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ARTICLE

Trade Usages in International Sales Law

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1. Introduction

Much of commercial law originates from business practices, norms and usages. Although the rise of the nation state led to a decline of a trade usage ('TU') as a self-standing source governing commercial contracts,[1] modern commercial law regimes continue to recognise and enforce TUs in order to promote commerce by meeting the business persons' needs and expectations. As a creature of the business community, a TU is seen as an important source of identifying and channelling such expectations into commercial law, enabling commercial law to align itself with commercial reality. Therefore, conceptually and functionally, a TU lies at the heart of modern commercial law.

Despite this apparent value of recognising and giving legal effect to a usage (hereinafter referred to as the 'usage incorporation strategy' ('UIS')), it is far from clear what role TUs actually play in governing commercial contracts today. It is also highly controversial whether the UIS is viable and credible. The views on these matters differ greatly. On the one hand, the proponents of *lex mercatoria* regard TUs as rules of law that are, as such, applicable to and vital for international business transactions. Outside the *lex mercatoria* realm, TUs are often equally seen as 'indispensable ingredients in commercial contracts':[2] as part of the commercial context, they can and should strongly influence contract interpretation,[3] 'amplify[ing] contracts'.[4] Businesses are said to

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[1] See eg JH Dalhuisen, 'Custom and Its Revival in Transnational Private Law' (2008) 18 Duke J Comparative Int'l L 339, 342-347.

[2] MG Bridge, *The International Sale of Goods*, (4th edn, OUP 2017) 10.60.

[3] E McKendrick, *Goode on Commercial Law*, (5th edn, Penguin 2017) 1.21.

[4] Bridge (n 2) 10.60.

frequently rely on TUs in their day-to-day dealings and regard TUs as 'very powerful tools to ensure the stability of their bargain'.[5] It has even been suggested that sometimes businesses transact 'solely based on…usages and practices, without any written contract'.[6] On the other hand, some have challenged these propositions, presenting empirical data suggesting that some commodities sectors do not rely on TUs at all and govern themselves solely by written contracts. More importantly, it has been argued that TUs are often established on weak or no evidence: what adjudicators recognise as TUs is something illusory, resulting in commercial law aligning itself more with fiction, than reality. If so, the UIS corrodes commercial law at its core and should be abandoned.

This work seeks to contribute to this debate by examining TUs more comprehensively than it has thus far been done. Its focus is on the international sale of goods which, as a key commercial transaction, reveals much about commercial law generally. This work integrates and draws on the experience of several leading sales law regimes: English law, the UN Convention on Contracts for the International Sale of Goods ('CISG') and the US Uniform Commercial Code ('UCC'). Being well-developed and frequently applicable to international sales contracts, these regimes are indicative of the role of usages in governing international sales contracts. This work's underlying objectives and theses are threefold. First, it explores the reality of how courts and arbitrators worldwide apply TUs. This investigation is based on a framework that encompasses all key aspects of TUs and forms this work's structure: their rationale, definition, functions, preconditions for their applicability, constituent sources and proof. This comprehensive evaluation advances our understanding of the legal nature of TUs, conceptual and practical issues and problems involved in establishing them.

Secondly, the work analyses the viability of the UIS. By revealing shortcomings in the ways adjudicators establish TUs, it is concluded that there should be *limited* scope and role for usages in international trade because of the danger that commercial law promotes 'phantom usages'. This position, advocating the limited scope for TUs, manifests itself, amongst others, in the arguments: in favour of the rigorous preconditions

[5] L Graffi, 'Remarks on Trade Usages and Business Practices in International Sales Law' (2011) 29 J L Commerce 273.
[6] ibid.

for establishing a TU and their strict implementation; against readily establishing *generic* usages for the entire international trade; against treating international and transnational law instruments as being or evidencing international TUs. However, the abandonment of the UIS is not advocated because TUs undoubtedly exist and there are good reasons for commercial law to recognise and enforce them, where appropriate. Based on the analysis of key preconditions for a TU, the optimum set of preconditions is proposed. Finally, it is argued that even with limited scope for a TU, modern sales laws are already well aligned with commercial reality. Their context sensitive rules of contract interpretation make industry practices and norms relevant factors that influence the contracting parties' rights, obligations and liabilities in appropriate cases.

