

## TOWARD A TRANSNATIONAL LAW OF TRADE USAGES?

By  
Fabien Gélinas\*

The subject of trade usages is at once ancient and fresh.<sup>1</sup> It is ancient because the question of the legal characterization of usages is an old favorite of legal theorists, and makes appearances quite regularly at conferences. It is fresh because the practice of what has come to be known as transnational law has given a renewed role to usages, which I think forces us to address the concept more directly and candidly.

This article outlines a project for which I have been collecting accounts of the law on usages in influential jurisdictions and under international instruments, in order to take stock of the available conceptual frameworks for usages, with a view, ultimately, to teasing out an appropriate framework for a transnational law of usages. The idea is to help shape an existing practice that is found in arbitral awards. A survey of International Chamber of Commerce awards has now been completed as part of this project.<sup>2</sup>

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\* Professor of Law and Norton Rose Fulbright Faculty Scholar, McGill University.

<sup>1</sup> For an introduction, see FRANÇOIS GÉNY, MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (2d ed. 1954); ANTOINE KASSIS, THÉORIE GÉNÉRALE DES USAGES DU COMMERCE (1984); ÉDOUARD LAMBERT, LA FONCTION DU DROIT CIVIL COMPARÉ (1903); KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA (2d ed. 2010); CLIVE M. SCHMITTHOFF, INTERNATIONAL TRADE USAGES (1987); Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523 (2005); Roy Goode, *Usage and Its Reception in Transnational Commercial Law*, 46 INT’L & COMP. L.Q. 1 (1997); Carine Jallamion, *Introduction historique: de la règle coutumière à la règle transnationale*, 92 J. DES SOCIÉTÉS 14 (2011); Pierre Mousseron, *Usages et normes privés*, 36 REVUE DE LA RECHERCHE JURIDIQUE 2225 (2011); Bruno Oppetit, *Sur la coutume en droit privé*, 3 DROITS 39 (1986).

<sup>2</sup> See Emmanuel Jolivet, Giacomo Marchisio & Fabien Gélinas, *Trade Usages in ICC Arbitration*, in TRADE USAGES IN THE AGE OF ARBITRATION (Fabien Gélinas ed., forthcoming 2015). For previous studies, see Yves Derains, *Le statut des usages du commerce international devant les juridictions arbitrales*, 1973 REVUE DE L’ARBITRAGE 122; Jan Paulsson, *La lex mercatoria dans l’arbitrage CCI*, 1990 REVUE DE L’ARBITRAGE 55; Jean-Baptiste Racine, *Les usages dans l’arbitrage commercial international: une place à géométrie variable*, 92 J. DES SOCIÉTÉS 37 (2011).

Here, I begin with the relationship between law and contract. Lon Fuller once drew his American readers' attention to the civilian conception of contract as the law of the parties.<sup>3</sup> This conception fully recognizes that contracts are apt to govern relationships in the way that law is generally seen to do. To think about the difference between law and contract is to think about the distinction between the realms of the public and the private, which is a question central to global governance today.<sup>4</sup>

The complex relationship between law and contract is nowhere more apparent than in the age-old debate surrounding the legal characterization of usages. Historically, usages have been variously treated as law or as contract, and at times as both. I do not think many people would disagree if I said that it is the ascendancy of formal state law, combined with the ascendancy of legal positivism more generally, that has kept debates over the status of usages confined mostly to the theoretical space of academic deliberations.<sup>5</sup> Many would agree that usages play only a minor role in the legal governance of societies, because this is how usages were presented to most of us who studied law more than ten or fifteen years ago.

But usages have been given a new lease on life with the expansion of international commerce and the growing recognition of a transnational law of commercial contracts, a law merchant. What I propose to do is, briefly, to explore some of the consequences of the legal characterization of usages and, more generally, of the development of a transnational law of commercial contracts.

## 1. Background

The difficulty in characterizing usages was nicely captured by Jean Escarra in the early 1900s. He wrote that “usage blurs the contours of law and contract, standing between them as an element of transition, a penumbra in which all strong contrasts and oppositions are toned down and distinct features become indistinguishable.”<sup>6</sup>

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<sup>3</sup> Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 810 (1941).

<sup>4</sup> This point is aptly raised by Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997).

<sup>5</sup> H. Patrick Glenn, *The Capture, Reconstruction and Marginalization of “Custom,”* 45 AM. J. COMP. L. 613, 619 (1997).

<sup>6</sup> Jean Escarra, *De la valeur juridique de l'usage en droit commercial*, 1910 ANNALES DE DROIT COMMERCIAL 97 (translated by author).

