INTERNATIONAL AND EUROPEAN COMMERCIAL AND COMPANY LAW

Relevant trade usage and practices under UN sales law

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I. Introduction

The relevance of usage and practices within the framework of contractual relationships governed by the UN Convention on Contracts for the International Sale of Goods (CISG)[1] has not often been the subject of academic research.[2] The same can be said of case law on Article 9 CISG, the provision regulating this issue, which has to date dealt with this topic only rarely and, in my opinion, not always exhaustively. Only some aspects– albeit important ones – have actually been addressed in the various judgments. This is also the case in respect of the latest judgment on Article 9 CISG, *St. Paul Guardian Insurance Co., et al.* v *Neuromed Medical Systems & Support, et al.*,[3] which involved the question of how clauses added to a contract governed by the CISG (such as CIF, FOB, etc.) are to be interpreted in the absence of any reference to INCOTERMS.

This short article will address this issue[4] as well as other questions relating to the relevance of trade usage and practices in the context of the CISG.

The starting point for the discussion is the text of Article 9 CISG, which is based upon Article 13 ULF and Article 9 ULIS,[5] but nevertheless generated intense discussions on the occasion of the Vienna Conference.[6] Article 9 dispositively[7] defines the legal consequences of usage and practices within the framework of the contracts governed by the CISG.[8] However, it is essential to distinguish between usages and existing practices that have been accepted by the parties (paragraph 1) on the one hand and other relevant usages which bind the parties even in the absence of an agreement by the parties (paragraph 2) on the other.[9]

II. Usages agreed to and practices established between the parties

1. Usages

Under Article 9(1) CISG, the parties are bound by any usage to which they have agreed. In this regard it is not necessary that the agreement be made explicitly; the agreement by which the usages become relevant may also be implicit,[10] as long as there is a real consent,[11] which can also take place after conclusion of the contract.

The term "usage" is unfortunately not defined in the CISG.[12] This does not warrant recourse to domestic notions

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1 This appears to be the most commonly used abbreviation; in this regard, see *Flessner/Kadner*, CISG? Zur Suche nach einer Abkürzung für das Wiener Übereinkommen über Verträge über den internationalen Warenkauf, [1995] ZEuP 347 et seq.

2 For articles concerning the meaning of usages and practices, see *Bainbridge*, Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Convention, [1984] 24 Va. J. Int'l L. 619 et seq.; *Bonell*, Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980, [1985] ÖstJBl 385 et seq.; *Farnsworth*, Unification and Comparative Law in Theory and Practice: Liber amicorum Jean Georges Sauveplanne, Deventer (NL), 1984, at 81 et seq.; *Ferrari*, La rilevanza degli usi nella convenzione di Vienna sulla vendita internazionale di beni mobili, [1994] Contr. Imp. 239 et seq.; *Goldstajn*, in: *Sarcevic/Volken* (eds), Dubrovnik Lectures, New York (USA), 1986, at 55 et seq.; *Holl/Keßler*, "Selbstgeschaffenes Recht der Wirtschaft" und Einheitsrecht - Die Stellung der Handelsbräuche und Gepflogenheiten im Wiener UN-Kaufrecht, [1995] RIW 457 et seq.

3 2002 U.S. Dist. Lexis 5096 (S.D.N.Y. 2002).

4 On this question, see the text in note 78 et seq.

5 See *Achilles*, Kommentar zum UN-Kaufrechtsübereinkommen (CISG), Neuwied (D), 2000, Article 9, para. 2; *Bianca/Bonell/Bonell*, Commentary on the International Sales Law, Milan (I), 1987, Article 9, commentary 1.2; *Herber/Czerwenka*, Internationales Kaufrecht, Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf, München (D), 1991, Article 9, para. 1; *Honsell/Melis*, Kommentar zum UN-Kaufrecht, Berlin (D), 1997, Article 9, para. 1; *Staudinger/Magnus*, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG), 13th revised ed., Berlin (D), 1999, Article 9 CISG, para. 3.

6 See Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees (Vienna, 10 March – 11 April 1980), U.N. Doc. A/Conf.97/19, New York (USA), 1981 (cited: O.R.) at 89, 262 et seq.; *Bianca/Bonell/Bonell* (*supra* note 5), Article 9, commentary 2.3.

7 *Bonell*, Commento all'art. 9 della convenzione di Vienna, Nuove leggi civ. comm. 1989 at 37, 38.

8 *Holl/Keßler* (*supra* note 2), 457.

9 See also: *Goddard*, El Contrato de Compraventa Internacional, Mexico City (MEX), 1994, at 80; *Diez-Picazo/Calvo Caravaca*, La compraventa internacional de mercaderías. Comentario de la Convención de Viena, Madrid (E), 1998, Article 9, at 137.