2. Rationale

There are many policies and reasons underlying the UIS. Together, they make a strong case why a TU should be a source of contract interpretation. The first argument is that, to some degree, modern commercial laws owe their existence to TUs. Many rules, concepts and instruments in sales law and practice - such as trade terms, a bill of lading ('b/l') and aspects of its conformity – originate from the usages of the mercantile community, which, in turn, have been absorbed and developed in different ways by national legal systems.[7] Notwithstanding this absorption by domestic legal systems (a major factor in a decline of usages),[8] most legal systems and international instruments continue to recognise and are premised on the existence of TUs. The legal community worldwide believes that business persons continue to develop[9] and rely on TUs to govern their transactions. That is why TUs are often viewed as an economic and commercial

[7] This process has been described in many sources. See eg S Bainbridge, 'Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Convention' (1980) 24 Virginial J Int'l Law 619, 623-8.
[8] See eg J Coetzee, 'The Role and Function of Trade Usage in Modern International Sales Law' (2015) 20 Unif L Rev, 2.
[9] 'The fertility of the business mind and the fact that a practice which begins life by having no legal force acquires over time the sanctity of law are key factors to which the commercial lawyer must continually be responsive' (McKendrick (n 3) 1.21).

reality: the UIS merely recognises this reality, 'formaliz[es]…an economic fact'.[10] Globalisation amplifies this reality because the global world encourages the industries'/trade sectors' autonomous or self- regulation,[11] for which TUs are the primary vehicle.

The second related set of reasons lies in the purpose of commercial law of facilitating commerce by meeting the business persons' needs and expectations. A TU, a creature of the business community, naturally evidences such needs and expectations. Consequently, the UIS enables commercial law to fulfil its main objective:

> 'In business, custom reflects what is most desirable in terms of common sense and experience. In commerce and finance, custom's objective is therefore to best serve the needs of the business community given that community's perception of its own needs and future'.[12]

A similar expression of deference to the standards and practices of the business community is expressed in one case as follows: 'The function of the commercial law is to allow, so far as it can, commercial men to do business in the way in which they want to do it…'.[13] This line of thinking, seeking to align commercial law with commercial reality, has shaped some leading commercial law regimes, such as the UCC,[14] and is seen not only as their valuable attribute, attractive to and useful for the business,[15] but also as a hallmark of commercial law, a feature distinguishing a commercial contract from other contracts.[16]

A closely related reason is that trade is arguably most effectively promoted in the *laissez-faire* environment, based on individualism and freedom of contract, that require contracts to be interpreted with reference to the parties' intentions. It is sometimes

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[10] See Bainbridge (n 7), citing Hill, 'The Relevance of Courses of Dealing, Usages and Customs in the Interpretation of International Commercial Contracts' (1976) 2 New Directions in International Trade Law 523.
[11] Coetzee (n 8) 5.
[12] Dalhuisen (n 1) 370.
[13] *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, 444.
[14] This philosophy, underlying the UCC, is well documented. See eg JH Levie, 'Trade Usage and Custom under the Common Law and the UCC' (1965) NYU L Rev 1101.
[15] See eg W Hoffman, 'On the Use and Abuse of Custom and Usage in Reinsurance Contracts' [1998] LMCLQ 43, citing *Mercer County v Hacket* (1863) 68 US 83, 95.
[16] See McKendrick (n 3).