This difficulty is today apparent at the international level in the instruments governing commercial contracts that refer to usages. The UN Convention on the International Sale of Goods (CISG)<sup>7</sup> provisions on usages (Article 9) read as follows:

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) *The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known* and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.<sup>8</sup>

Paragraph (1) of the corresponding provisions (Article 1.9) in the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) is identical.<sup>9</sup> Article 1.9, paragraph 2, reads thus: “(2) *The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned* except where the application of such a usage would be unreasonable.”<sup>10</sup>

Several observations can be made about these provisions.

First, the provisions may be said to represent current, or at least recent, thinking on trade usages as they relate to international commercial contracts.<sup>11</sup> The CISG is a self-executing treaty negotiated by states and applies very broadly to international sales contracts. The UNIDROIT

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<sup>7</sup> For an overview, see C. M. BIANCA & MICHAEL JOACHIM BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION (1987); Stephen Bainbridge, *Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions*, 24 VA. J. INT’L L. 619 (1984); Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG*, 5 CHI. J. INT’L L. 157, 169 (2004).

<sup>8</sup> United Nations Convention on Contracts for the International Sale of Goods, art. 9, Apr. 11, 1980, 1489 U.N.T.S. 3 (emphasis added).

<sup>9</sup> For a general introduction, see MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (3d ed. 2005); COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009).

<sup>10</sup> UNIDROIT Principles of International Commercial Contracts, art. 1.9 (2010) (emphasis added).

<sup>11</sup> This has not always been the case. See Michael Joachim Bonell, *The CISG, European Law and the Development of a World Contract Law*, 56 AM. J. COMP. L. 1, 2 (2008).

Principles were drafted by a group of experts working independently from states and enjoy broad recognition as a normative point of reference for the regulation of international commercial contracts.<sup>12</sup> They are recognized by international arbitrators as an accurate reflection of an emerging transnational law of commercial contracts.<sup>13</sup>

Second, the provisions do not refer specifically to “international trade usages,” such as might apply to all international commercial contracts. Rather, they refer to the usages applied or known in the “particular trade concerned.”

The provisions themselves, to the extent that they may be considered an “international trade usage,” seem more general, or more generally applicable, than the usages to which they primarily refer. Yet the provisions do not actually exclude the possibility that some usages may apply to all types of commercial contracts in all trades and regions. It may well be that some usages, including but not limited to usages about usages, or secondary usages, will apply across trades and industries.

The provisions refer to two categories of usage. The first category is that of “practices” established “between the parties.” These are known here in the United States as “courses of dealing” and in some jurisdictions as “subjective usages.”<sup>14</sup> The second category is that of “trade-specific usages.”<sup>15</sup> If we include usages that apply more broadly, a third category would be that of general usages, relevant to all international commercial contracts, irrespective of industry or of region. The last two categories of usage are those in which I am interested.

Third, the provisions make it clear that usages may apply irrespective of whether the parties actually knew of them, thus acknowledging that actual consent of the parties is not strictly required in order for a usage to apply. Article 9(2) of the CISG states that “[t]he parties are considered . . . to have impliedly made applicable to their contract or its formation” a usage that is recognizable in the relevant trade. The reason why the usage applies here is that the parties are deemed to have made it applicable to their contract—and even to the formation of their contract.

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<sup>12</sup> Herbert Kronke, *The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 J.L. & COM. 451, 455 (2005–2006).

<sup>13</sup> See the examples found in Michael Joachim Bonell, *The UNIDROIT Principles and Transnational Law*, 2 UNIFORM L. REV. 199 (2000); Fabrizio Marrella & Fabien Gélinais, *The UNIDROIT Principles for International Commercial Contracts in ICC Arbitration*, 10 ICC INT’L CT. ARB. BULL. 26 (1999).

<sup>14</sup> U.C.C. § 1-303 (b) (2001) (“A ‘course of dealing’ is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.”).

<sup>15</sup> See, e.g., the interpretation of the Italian *Corte di Cassazione*: Cass., sez. II, 6 marzo 2007, n. 5135, in matters referring to implied terms under Article 1340 of the Italian Civil Code (“Clausole d’uso”).

The usage is treated as an implied term of the contract but looks much more like a default legal provision from which parties could depart, if only they would bother to do so. The UNIDROIT provision (Article 1.9, paragraph 2) states bluntly that “[t]he parties are bound” by a relevant usage unless its application would be unreasonable.

Both provisions thus take the significant step of making a usage of which neither party was aware potentially binding. In both cases, the result is the same as if the substance of the usage were part of the law governing the contract: it is applicable unless the parties have agreed otherwise.<sup>16</sup>

The only caveat to this statement is both important and interesting. It is that a usage may be treated as trumping the law governing a contract to the extent that parties can depart from such law by contract, including by implied contract terms and thus by the implied incorporation of usages. If usages are contract terms, and contracts can depart from default legal rules, then usages will effectively depart from those rules.