10 O.R. (*supra* note 6) at 19; *Achilles* (*supra* note 5), Article 9, para. 4; *Bianca/Bonell/Bonell* (*supra* note 5), Article 9, commentary 2.1.2; *Bonell* (*supra* note 7), at 39; *Ferrari* (*supra* note 2), 247; *Honsell/Melis* (*supra* note 5), Article 9, para. 2; *Huber*, Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge, [1979] RabelsZ 413, 427; *Karollus*, UN-Kaufrecht, Vienna/New York (A/USA), 1991, at 50; *Rudolph*, Kaufrecht der Export und Import Verträge, Kommentierung des UN-Übereinkommens über Internationale Warenkaufverträge mit Hinweisen für die Vertragspraxis, Freiburg/Berlin (D), 1996, Article 9, para. 2; *Schlechtriem/Junge*, Kommentar zum Einheitlichen UN-Kaufrecht (CISG), 3rd ed., Munich (D), 2000, Article 9, para. 8; *Soergel/Lüderitz/Lorenz*, Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Volume 13, Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG), Stuttgart (D), 2000, Article 9 CISG, para. 3; *Witz/Salger/Lorenz*, Einheitliches Kaufrecht, Heidelberg (D), 2000, Article 9, para. 5; to the same effect in the case law, see OGH (A) 21 March 2000 – 10 Ob 344/99g, CISG Austria Online; for a different point of view, see *Goddard* (*supra* note 9), at 80 et seq.; *Gilette*, Harmony and Stasis in Trade Usages for International Sales, [1999] 39 Va. J. Int'l L. 707, 713.

11 *Achilles* (*supra* note 5), para. 5; *Herber/Czerwenka* (*supra* note 5), Article 9, para. 6; *Staudinger/Magnus* (*supra* note 5), Article 9 CISG para. 9.

12 *Goddard* (*supra* note 9), at 80; *Bianca/Bonell/Bonell* (*supra* note 5), Article 9, commentary 3.1; *Bonell* (*supra* note 7), at 38; *Diez Picazo/Calvo Caravaca* (*supra* note 9), Article 9, at 140; *Goldstajn* (*supra* note 2), at

or definitions, however, as this would run counter to the *ratio conventionis*.[13] As is the case with most of the terms used in the CISG,[14] the concept of usages must in fact be autonomously interpreted[15] – in other words, interpreted on its own without resorting to the national law of the interpreter or to particular national concepts or perceptions.[16] Accordingly, usages within the meaning of the CISG include all those actions or modes of behaviour (including omissions)[17] which are generally and regularly observed in the course of business transactions in a specific area of trade or at a certain trade centre.[18] However, it is not necessary that the relevant commercial circles be believe that the usages are binding.[19]

In contrast to usages to which the parties are bound under Article 9(2), it is not necessary that usages under Article 9(1) be international.[20] Local, regional or national usages may also be relevant under this provision.[21] Furthermore, Article 9(1), as opposed to Article 9(2),[22] does not require that the usages be "widely known".[23] The fact that every rule agreed to by the parties supersedes those of the CISG[24] has induced some authors to contend that an exact delimitation of usages is not relevant as far as Article 9(1) is concerned – this is not true in respect of Article 9(2).[25]

Since it concerns a question that is basically[26] not dealt with by the CISG,[27] whether the usages agreed to by the parties are valid will depend on the national law applicable under conflict of law rules[28] – or, in the case of usages that are common to certain trade centres, such as seaports or stock exchanges, the law applicable in that location.[29] If it is determined that these usages are applicable (and effectively agreed upon), they trump the provisions of the CISG.[30]

2. Practices established between the parties

Practices within the meaning of the CISG are manners of conduct that are regularly observed by or have been established between the parties to a specific transaction, whichever the case may be,[31] such as the prompt delivery of spare parts for sold machinery.[32] The individual practice between the parties, rather than the general practice, is thus decisive,[33] which necessarily presupposes a business relationship characterised by a certain duration as well as the conclusion of number of contracts.[34] According to case law, this condition is not satisfied, however, in the case of a pre-existing relationship between two parties that is limited to two contracts that have been concluded simultaneously,[35] nor can any practice arise

96; *Honsell/Melis* (*supra* note 5), Article 9, para. 3; *Rudolph* (*supra* note 10), Article 9, para. 6; *Schlechtriem/Junge* (*supra* note 10), Article 9, para. 2.

13 *Ferrari*, Vendita internazionale di beni mobili. Artt. 1-13. Ambito di applicazione. Disposizioni generali, Bologna (I), 1994, at 187; *Holl/Keßler* (*supra* note 2), 458.

14 For more details, see *Schlechtriem/Ferrari* (*supra* note 10), Article 7, para. 11 et seq.

15 *Achilles* (*supra* note 5), Article 9 para. 2; *Bianca/Bonell/Bonell* (*supra* note 5), Article 9, commentary 3.2; *Bonell* (*supra* note 2), 386; *Diez Picazo/Calvo Caravaca* (*supra* note 9), Article 9, at 140; *Ferrari* (*supra* note 13), at 187; *Herber/Czerwenka* (*supra* note 5), Article 9, para. 4; *Honsell/Melis* (*supra* note 5), Article 9, para. 3; *Witz/Salger/Lorenz* (*supra* note 10), Article 9, para. 4.

16 *Staudinger/Magnus* (*supra* note 5), Article 7 CISG, para. 12; likewise *Diedrich*, Autonome Auslegung von Internationalem Einheitsrecht. Computersoftware im Wiener Kaufrecht, Baden-Baden (D), 1994, at 77; *Ferrari*, Besprechung von Magnus, Wiener UN-Kaufrecht, Berlin (D), 1995, [1997] IPRax 64, 65; *Heuzé*, La vente internationale de marchandises - droit uniforme, 2nd ed., Paris (F), 2000, commentary 95; *Honsell/Melis* (*supra* note 5), Article 7, para. 5; *Schlechtriem*, Internationales UN-Kaufrecht, Tübingen (D), 1996, para. 43; *Torzilli*, The Aftermath of MCC-Marble: Is This the Death Knell for the Parol Evidence Rule?, [2000] 74 St. John's L. Rev. 843, 859; in the case law, see OLG Karlsruhe (D) 25 June 1997 – 1 U 280/96, Unilex (stating that German legal terms such as mistake [*Fehler*] and "warranted characteristics" [*zugesicherte Eigenschaften*] are not transferable to the CISG); Gerichtspräsident Laufen, 7 May 1993, Unilex (stating that the CISG should be interpreted autonomously and not from the respective national law viewpoint held by the individual applying the law).

