw3.law.pace.edu/cases/020510u1.html> (last visited 21-08-2009) where the court applied trade usage automatically without proof of any additional requirements.

<sup>83</sup>This is especially true for the less well known INCOTERMS. ERAUW, “Observations on passing of risk” in *The Draft UNCITRAL Digest and Beyond*, (2004), p. 303; HONNOLD, *Uniform Law*, (1999), § 118.

<sup>84</sup>Domestic usages can also suffice as long as they are internationally well known and regularly observed in the trade concerned. See CLOUT Case No. 175 (Oberlandesgericht [Appellate Court] Graz, Austria, 9 November 1995 – marble slabs case), <http://cisgw3.law.pace.edu/cases/951109a3.html> (last visited 21-08-2009); CLOUT Case No. 240 (Oberstergerichtshof [Supreme Court] Austria, 15 October 1998 – timber case), <http://cisgw3.law.pace.edu/cases/981015a3.html> (last visited 21-08-2009); CLOUT Case No. 425 (Supreme Court Austria, 21 March 2000 – wood case), <http://cisgw3.law.pace.edu/cases/000321a3.html> (last visited 21-08-2009).

<sup>85</sup>According to BRIDGE Michael G., *The International Sale of Goods: Law and Practice*, (1999), Oxford University

The United States Court of Appeal<sup>86</sup> held that, even though the use of INCOTERMS is not universal, they can be incorporated by virtue of Article 9(2) CISG because they are well known in international trade. In support of its view, the court relied on the fact that courts in France and Germany have incorporated INCOTERMS into a contract on the basis of international trade usage or custom.<sup>87</sup> Further support is found in the UNCITRAL Secretariat's statement that INCOTERMS are widely-observed usages for commercial terms which will replace the provisions of the Convention where applicable.<sup>88</sup>

Despite misgivings on whether INCOTERMS should qualify as international trade usage in toto,<sup>89</sup> most scholars agree that the older and more established trade terms, such as FOB and CIF, will qualify as Article 9(2) trade usages as they represent commercial practice that goes back a long time.<sup>90</sup> They are widely known and respected and may have acquired the status of autonomous international trade customs<sup>91</sup>. These scholars hold that the cases which acknowledged INCOTERMS as Article 9(2) trade usages only dealt with the best known and frequently-used trade terms. No cases are reported involving less known trade terms such as the D-terms or EXW. The interpretative results for those are accordingly still uncertain.<sup>92</sup> They conclude that it is impossible to find that all of the INCOTERMS qualify as Article 9(2) usages since all of them do not satisfy the strict criteria.

Although it is true that the cases dealing with INCOTERMS as normative trade usages involved well-known trade terms such as CIF and FOB, the rulings referred to INCOTERMS in toto and not merely to a particular INCOTERM. Moreover, if it is customary in a particular trade to refer to INCOTERMS as a whole, the codification as such will be implied by law. Rules which are based on consistent business prac-

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Press, pp. 69-70 this is why INCOTERMS will apply in the oil trade even in the absence of express agreement, whilst with dry cargo they will only apply if expressly agreed on.

<sup>86</sup>CLOUT Case No. 575 (B.P. Oil International v. Empresa Estatal Petroleos De Ecuador 332 F. 3d 333 (5th Cir. 2003) 338, 200 A.L.R. Fed. 771, Federal Appellate Court [5th Circuit] United States, 11 June 2003), <http://cisgw3.law.pace.edu/cases/030611u.html> (last visited 21-08-2009).

<sup>87</sup>FOLSOM Ralph H., *International Business Transactions I*, 2nd ed. (2002), West Group, p. 114 lends support to this statement.

<sup>88</sup>Report by the Secretary-General of the UN Commission on International Trade Law, UN Doc. A/7618 §§ 48-50, 57. It is also believed that the authors of the Convention had INCOTERMS in mind when they decided to omit any reference to trade terms in the Convention.

<sup>89</sup>SCHMIDT-KESSEL, "Article 9," in *Schlechtriem/Schwenzer Commentary*, (2005), § 26. He concedes, however, that INCOTERMS may function as a "lasting 'dependable source' of international trade usages." Some commentators go so far as to reject the entire idea of INCOTERMS having an autonomous function. GABRIEL, 5 V.J., (2001), pp. 42-43. BRIDGE Michael G, "The Transfer of Risk under the U.N. Sales Conventions 1980 (CISG)," in ANDERSEN Camilla Baasch & Schroeter Ulrich G., (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday 77*, (2008), Wildy Simmonds & Hill, p. 90 believes that INCOTERMS have to be incorporated into the contract to find application, either through express or implied agreement as envisaged by Art. 6 CISG.

<sup>90</sup>PERALES VISCASILLAS, "Comments on the draft Digest," in *The Draft UNCITRAL Digest and Beyond*, (2004), p. 290; BASEDOW, 56 Am. J. Comp. L., (2008), p. 709. See, however, SPANOGLE John A., "Incoterms and the UCC Article 2- Conflicts and Confusions," 31 Int'l L. 111, (1997), p. 113, who accepts their status as international trade usage without distinguishing between established terms and the more modern INCOTERMS.