The logical and practical consequence of using contract as a vehicle for giving effect to usages is thus to make usages prevail over the bulk of the governing law—that is, the part of the governing law from which the parties are free to depart by contract.

Let us now turn to the provisions concerning arbitration in international instruments to see what they say about usages.

Contemporary understandings of international commercial arbitration recognize party autonomy with respect to the “rules of law” governing a contract. Article 35(1) of the 2010 UNCITRAL Arbitration Rules, for example, provides: “[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.”<sup>17</sup> In the absence of an agreement between the parties, arbitration rules also call upon arbitrators to apply the “rules of law” they find “appropriate.”<sup>18</sup> Neither the parties nor the arbitrators need settle upon the law of any particular jurisdiction, and they sometimes refer to bodies of informal

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<sup>16</sup> See Eric Loquin, *La réalité des usages du commerce international*, 2 REVUE INTERNATIONALE DE DROIT ÉCONOMIQUE 163, 166 (1989).

<sup>17</sup> UNCITRAL ARBITRATION RULES art. 35(1) (rev. ed. 2010).

<sup>18</sup> See generally GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2614 (2d ed. 2014); Ole Lando, *The Law Applicable to the Merits of the Dispute*, 2 ARB. INT’L 104 (1986).

law such as transnational contract law.<sup>19</sup> The governing law provisions of virtually all commercial arbitration instruments also state that arbitrators must always take into account the provisions of the contract and relevant trade usages.<sup>20</sup>

The UNCITRAL Model Law on International Commercial Arbitration, for example, states in its governing law provision that “[i]n all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”<sup>21</sup> Arbitration rules that may be chosen independently by parties to international arbitration agreements are to the same effect: they make clear that relevant trade usages apply in all cases.<sup>22</sup> Given that such governing law provisions refer systematically to usages alongside the “terms of the contract,” one may be forgiven for thinking that they are understood as an implicit or implied part of the contract rather than of the governing law.

Yet if we think of the parties as having “consented to” the usage and if we enquire about the object of their consent, we realize that consent is not tied to a particular, tangible usage but rather to a web of practices on which economic activity in a given field is premised. As we zoom out to consider legal consent at an even broader level, its contents become less clear, and the apparent emphasis on a contractual explanation of usages naturally gives way to a contextual understanding of law as a normative system governing a community of traders. The usage may well be seen as part of the law of that community, or at least part of the normative expectations of those who enter into international commercial contracts.

This may explain why usages are often presented as a component of the law merchant. The results of our survey of ICC awards indicate that arbitrators do actually invoke the concept of trade usages when seeking to apply a broader understanding of the transnational law of commercial contracts, even where a national law is also applicable.<sup>23</sup> It is this key practice that

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<sup>19</sup> EMMANUEL GAILLARD, *ASPECTS PHILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL* 162 (2008); Berthold Goldman, *The Applicable Law: General Principles of Law—The “Lex Mercatoria,”* in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION* (Julian D.M. Lew ed., 1987).

<sup>20</sup> *See* CODE DE PROCÉDURE CIVILE [C.P.C] art. 1511(2) (Fr.); Singapore Arbitration Act art. 28(4) (2002) (Sing.); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] art. 1051(4) (Ger.).

<sup>21</sup> UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, 1985: WITH AMENDMENTS AS ADOPTED IN 2006, Ch. VI. art. 28(4) (2008).

<sup>22</sup> *See, e.g.*, UNCITRAL ARBITRATION RULES art. 35(3) (rev. ed. 2010); INTERNATIONAL CHAMBER OF COMMERCE, ARBITRATION RULES art. 21(3) (2012); SINGAPORE INTERNATIONAL ARBITRATION CENTRE, SIAC ARBITRATION RULES art. 27(3) (5th ed. 2013); MILAN CHAMBER OF ARBITRATION, ARBITRATION RULES art. 3(4) (2010).

<sup>23</sup> Loquin, *supra* note 16, at 166; *contra* Emmanuel Gaillard, *La distinction des principes généraux du droit et des usages du commerce international*, in *ÉTUDES OFFERTES À PIERRE BELLET* (1991).

has made apparent as well as unsatisfactory the unstable position of usages between law and contract, and the uncertain status of implicit or implied normative information surrounding transnational contracts more generally.

## 2. Trade Usages as Law Merchant

Now, what can be learned from a study of the national laws of trade usages across jurisdictions? We already have a pretty good sense of the tenor of these national laws based on the compromise that was reached in the text of the CISG, which was for the most part reproduced in the UNIDROIT Principles.