17 *Ferrari* (*supra* note 2), 244; *Schlechtriem/Junge* (*supra* note 10), Article 9, para. 2.

18 *Bianca/Bonell/Bonell* (*supra* note 5), Article 9, para. 4; *Honsell/Melis* (*supra* note 5), Article 9, para. 3; *Staudinger/Magnus* (*supra* note 5), Article 9 CISG, para. 7.

19 *Schlechtriem/Junge* (*supra* note 10), Article 9, para. 3.

20 *Honsell/Melis* (*supra* note 5), Article 9, para. 6; *Karollus* (*supra* note 10), at 51; stated explicitly in case law, OGH (A) 21 March 2000 – 10 Ob 344/99g, Unilex.

21 *Achilles* (*supra* note 5), Article 9, para. 4; *Bonell* (*supra* note 2), at 388; *Schlechtriem/Junge* (*supra* note 10), Article 9, para. 8.

22 On this point, see text in note 65 et seq.

23 To this effect, see *Soergel/Lüderitz/Fenge* (*supra* note 10), Article 9 CISG, para. 3; *Staudinger/Magnus* (*supra* note 5), Article 9 CISG, para. 8; in the case law, see OGH (A) 15 October 1998, [1999] JBl. 318.

24 See e.g. *Bianca/Bonell/Bonell* (*supra* note 5), Article 9, commentary 2.1.2.

25 *Staudinger/Magnus* (*supra* note 5), Article 9 CISG para. 7; to the same effect, see *Rudolph* (*supra* note 10), Article 9, para. 7.

26 However, it follows from Article 11 CISG that the formal requirements under the applicable national law concerning validity do not govern as a rule; see, contrary to all others, see *Herber/Czerwenka* (*supra* note 5), Article 9, para. 5.

27 See, for instance, *Bonell* (*supra* note 7), at 42; *Karollus* (*supra* note 10), at 50; *Rudolph* (*supra* note 10), Article 9 para. 3; *Schlechtriem/Ferrari* (*supra* note 10), Article 4, para. 26 et seq.; in the case law, see OGH (A) 22 October 2001 – 1 Ob 49/01i, Unilex; OGH (A) 21 March 2000 – 10 Ob 344/99g, CISG Austria Online.

28 *Achilles* (*supra* note 5), Article 9, para. 13; *Goddard* (*supra* note 9), at 83; *Bianca/Bonell/Bonell* (*supra* note 5), Article 9, commentary 3.4; *Ferrari* (*supra* note 13), at 188; *Holl/Keßler* (*supra* note 2), 460; *Honsell/Melis* (*supra* note 5), Article 9, para. 4; *Soergel/Lüderitz/Fenge* (*supra* note 10), Article 9 CISG, para. 6; *Staudinger/Magnus* (*supra* note 5), Article 9 CISG, para. 10; *Witz/Salger/Lorenz* (*supra* note 10), Article 9, para. 13; in the case law, see OGH (A) 15 October 1998, [1999] ZfRvgl 63.

29 *Schlechtriem/Junge* (*supra* note 10), Article 9, para. 5.

30 *Goddard* (*supra* note 9), at 81; *Enderlein/Maskow/Strohbach*, Internationales Kaufrecht, Berlin (D), 1991, Article 9, para. 1.2; *Ferrari* (*supra* note 13), at 192; *Herber/Czerwenka* (*supra* note 5), Article 9, para. 6; *Holl/Keßler* (*supra* note 2), 460; *Honsell/Melis* (*supra* note 5), Article 9, para. 6; *Karollus* (*supra* note 10), at 50; *Plantard*, Un nouveau droit uniforme de la vente internationale: La Convention des Nations Unies du 11 avril 1980, [1988] J.D.I. 311, 317; *Rudolph* (*supra* note 10), Article 9, para. 1; *Schlechtriem/Junge* (*supra* note 10), Article 9, para. 2; for the same, expressly stated in case law, see OGH (A) 21 March 2000 – 10 Ob 344/99g, Unilex.

31 *Bonell* (*supra* note 2), 387; *Karollus* (*supra* note 10), at 51; *Piltz*, Internationales Kaufrecht, Munich (D), 1993, § 2 para. 177.

32 Arbitral Court of the CCI Paris (F), Arbitral Award No. 8611, Unilex.

33 See *Achilles* (*supra* note 5), Article 9, para. 16; *Bianca/Bonell/Bonell* (*supra* note 5), Article 9, commentary 2.1.1; *Bonell* (*supra* note 7), at 39; *Ferrari* (*supra* note 13), at 189; *Herber/Czerwenka* (*supra* note 5), Article 9, para. 3; *Holl/Keßler* (*supra* note 2), 457; *Honsell/Melis* (*supra* note 5), Article 9, para. 4; *Karollus* (*supra* note 10), at 51; *Neumayer/Ming*, Convention de Vienne sur les contrats de vente internationale de marchandises. Commentaire, Lausanne (CH), 1993, Article 9, commentary 1; *Rudolph* (*supra* note 10), Article 9, para. 4; *Soergel/Lüderitz/Fenge* (*supra* note 10), Article 9 CISG, para. 2; *Staudinger/Magnus* (*supra* note 5), Article 9 CISG, para. 13.