believed that the parties' intentions cannot be duly understood and implemented unless TUs are taken into account. As stated in one US case, 'the courts have regarded the established practices and usages within a particular trade or industry as a more reliable indicator of the true intentions of the parties than the sometimes imperfect and often incomplete language of the written contract'.[17] From this perspective, the UIS is a necessity because otherwise it is not possible to stay true to the parties' intentions.[18]

The third set of reasons is, again, linked to facilitating trade, this time because of a TU's ability to reduce costs and promote economic efficiency. TUs reflect common benchmarks or standards of conduct for the business community. As such, they necessarily standardise and unify the governance of sales transactions[19] essentially for the same reasons as those underlying the movement to unify commercial law through international or transnational law instruments[20] and/or trade terms. Usages create a common legal and commercial language, 'short-hand terms to communicate complicated ideas',[21] making it easier and cheaper for parties to transact, thereby promoting trade and efficiency.

TUs are often believed to reduce costs for the parties and society as a whole.[22] Being a common language, TUs can save parties time, effort and costs of negotiating and drafting their contracts ('drafting costs')[23] and lead to an efficient allocation of risks when the contractual performance does not occur as planned. Because TUs usually evolve over time, they are likely to evolve, in a competitive environment, in a way that is deemed

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[17] *Urbana Farmers Union Elevator Co v John Schock*, 351 N.W.2d 88 (N.D. 1984), 92 (UCC).
[18] See L Van Muylem, 'Usages and Implied Terms under French and Belgian Positive Law: A Subjective Approach Tending toward Objectivity' in F Gélinas (ed), *Trade Usages and Implied Terms in the Age of Arbitration* (OUP 2016) 36, discussing a social conception of a usage, whereby '[c]ontracts are no longer only construed as the receptacle of the parties' intent but also as instruments for the determination of social life'.
[19] See eg R Goode, 'Usage and Its Reception in Transnational Commercial Law' (1997) 46 ICLQ 1, 5.
[20] See generally L Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' in I Fletcher, L Mistelis, M Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2001) 3-27.
[21] E Warren, 'Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule' (1981) 42 U Pitt L Rev 515, 542.
[22] Thereby promoting economic efficiency generally, which is sometimes seen as a goal of commercial law, particularly by commentators in the US (see eg Bainbridge (n 7) 647).
[23] See eg Bainbridge (n 7) 651; JS Kraus and SD Walt, 'In Defense of the Incorporation Strategy' in JS Kraus and SD Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law*, (CUP 2000) 207.

efficient by the business community.[24] TUs can also reduce the costs of dispute resolution and enforcement of a decision ('administrative costs').[25] If a TU is identifiable and its meaning is ascertainable with relative ease and at a reasonable cost,[26] it enables adjudicators to quickly determine the meaning of the contract and resolve the case.[27]

Usages are even thought to reduce future costs for newcomers to a particular trade.[28] Once the newcomers master the TUs, they will start to benefit from the cost reduction, whereas the binding nature of a TU and the adverse consequence of ignorance of the existing TUs provide a powerful incentive for newcomers to invest in and quickly develop an understanding of the TUs.[29] In addition, because TUs develop through a consistent practice of a business community, it is reasonable to assume that they are based on 'good practice' worthy of being promoted. These arguments can partly alleviate the concerns that TUs,[30] often originating from the developed world: lead to the traders from developing countries being bound by standards of conduct in the formation of which they did not participate; and favour stronger parties, becoming an instrument of domination in international trade.[31] It is also arguable that knowing and relying on TUs can help traders

[24] See CP Gillette and SD Walt, *Sales Law: Domestic and International*, (2nd edn, Foundation Press 2009) 115; JC Chen, 'Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant' (1992) 27 Tex Int'l L J 91, 123 ('The international sales community displays the classic characteristics of a highly competitive market: nearly perfect information, a great number of competitors, low barriers to entry, deconcentration of power to set prices. In such a competitive market, courts may usually assume that any surviving usage increases net social wealth').

[25] Gillette and Walt (n 24).