<sup>91</sup>ROWE Michael C., "The Contribution of the ICC to the Development of International Trade Law," in HORN Norbert & SCHMITTHOFF Clive M. (eds.), *The Transnational Law of International Commercial Transactions II* 51, (1982), Kluwer, p. 53. DE LY Filip, *International Business Law and Lex Mercatoria*, (1992), North Holland, pp. 174-175, holds that the more recent terms are not derived from international trade usage. The ICC created the more modern trade terms, which affects their legal nature as international trade usage.

<sup>92</sup>PERALES VISCASILLAS, "Comments on the draft Digest" in *The Draft UNCITRAL Digest and Beyond*, (2004), p. 291; ROWE, "The Contribution of the ICC," in *Transnational Law II*, (1982), p. 53; De Vries H., "The Passing of Risk in International Sales under the Vienna Sales Convention 1980 as compared with Traditional Trade Terms," 17 Eur. Trans. L. 495 (1982), p. 497 n. 37.

tice may gradually acquire the force of international custom if they are regularly observed over a long period of time in a certain sphere of trade. Therefore, the more commonly INCOTERMS are used in a specific trade or region, the greater the possibility that they are to be followed as trade usage or mercantile custom, which are binding on the parties even if they did not know about them.<sup>93</sup> Basedow<sup>94</sup> is of the opinion that INCOTERMS were originally aimed at reconciling divergent international understandings of trade terms by means of a deliberate international compromise, but that through their continuous use they have over the course of one or two generations been gradually transformed into commercial custom. Whether INCOTERMS can enjoy autonomous application independent of party agreement is, therefore, an issue which is largely dependent on the degree to which they are consistently recognised and applied by merchants in a particular trade.

## 5 CONCLUSION

Mercantile custom plays an important role in international commercial law, whether that is as a source of or merely as an element of the new law merchant. Customs and trade usages fulfill a harmonization function, whereby the problems created by arbitrary rules of private international law are reduced. Mercantile customs and usages are created by merchants for the use of merchants. They are able to address the needs of international trade far better than statutory default rules, which are often out of touch with the realities of international trade. However, despite its harmonization function, it is at times difficult to identify consistent practices on a universal level. Trade usages and practices tend to be linked to a specific location, trade or port in which they are used. Especially in the context of trade terms, differences in interpretation detract from their harmonization function. This necessitates the standardization of trade term meanings, such as provided by the ICC INCOTERMS.

INCOTERMS reduce transaction costs by providing legal certainty and clarity. Their efficiency is enhanced by their flexible and dynamic nature. However, because of their limited scope of regulation, INCOTERMS cannot function as an autonomous legal system INCOTERMS have to be supplemented by the governing law of the contract to address aspects that are beyond their scope of regulation. However, in combination with other international instruments of harmonization and unification, such as the UNIDROIT Principles or the CISG, they are capable of constituting a framework law that can facilitate international sales effectively.

<sup>93</sup>EISEMANN, J.B.L., (1965), pp. 121-122; DASSER, INCOTERMS and the Lex Mercatoria, (1995), 71. SCHMITTHOFF, "The Law of International Trade," in Clive M Schmitthoff's Select Essays, pp. 224 considers INCOTERMS as one of the sources of the law of international trade. He distinguishes between two sources, namely international legislation and international commercial custom. The latter consists of commercial practices, usages or standards which have been formulated by international agencies such as the ICC. Although he believes that international commercial custom has no autonomous application independent of the will of the parties and that it only functions as contractual trade usage, he seems to express a slightly different view in International Trade Usages, (1987), §§ 40 & 48. In §§ 52-57 & 62, where he states that trade usages are capable of functioning as normative usages if they qualify as universal trade usages. INCOTERMS are "positioned on the borderline of normative and contractual trade usages" and may have crossed this border in some jurisdictions. Germany is mentioned as an example where this might have happened already. He concludes that INCOTERMS' practical application is far more important than their legal qualification. INCOTERMS are used extensively in international trade by countries such as Germany, Austria, Finland, Sweden Switzerland, Yugoslavia, Ireland and at the time of the publication of the report, which was almost twenty years ago, their use was already growing in the UK, USA and the Philippines. The observance of such usages in practice should be the important and decisive factor in determining their true character. Schmitthoff observes that in jurisdictions which only accord contractual character to INCOTERMS, many jurists already consider them "an incipient normative usage [which] will assume this character fully in due course." Taking into consideration that this report was published in 1987, the normative character of INCOTERMS might even be fully established by now. DALHUISEN, 18 Duke J. Comp. & Int'l L., (2008), p. 356 agrees that, although they are normally applied as contract terms, INCOTERMS may also operate as custom.

<sup>94</sup>56 Am. J. Comp. L., (2008), pp. 709-710.