34 See also *Schlechtriem/Junge* (*supra* note 10), Article 9, para. 7; also refer to *Schlechtriem* (*supra* note 16), para. 60, who mentions the requirement of a certain continuity and duration of a practice (*eine gewisse Häufigkeit und Dauer einer Übung*).

35 ZG Kanton Basel-Stadt (CH) 3 December 1997 – P4 1996/00448, Un-

from one single delivery of goods between the parties.[36] Therefore, a judgment of the Austrian Supreme Court (OGH) was met with some surprise,[37] in which the OGH ruled it perfectly conceivable that a party's perceptions from preliminary discussions, although not expressly agreed upon, could form part of the first contract as "practices" within the meaning of Article 9, even at the outset of the business relationship.

The fact that parties are bound by those practices that have originated between them in the course of extended business relations is in keeping with the general principles of good faith underlying the CISG[38] as well as the prohibition of *venire contra factum proprium*.[39] A factual element of trust, which may not be frustrated, has come into existence between the parties.[40] Accordingly, for instance, a party cannot contend that the contract makes no specific requirements in respect of notification periods (with which the complaining party has not complied) if existing practices indicate the opposite. The parties may, of course, dispense with these practices by agreement.[41]

With regard to the relationship between practices existing between the parties and the provisions of the CISG, it must be assumed that the former have priority.[42] Should the usages agreed upon contradict those practices established between the parties, the usages agreed upon take precedence.[43]

III. Binding force of international trade usages

1. Widely known and regularly observed usages

Article 9(2) states that in the absence of any agreement to the contrary, the parties are bound by specific international trade usages. As a compromise to satisfy the concerns of several countries that feared the prevalence of usages unknown to them or, as the case may be, usages in the development of which they did not take part,[44] the scope of application of the fictional agreement between the parties[45] under Article 9(2), i.e. to binding usages,[46] has been very narrowly circumscribed.[47] These usages must be widely known and regularly observed in the particular international trade concerned.[48] Moreover, the parties must have either known or ought to have known about the usages.[49] If the aforementioned prerequisites are met, the usages are applicable[50] and take precedence over the CISG,[51] as recognised in recent case law.[52] However, in the event of a contradiction between, on the one hand, the applicable usages agreed upon by the parties or the practices established between them and, on the other hand, the usages that are applicable by virtue of a fictional agreement between the parties, the former take precedence.[53] The same also applies to the relationship between the individual contractual clauses and usages that are applicable under Article 9(2);[54] the precedence of contractual clauses can clearly be derived from

ilex; but see also AG Duisburg (D) 13 April 2000, [2001] IHR 114, 115, where it is explicitly pointed out that a certain duration and continuity does not yet exist in the case of two previous deliveries.

36 LG Zwickau (D) 19 March 1999 – 3 HKO 67/98, CISG Online.

37 OGH (A) 6 February 1996 – 10 Ob 518/95, Unilex.

38 *Honsell/Melis* (*supra* note 5), Article 9, para. 4; *Schlechtriem/Junge* (*supra* note 10), Article 9, para. 7.

39 *Achilles* (*supra* note 5), Article 9, para. 16; *Diez-Picazo/Calvo Caravaca* (*supra* note 9), Article 9, at 137; *Honnold*, Uniform Law for International Sales, 3rd ed., Boston (USA), 1999, para. 116; *Honsell/Melis* (*supra* note 5), Article 9, para. 4; *Rudolph* (*supra* note 10), Article 9, para. 4; *Witz/Salger/Lorenz* (*supra* note 10), Article 9, para. 16.

40 *Herber/Czerwenka* (*supra* note 5), Article 9, para. 3; *Honnold* (*supra* note 39), para. 116; *Soergel/Lüderitz/Fenge* (*supra* note 10), Article 9 CISG, para. 2.

41 *Honnold* (*supra* note 39), para. 116; in the case law, see CCI Paris, Arbitral Award No. 8817, Unilex.

42 *Diez-Picazo/Calvo Caravaca* (*supra* note 9), at 138; *Rudolph* (*supra* note 10), Article 9, para. 1; *Staudinger/Magnus* (*supra* note 5), Article 9 CISG, para. 12; *Witz/Salger/Lorenz* (*supra* note 10), Article 9, para. 1.

43 See *Achilles* (*supra* note 5), Article 9, para. 8; *Diez-Picazo/Calvo Caravaca* (*supra* note 9), Article 9, at 138; *Ferrari* (*supra* note 13), at 192; *Garro/Zuppi*, Compraventa internacional de mercaderías, Buenos Aires (RA), 1990, at 62; *Piltz* (*supra* note 31), § 2 para. 178; *Reinhart*, UN-Kaufrecht, Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf, Heidelberg (D), 1991, Article 9 para. 2; for a different opinion, see *Staudinger/Magnus* (*supra* note 5), Article 9 CISG, para. 15 (proposing a case-by-case approach); see *Enderlein/Maskow/Strohbach* (*supra* note 30), Article 9, commentary 3 (holding view that practices should take precedence).