[26] If a TU and its meaning are not identifiable with reasonable precision, ease and cost, the efficiency argument loses its strength. There will be adverse consequence and costs of judicial error, uncertainty as regards the existence and/or content of a TU, leading to increased costs of proof and even the parties' ignoring a TU in contract negotiations and drafting (see CP Gillette, 'The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG' (2004) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=485263> (accessed 1 December 2018) 10-11).

[27] ibid 116.

[28] See eg Warren (n 21) 518.

[29] 'Existing merchants would deal with each other rather than risk litigation and potential liability to newcomers who have no incentive to learn the rules of the trade' (Chen (n 24) 125-126). See further Warren (n 21) 542-564.

[30] These concerns were widely expressed by developing and socialist countries at the Vienna conference when the CISG was drafted. See eg G Eörsi, 'General Provisions' in Galston and Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, (Matthew Bender 1984) [2-20]-[2-21].

[31] The representatives of Czechoslovakia and Yugoslavia at the Vienna Conference argued that TUs should have no role to play in the New International Economic Order (see eg ibid; see also AH Kastely, 'Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention' (1988) 8 Northwestern J Int'l L Business 574, 612).

from less advanced economies integrate into the world markets and improve their own standards.[32]

All these arguments are *only* valid and meaningful if a TU: exists in reality; is capable of being identified and defined with a degree of precision that makes it practically useful; and the costs of identifying/defining it are less than the benefits, flowing from it. The presence of these conditions has been challenged on the basis that relying on a TU inevitably leads to the distortion of 'the very reality' it is meant to represent.[33] A particular legal regime's preconditions for establishing a TU, such as those concerning knowledge or observance of it, are difficult to implement. Ideally, statistical and empirical data would be required,[34] but gathering and analysing such data are a complex exercise. Determining knowledge and observance of an alleged usage by businesses[35] around the world is difficult enough. Added to this are the confidentiality considerations of an individual business, which impede access to the relevant information.[36] A further complication is that adjudicators tend to admit weak evidence to establish a TU[37] or do not duly apply the applicable preconditions for a TU.[38] All this can make a TU a 'legal fiction',[39] resulting in the consequences that contravene the objectives of the UIS.

One such consequence, it has been argued, is that the UIS increases costs, such as the costs of the adjudicators erroneously establishing a TU or determining its scope or content ('interpretative costs').[40] The parties will then have to invest time and resources in contract drafting to exclude TUs and/or to eliminate any doubt as to what has been agreed.[41] Another negative consequence is that the UIS invites manipulative behaviour.

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[32] Chen (n 24) 126.
[33] See L Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1995-1996) 144 U Pennsylvania L Rev 1765, 1769.
[34] L Bernstein, 'Custom in Courts' (2015) 110 Northwestern U L Rev 63, 89.
[35] Identifying the relevant sectors and the types of commercial players is in itself a difficult exercise.
[36] 'Many businesses are reluctant to share information about their contracting relationships. Confidentiality provisions, many of which preclude the parties from revealing even the existence of a contracting relationship, are common in large business contracts and firms are likely to fear that inquiring the contracting practices of their competitors could be viewed as anti-competitive' (Bernstein (n 34) 89).
[37] ibid 77-82.
[38] See also Hoffman (n 15) 111-112.
[39] ibid 95.
[40] Bernstein (n 34) 87-94.
[41] Another reason why recognising a usage leads to inefficiency is said to be the adjudicators' reliance on the so-called 'relationship preserving norms' (RPN) in an alleged usage to an 'end-game' situation (EG)

After concluding the contract, a party may, to the surprise of the other, allege a TU, whose content favours the former's interpretation of the contract.[42] Some regard these weaknesses as being so great and its effects so negative as to render some regimes, pursuing the UIS, to be 'deeply broken'.[43]