Looking at national laws, in every jurisdiction we find tension between the treatment of trade usages as implied contract terms, on the one hand, and as independently applicable customary norms, on the other—that is, a tension between a characterization of usages as the law of the parties (i.e., contract) and as the independently applicable law of the community (i.e., custom). Looking carefully, we can detect a greater emphasis on party autonomy and the characterization of usages as what the parties *subjectively intended* in countries like France and Belgium.<sup>24</sup> Countries like Germany and England are closer to an objective theory of contract, which is less shy about detaching the enforceable contract from the subjective intent of the parties and objectively assigning meaning and content to the contract.<sup>25</sup> But in both cases we end up explaining the legal force of usages by relying on the contract, however that contract may be defined, rather than relying on an independent notion of customary law.

Let us now take a closer look at the distinction between law and contract. There are different ways of approaching this distinction. According to a once popular way of looking at the world, the distinction can be seen as one between *is* and *ought*. Or one between the factual and the normative. If the usage is a mere fact, it will be given legal force through its relevance to a particular contract. If it is normative, it will bind of its own force, independently of the contract. That said, a supplementary distinction may then be required between legal norms and non-legal norms. The legal norm is one that is created or given binding force by the relevant legal system, and the non-legal norm is one that is not recognized as a legal norm by that system. We may call this non-legal norm, from an internal, systemic perspective, a normative fact.<sup>26</sup>

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<sup>24</sup> Catherine Walcke, *Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric*, in *EXPLORING CONTRACT LAW* (J. Neyers ed., 2008).

<sup>25</sup> See, e.g., *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 W.L.R. 896 (H.L.) 912 (Eng.). For an overview, see Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 *FORDHAM L. REV.* 427 (2000).

<sup>26</sup> Jacques Chevallier, *L'ordre juridique*, in *LE DROIT EN PROCÈS* 7, 23 (1983).

One may think, legitimately, that this is getting too abstract and disconnected from legal practice. So let us use an analogy. Let us consider the way in which common law courts treat a foreign law when they are called upon to apply it.<sup>27</sup> They treat it as fact, notably for the purpose of the law of evidence,<sup>28</sup> even though they actually end up applying that law to the problem at hand.<sup>29</sup>

This particular private international law approach is helpful in understanding the status of usages, I think. It helps us understand the juridical protectionism often present in national laws. In this particular case, the national law denies any legal character to foreign law even where it recognizes that the latter is applicable and must govern the dispute. Since the beginning of the movement in favor of legal nationalization, which in many civilian jurisdictions came with codification, national legal systems have been keen to marginalize all forms of law other than the laws proclaimed by their official organs, be they legislators or courts.<sup>30</sup> Particularly important to the success of this nationalization project has been the marginalization of customary laws, which governed vast areas of human interactions before national laws took over. My hypothesis here is that the demands of legal nationalization projects and the narrow theory of sources that they brought to the fore are the main reasons why usages have been denied direct, independent legal status. What I draw from this hypothesis is that we should not necessarily reproduce national patterns in the process of constructing a transnational law of contract and of usages.

When arbitrators are called upon to decide an international business contract dispute, they do not represent a national legal system whose theory of sources needs to be asserted and defended as against potential competitors like trade usages. If there is a transnational law of business contracts, and I think there must be, then its own theory of sources must recognize trade usages as directly applicable, primary rules of law. There is no need to protect transnational law from itself, or from one of its constituent parts. There is no need, in other words, to fear the recognition of trade usages as a kind of transnational customary law.

If we were to adopt this perspective, trade usages, where relevant, would always be seen as applicable, not because the contracts between parties impliedly refer to them, but because trade usages are part of the default normative context, that is, the default law, of all international commercial contracts.

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<sup>27</sup> Imre Zajtay, *L'application du droit étranger: science et fictions*, 23 REVUE INTERNATIONALE DE DROIT COMPARÉ 49 (1971).

<sup>28</sup> Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018 (1941).

<sup>29</sup> See Fabien Gélinas, *Peeking Through the Form of Uniform Law: International Arbitration Practice and Legal Harmonization* 27 J. INT'L ARB. 317, 325 (2010).

<sup>30</sup> See Glenn, *supra* note 5.



I would say, tentatively, that this position would hold even in cases where the parties designate a national law as their governing law. Indeed, transnational law provides a welcome, non-circular explanation of where the recognition of a contractual choice of law comes from. The choice of a national law in an international contract is recognized by the default law, that is, transnational law.

Many questions remain open in my mind, notably about the distinction, for the purpose of usages, between primary and secondary rules, and about the distinction between local and universal usages. But it does seem to me that the time is ripe for a recognition of usages as a form of customary transnational law.