44 See *Schlechtriem/Junge* (*supra* note 10), Article 9, para. 9; *van Houtte*, Algemene Bepalingen en interpretatie, in: *van Houtte/Erauw/Wautelet* (eds), Het Weens Koopverdrag, Antwerpen/Groningen (B/NL), 1997, at 53, 65.

45 Similarly, see *Achilles* (*supra* note 5), Article 9, para. 6; *Bonell* (*supra* note 7), at 40; *Enderlein/Maskow/Strohbach* (*supra* note 30), Article 9, para. 4; *Herber/Czerwenka* (*supra* note 5), Article 9, para. 7; *Honsell/Melis* (*supra* note 5), Article 9, para. 8; *Rudolph* (*supra* note 10), Article 9, para. 2; *Staudinger/Magnus* (*supra* note 5), Article 9 CISG, para. 16; *Witz/Salger/Lorenz* (*supra* note 10), Article 9, para. 6; in the case law, see OGH (A) 21 March 2000 – 10 Ob 344/99g, CISG Austria Online; against the classification as "fiction", see *Neumayer/Ming* (*supra* note 33), Article 9, commentary 3.

46 *Soergel/Lüderitz/Fenge* (*supra* note 10), Article 9 CISG, para. 1, refers to normative customs (*normativen Verkehrssitten*); similarly, see *Rudolph* (*supra* note 10), Article 9, para. 8; in the case law, see Juzgado Nacional de Primera Instancia en lo Comercial No. 7 (Argentina) 20 May 1991 – 50272, Unilex.

47 See *Schlechtriem* (*supra* note 16), para. 61.

48 See OGH (A) 15 October 1998, [1999] ÖstJBl., 318.

49 *Ferrari* (*supra* note 13), at 195; *Herber/Czerwenka* (*supra* note 5), Article 9, para. 8; *Gilette* (*supra* note 10), 719; *Maskow*, The Convention on the International Sale of Goods from the Perspective of the Socialist Countries, in: La vendita internazionale. La convenzione di Vienna dell'11 aprile 1980, Milan (I), 1981, at 39, 58; *Neumayer/Ming* (*supra* note 33), Article 9, commentary 3; in the case law, see Arbitral Court of the CCI Paris (F), Arbitral Award No. 8324/1995, Unilex; ZG Kanton Basel-Stadt (CH) 21 December 1992 – P4 1991/238, Unilex.

50 Thus incorrectly decided is *Geneva Pharmaceuticals Technology Corp./Barr Laboratories Inc.*, 2002 WL 959574 (S.D.N.Y. 2002), according to which the usages always apply, provided that the parties have not expressly excluded this.

51 See also *Audit*, La vente internationale de marchandises, Paris (F), 1990, at 45; *Bernardini*, La compravendita internazionale, in: *Mirabelli* (ed.), Rapporti internazionali nel diritto internazionale, Milan (I), 1991, at 77, 82; *Bydlinski*, Das allgemeine Vertragsrecht, in: *Doralt* (ed.), Das UNCITRAL-Kaufrecht im Vergleich zum österreichischen Recht, Vienna (A), 1985, at 57, 76; *Carbone*, L'ambito di applicazione ed i criteri interpretativi della convenzione di Vienna sulla vendita internazionale, in: La vendita internazionale. La convenzione di Vienna dell'11 aprile 1980, Milan (I), 1981, at 61, 77; *Diez Picazo/Calvo Caravaca* (*supra* note 9), Article 9, at 144; *Ferrari* (*supra* note 13), at 202; *Garro/Zuppi* (*supra* note 43), at 62; *Gilette* (*supra* note 10), 711; *Honnold* (*supra* note 39), para. 122; O.R. (*supra* note 6), at 19; *Rudolph* (*supra* note 10), Article 9, para. 9.

52 OGH (A) 21 March 2000 – 10 Ob 344/99g, CISG Austria Online; OGH (A) 15 October 1998, [1998] östJBl. 318 et seq.

53 See *Achilles* (*supra* note 5), Article 9, para. 1; *Bonell* (*supra* note 7), at 40; *Gilette* (*supra* note 10), 722; *Herber/Czerwenka* (*supra* note 5), Article 9, para. 7; *Rudolph* (*supra* note 10), Article 9, para. 7; *Soergel/Lüderitz/Fenge* (*supra* note 10), Article 9 CISG, para. 1; *Staudinger/Magnus* (*supra* note 5), Article 9 CISG, para. 19.

54 OLG Saarbrücken (D) 13 January 1993 – 1 U 69/92, Unilex; for a minority opinion in the academic literature, see *Honnold* (*supra* note 39), para. 121.

the introductory language of Article 9(2). However, should the usages applicable under Article 9(2) be contradictory, it may be assumed that that those usages most closely related to the contractual relationship would take precedence.[55]

The usages binding to the parties, even in the absence of any agreement, must be "widely known" in the relevant branch of international trade.[56] This does not mean that all persons who are active in that particular branch of trade must know those usages,[57] neither is it necessary that the usages be known throughout the world.[58]

This also does not preclude the application of those usages which may be of mere local relevance, or valid only in certain places, i.e. usages at trade exhibitions or seaports.[59] For such local usages to be valid under Article 9(2), however, it is necessary that international trade occur at these places[60] and that that the usages comply with all the requirements listed with regard to the degree of recognition and regular observance.[61]