3. Definition and legal nature

There is no universally accepted definition of a TU. The proponents of *lex mercatoria*—a transnational body of rules, autonomous from the state-made law, applicable by virtue of its existence and consisting, amongst others, of usages and practices of international trade—may argue that because transnational TUs are always applicable as *rules of law*[44] to cross-border sales/commercial contracts they must and do have a universal meaning. However, the attempts to provide a universal definition reflect the preferences of a given commentator[45] and no consensus has emerged regarding any such definition. This work does not subscribe to the theory of *lex mercatoria*, adopting a more traditional stance whereby the specific definition of or preconditions for a TU depend on the applicable domestic law or the international contract law regime, such as the CISG or UNIDROIT Principles of International Commercial Contracts ('UPICC'). That it is why it is difficult to provide a generic definition. But, broadly speaking, a TU is a practice, method, course of dealing, line of conduct or behaviour, adopted by those engaged in international trade or a particular trade sector. The requirements, through which a TU is seen as 'adopted' within the trade under the applicable law, usually concern a certain level of *knowledge* and *observance* of a TU by the business community.

(ibid 1796-1802). However, the RPN are presumably those concerned with guiding the parties' performance, as opposed to remedies and the issues of contractual performance are just as significant at the dispute resolution (end-game) stage since they are essential to determining a party's (non-)liability. It is doubtful therefore whether a clear and meaningful distinction between RPN and EG can be drawn.

[42] Bernstein (n 34) 105-106.

[43] ibid 112.

[44] See eg F Gélinas, 'Trade Usages as Transnational Law' in Gélinas (n 18) 275 ('If there is a transnational law of business contracts – and few would deny that there is one – then its own theory of sources must recognize trade usages as directly applicable, primary rules of law'); Dalhuisen (n 1) 362-363.

[45] See eg ibid 276-277, preferring definitions in the CISG and UPICC, which are not, it must be noted, identical (see (n 46) and its accompanying main text); also Dalhuisen (n 1) 362.

Under the CISG, a usage is that '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'.[46] The UCC adopts a similar conception by treating a usage as one of which the parties engaged in the relevant 'vocation or trade' 'are or should be aware'[47] and which has 'such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question'.[48] For English law, that requires a usage to be 'notorious' or 'universally accepted', such requirements are insufficient because a usage must observed from a sense of a binding obligation, and not simply from goodwill, convenience or habit.[49]

This latter requirement—that a TU must be observed from a sense of a binding obligation—is closely aligned with *laissez-faire* and freedom of contract because the law defers to what businesses regard as binding on them.[50] Recognising a TU as a source of industry 'self-regulation' is what gives a TU its legitimacy and enforceability.[51] From this perspective, a regime that dispenses with this requirement is, to an extent, a move towards a more regulatory stance,[52] a tool of 'social policy'.[53] International instruments, such as the CISG, have been criticised for not providing for this requirement.[54] But it is suggested that whilst it is conceptually sound, it is difficult and costly to practically implement it, especially in international trade. It requires an inquiry into a subjective state of mind of numerous parties, members of the relevant trade. Insisting on proving the community's *perception* of whether a particular obligation is binding with this community will lead to the inability to establish a TU in most cases, undermining any

[46] Art 9(2). See, similarly, Art 1.8(2) UPICC ('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 usage would be unreasonable.').
[47] UCC §1-303(d).
[48] UCC §1-303(c).
[49] *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421, 1438; *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] QB 856, 874 (Slade LJ).
[50] See Chen (n 24) 120-121.
[51] DR Thomas, '"Custom of Port" as a Category of Commercial Custom' [2016] LMCLQ 436, 438-439.
[52] ibid 118.
[53] 'Intended as an instrument of social engineering, the UCC revolted against opinion necessitates and unfettered freedom of contract. The UCC could not tolerate the mercantile community as a competing source of legal authority' (ibid 121). See also (n 18).
[54] Goode (n 19) 10.

benefits of the UIS. An increased burden of proof will also increase 'administrative costs'.[55] It is easier and cheaper to rely on conditions that are less subjective and at least aspire to be empirically verifiable, as is the case with the knowledge and observance requirements. It is also highly likely that those practices that are widely known to and observed by the business community are followed *because of* a sense that they are binding.