With regard to the aforementioned requirement concerning the regular observance of usages, some of the legal literature has suggested that this is a "superfluous" prerequisite, since all usages that are widely known would be regularly observed.[62] This point of view cannot be supported,[63] since it is most certainly possible that there are particular usages in certain countries that are also known in other countries, but not regularly observed there.[64]

2. Extent of familiarity with usages

Under Article 9(2), the parties involved in a specific business transaction are bound only by usages if these usages are known to them at the time of conclusion of the contract,[65] or if they ought to have been familiar with these usages (whereas for constructive knowledge no particular degree of negligence is required).[66] This subjective requirement[67] would often, but – and this is the point – not always be present in the case of usages that are "widely known"; the requirement is therefore not dispensable or redundant.[68] One could in fact conceive of cases where usages were not known to the parties or where they ought not necessarily to have known about these usages, even though such usages are indeed "widely known".[69]

With regard to constructive knowledge, it has partly been acknowledged in legal literature and also in more recent case law[70] – indeed correctly so – that only those parties resident in the area where the usages are widely known or involved in the relevant branch of business there are subject to application of those usages.[71]

3. Silence as response to commercial letters of confirmation

The question of whether the rules governing the issue of silence by the recipient of a commercial letter of confirmation are usages that are binding on the parties to a contract governed by the CISG must be answered in the light of what has been said in the previous sections.[72] It is safe to assume that the rules pertaining to this issue may be understood as usages within the (autonomous) meaning of the CISG;[73] however, neither this fact, nor the circumstance that the rules relating to letters of confirmation are valid in the country of the place of business of recipient, suffice as reasons to bind the parties under Article 9(2).[74] In fact, it is required that both parties have their place of business in the area where this practice exists or that they conduct business there on a regular basis. Further-

55 *Achilles* (*supra* note 5), Article 9, para. 8; see, for another opinion, *Bianca/Bonell/Bonell* (*supra* note 5), Article 9, commentary 2.2.3, who is of the opinion that the contradicting usages are mutually exclusive.

56 The period of exercise of usages is irrelevant, insofar that usages are widely known and observed regularly; see *Honnold* (*supra* note 39), para. 120.1; *Staudinger/Magnus* (*supra* note 5), Article 9 CISG, para. 23.

57 *Staudinger/Magnus* (*supra* note 5), Article 9 CISG, para. 22.

58 Also see *Achilles* (*supra* note 5), Article 9, para. 6; *Audit* (*supra* note 51), at 46; *Bonell* (*supra* note 2), 391; *Diez Picazo/Calvo Caravaca* (*supra* note 9), Article 9, at 142; *Ferrari* (*supra* note 13), at 199; *Herber/Czerwenka* (*supra* note 5), Article 9, para. 9; *Rudolph* (*supra* note 10), Article 9, para. 9; *Schlechtriem/Junge* (*supra* note 10), Article 9, para. 9; *van Houtte* (*supra* note 44), at 65.

59 *Achilles* (*supra* note 5), Article 9, para. 5; *Audit*, *l.c.* ; *Bianca/Bonell/Bonell* (*supra* note 5), Article 9, commentary 2.2.3; *Bonell* (*supra* note 7), at 40; *Ferrari* (*supra* note 2), 255; *Herber/Czerwenka* (*supra* note 5), Article 9, para. 11; for a different opinion, see *Berman/Kaufman*, The Law of International Commercial Transactions (Lex Mercatoria), [1978] 19 Harv. Int'l L. J. 221, 221; *Honsell/Melis* (*supra* note 5), Article 9, para. 8.

60 *Herber/Czerwenka* (*supra* note 5), Article 9, para. 9; *Schlechtriem/Junge* (*supra* note 10), Article 9, para. 9; *Soergel/Lüderitz/Fenge* (*supra* note 10), Art. 9 CISG, para. 4.

61 *Achilles* (*supra* note 5), para. 9; *Audit* (*supra* note 51), at 46; *Bonell* (*supra* note 2), 391; *Diez Picazo/Calvo Caravaca* (*supra* note 9), Article 9, at 142; *Ferrari* (*supra* note 13), at 199; *Honnold* (*supra* note 39), para. 120.1; *Karollus* (*supra* note 10), at 52; *Neumayer/Ming* (*supra* note 33), Article 9, commentary 4; *Staudinger/Magnus*, (*supra* note 5), Article 9 CISG, para. 22; in the case law, see OLG Graz (A) 9 November 1995 – 6 R 194/95, Unilex (addressing the relevance of local usages as an interpretative aid).

62 *Huber* (*supra* note 10), 428.

63 Also see *Herber/Czerwenka* (*supra* note 5), Article 9, para. 10.

64 See also *Enderlein/Maskow/Strobach* (*supra* note 30), Article 9 para. 10; *Ferrari* (*supra* note 2), 253.

65 *Karollus* (*supra* note 10), at 52.

66 See *Staudinger/Magnus* (*supra* note 5), Article 9 CISG, para. 30.

67 *Achilles* (supra note 5), for instance, qualifies the requirement in this way, Article 9 para. 7; *Ferrari* (*supra* note 13), at 196; *Frignani*, Il contratto internazionale, Padua (I), 1990, at 311; *Herber/Czerwenka* (*supra* note 5), Article 9, para. 10; *Reinhart* (*supra* note 43), Article 9 para. 3; *Bainbridge* (supra note 2), at 655, is of a different opinion: He qualifies the said requirement as an objective prerequisite.

68 To this effect, *Huber* (*supra* note 10), 428; also see *Soergel/Lüderitz/Fenge* (*supra* note 10), Article 9 CISG, para. 5 (denoting the limited practical importance of the requirement).

69 *Enderlein/Maskow/Strohbach* (*supra* note 30), Article 9, para. 8; *Ferrari* (*supra* note 13), at 198.

70 OGH (A) 21 March 2000 – 10 Ob 344/99g, CISG Austria Online (stating that trade usages that are widely known and observed are binding only on parties who either reside in the area where these usages are practised or who are regularly active in the specific branch of trade there).

71 To this express effect, see *Staudinger/Magnus* (*supra* note 5), Article 9, CISG para. 25; see also *Achilles* (*supra* note 5), Article 9, para. 7.

72 Similarly, see ZG Kanton Basel-Stadt (CH) 21 December 1992 – P4 1991/238, Unilex (stating that a letter of confirmation is contractually binding within the meaning of the CISG, provided that this form of conclusion of a contract may be classified as a trade usage under Article 9 CISG).

73 To this effect, see *Esser*, Die letzte Glocke zum Geleit? - Kaufmännische Bestätigungsschreiben im Internationalen Handel: Deutsches, Französisches, Österreichisches und Schweizerisches Recht und Einheitliches Recht unter der Kaufrechtskonvention von 1980, [1988] ZfRvgl 167, 188 et seq.; *Piltz* (*supra* note 31), § 2 para. 178.

74 To the same extent, see also *Herber/Czerwenka* (*supra* note 5), Article 9 para. 12; for a different opinion, see *Ebenroth*, Internationale Vertragsgestaltung im Spannungsverhältnis zwischen AGBG, IPR-Gesetz und UN-Kaufrecht, [1986] OstJBl. 681, 688.

more, the practice must be well known and regularly observed in the relevant branch of trade.[75] This has at least been confirmed in those judgments[76] which do not entirely exclude the possibility that the rules pertaining to silence as a response to commercial letters of confirmation may be applicable as international usage within the meaning of the CISG.[77]

4. INCOTERMS

INCOTERMS may be applicable under Article 9(1) on the basis of the agreement between the parties[78] or under Article 9(2), if the set prerequisites have been satisfied. The INCOTERMS do not include any legal rules themselves;[79] rather, they contain a catalogue of rules for the interpretation of the most important terms used in foreign trade contracts (most notably with respect to the point of time and modalities concerning delivery of goods and the transfer of documents, acceptance and transfer of risk).[80] It is debatable whether the reference to clauses which are also included in INCOTERMS (CIF, FOB, etc.) indicates the parties' consent to the application of the rules of interpretation contained there, even in the absence of any express reference to INCOTERMS. This question was answered in the affirmative in the US judgment cited in first section of this article.[81] In my opinion such consent is not self evident,[82] as the abbreviations in the various countries do not always have the meaning ascribed to them by INCOTERMS.[83]

IV. Burden of proof

In conclusion, the question of the burden of proof will only briefly be touched upon, although this is an aspect of great practical importance. The starting point for this discussion is the question of whether it is possible to draw up one or more general principles relating to the burden of proof which precludes the application of national law under Article 7(2). This is a controversial question.[84] Although several authors have rejected the point of view that the burden of proof is regulated by the CISG and that national law therefore applies,[85] the prevalent opinion is to the contrary.[86] In principle, the party benefiting from a provision must prove the actual prerequisites set out by that provision.[87] Regarding the distribution of the burden of proof, the basic rule is therefore *actore incumbit probatio*;[88] this rule has in the meantime also gained recognition in case law as fundamental to the CISG.[89] Therefore, it is required that the party relying either on a practice or usage prove the relevant practice or usage[90] – at the very least in the event that national procedural law[91] qualifies the evidence of the usage as a factual issue[92] or if the court is not obliged to gain proof of the usage itself,[93] which is often the case.[94] The parties are not bound by any practices or usages that are not proved.[95]

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75 See also *Achilles* (*supra* note 5), Article 9, para. 4; *Bydlinski* (*supra* note 51), at 79 et seq.; *Holl/Kessler* (*supra* note 2), 459; *Neumayer/Ming* (*supra* note 33), Article 9, commentary 4; *Schlechtriem* (*supra* note 16), para. 62; *Soergel/Lüderitz/Fenge* (*supra* note 10), Article 9 CISG, para. 7; *Staudinger/Magnus* (*supra* note 5), Article 9 CISG, para. 27; *van Houtte* (*supra* note 44), at 65 (setting less stringent prerequisites).

76 See OLG Frankfurt (D) 5 July 1995 – 9 U 81/94, Unilex (stating that the fact that a trade usage is valid in only one of the two contracting states, is not sufficient for the establishment of a particular trade usage due to the requirement of internationality stipulated in Article 9(2) CISG and that it is also not sufficient that the trade usage in respect of the commercial letter of confirmation exist merely at the domicile of the recipient of the letter in Germany); see judgment of ZG Kanton Basel-Stadt (CH) 21 December 1992 – P4 1991/238, Unilex (failing to take notice of the fact that in one of the two states involved (namely Austria), the effect of such a letter of confirmation, i.e. the conclusion of a contract, has been ruled out [on Austrian law, see for instance, OGH (A) 26 June 1974, [1975] ÖstJBl. 89]).

77 However, see LG Frankfurt (D) 6 July 1994 – 2/1 O 7/94, Unilex: (stating that the rules developed in German law with regard to silence as a response to letters of confirmation are not applicable to in the area of the uniform CISG).

78 On this, see *Honsell/Melis* (*supra* note 5), Article 9, para. 7.

79 *Herber/Czerwenka* (*supra* note 5), Article 9, para. 16; *Rudolph* (*supra* note 10), Article 9, para. 6.

80 This was expressly ruled recently in *St. Paul Guardian Insurance Co. et al.* v *Neuromed Medical Systems & Support et al.*, 2002 U.S. Dist. Lexis 5096 (S.D.N.Y. 2002).

81 For a different point of view, see *St. Paul Guardian Insurance Co. u.a./Neuromed Medical Systems & Support u.a.*, 2002 U.S. Dist. Lexis 5096 (S.D.N.Y. 2002): "pursuant to CISG art. 9(2), Incoterms definitions should be applied to the contract despite the lack of an explicit Incoterms reference in the contract"; similarly, see also Corte d'Appello Genoa (I) 24 March 1995 – No. 211, Unilex.

82 This is, correctly so, answered in the negative by *Achilles* (*supra* note 5), Article 9 para. 14; *Witz/Salger/Lorenz* (*supra* note 10), Article 9, para. 14; in the affirmative, *Goddard* (*supra* note 9), at 85; *Bianca/Bonell/Bonell* (*supra* note 5), Article 9, commentary 3.5; *Bonell* (*supra* note 7), at 42; *Enderlein/Maskow/Strohbach* (*supra* note 30), Article 9, commentary 11; *Herber/Czerwenka* (*supra* note 5), Article 9, para. 16.

83 Also holding this point of view, *Gilette* (*supra* note 10), 736 et seq.

84 For a monograph on issues concerning the relationship between the CISG and procedural law in general and, in particular, the law of evidence, see *Henninger*, Die Frage der Beweislast im Rahmen des UN-Kaufrechts: Zugleich eine rechtsvergleichende Grundlagenstudie zur Beweislast, Munich (D), 1995; *Jung*, Die Beweislastverteilung im UN-Kaufrecht, Frankfurt/M. (D), 1996; *Reimers-Zocher*, Beweislastfragen im Haager und Wiener Kaufrecht, Frankfurt/M. (D), 1995.

85 To this effect, see, e.g., *Bianca/Bonell/Khoo* (*supra* note 5), Article 2, commentary 3.2.

86 This is confirmed in case law, Trib. Vigevano (I), [2001] IHR 72 et seq.; see HG Zürich (CH) 26 April 1995 – HG 920670, Unilex (where court resorted to "general principles" of the CISG in solving a problem relating to the law on evidence); for a different opinion, see the Arbitral Court of the CCI Paris (F), Arbitral Award No. 6653/93, [1993] J.D.I., 1040, 1044 (applying the Convention, but solving the problem of the burden of proof on the basis of non-unified French law.

87 To the same effect, see *Magnus*, Die allgemeinen Grundsätze im UN-Kaufrecht, [1995] RabelsZ 469, 489; *Neumayer/Ming* (*supra* note 33), Article 4, para. 13; *Schlechtriem* (*supra* note 16), para. 50.

88 For a minority opinion in the academic literature, see *Schlechtriem/Ferrari* (*supra* note 10), Article 4, para. 48 et seq.

89 On this, see for instance, Trib. Vigevano (I) 12 July 2000, [2001] Giur. it. 280, 286.

90 *Achilles* (*supra* note 5), Article 9 para. 11; *Baumgärtel/Laumen/Hepting*, Handbuch der Beweislast im Privatrecht, vol. 2, BGB Sachen-, Familien- und Erbrecht, Recht der EG, UN-Kaufrecht, 2nd ed., Cologne (D), 1999, Article 9 WKR para. 1; *Herber/Czerwenka* (*supra* note 5), Article 9, para. 19; *Witz/Salger/Lorenz* (*supra* note 10), Article 9, para. 11.

91 In Austria, the question on the existence of a trade usage is a factual question; expressly stated in case law on the CISG in OGH (A) 21 March 2000 – 10 Ob 344/99g, CISG Austria Online.

92 *Achilles* (*supra* note 5), Article 9, para. 10; *Diez Picazo/Calvo Caravaca* (*supra* note 9), Article 9, at 143; *Honsell/Melis* (*supra* note 5), Article 9, para. 9; *Neumayer/Ming* (*supra* note 33), Article 9, commentary 3; *Schlechtriem/Junge* (*supra* note 10), Article 9, para. 13; *Staudinger/Magnus* (*supra* note 5), Article 9 CISG, para. 33.

93 *Rudolph* (*supra* note 10), Article 9, para. 10.

94 Along these lines, see *Goddard* (*supra* note 9), at 84.

95 See, e.g, OLG Dresden (D) 9 July 1998 – 7 U 720/98, Unilex (party alleging that recipient's lack of response equals consent in the absence of a response to a letter of confirmation was unable to establish that this was valid international trade usage); ZG Basel-Stadt (CH) 3 December 1997 – P4 1996/00448, Unilex (party alleging existence of a binding international trade usage, according to which payment by means of direct transfer into the account of the seller is common in the import trade industry, need not prove this in the event that the parties ought to have been aware of this practice.)