Many legal regimes struggle with the question whether a TU is applicable by virtue of the parties' presumed intentions (or implied agreement) *or* as a source of law.[56] The position taken in English law,[57] the UCC and, albeit not unanimously, the CISG favours the former conceptualisation,[58] whilst the position in some other systems,[59] including that taken by the proponents of *lex mercatoria*,[60] treats usages as a source of law. Given that establishing a TU inevitably raises questions of fact, implying a TU by virtue of the presumed intentions conceptualises a TU more accurately. The focus on the intentions at least symbolises and has greater affinity with the dependence of a TU on the factual context: the preconditions for a usage need to be established substantially with reference to factual matters, such as the knowledge and observance of an alleged TU within the business community.

Another point is that, as shown below, establishing a TU, in addition to questions of fact, raises the issues of law. Distinguishing between questions of law and fact not only helps understand the legal nature of a TU, but also has legal implications. First, it may predetermine whether certain appellate procedures are applicable:[61] for example,

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[55] See (nn 25 and 26).
[56] Italian law recognises both concepts through a threefold distinction onto 'normative' (implied in law), 'trade' ('contractual' usages, deemed to be questions of fact) and 'interpretative' usages (see LGR di Brozolo and G Marchisio, 'Usages and Implied Terms in Italy' in Gélinas (n 18) 62-71, 78-79).
[57] See eg Goode (n 19) 8.
[58] Similarly, in Quebec (see MC Rigaud, 'White Space, Implied Terms, and the Concept of Usage in Quebec' in Gélinas (n 18) 43).
[59] See Muylem (n 18) 16 (noting an 'evolution toward an objective conception of usages' in French and Belgian law); H Dedek, 'Not Merely Facts: Trade Usages in German Contract Law' in Gélinas (n 18) 101-102.
[60] See (n 44-45) with the accompanying main text.
[61] See M Schmidt-Kessel in I Schwenzer (ed), *Schelchtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, (4th edn, Oxford: OUP 2015) Art 8 para 69.

questions of fact cannot normally be appealed.[62] Secondly, it may predetermine whether the issue is to be decided by the judge or jury.[63] Thirdly, a party normally bears the burden of proving the facts, but not the law as such,[64] although there is a burden of proving the applicable preconditions and the parties may argue about the precise content of the law.[65] Finally, the role of prior cases on an aspect of a TU differs depending on whether this aspect is legal or factual. Take the CISG that requires adjudicators to promote uniformity in its application.[66] If the issue is one of law, this requirement is applicable and prior cases concerning it must be taken into account. If the issue is one of fact, prior cases *may* only evidence the relevant fact, but are not subject to the uniformity requirement.

4. Functions

A usage can influence the interpretation and meaning of a contract. This broad function manifests itself in many specific, and often inter-related, functions and consequences. First, a TU can be used to interpret an express term, even where at first sight it may not seem to have any technical meaning, such as where, by virtue of a TU: '1000 rabbits' means '1,200 rabbits';[67] a 'June-August' delivery indicates the seller's obligation to deliver the majority of the goods in June and only one fifth of them in August;[68] '500 tonnes' means 'up to 500 tonnes';[69] or the contract price remains fixed notwithstanding the express term that the price is the seller's 'posted price at time of delivery'.[70] In these cases, usages change or at least qualify the natural meaning of the

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[62] ibid; Supreme Court, 6 February 1996 (Austria) (CISG) <http://cisgw3.law.pace.edu/cases/960206a3.html> accessed 1 December 2018. ('The Supreme Court does not decide on the facts, but on the law only. The Supreme Court is not entitled to examine whether the lower courts in their taking of evidence established the facts of the case correctly.').
[63] Schmidt-Kessel (n 61).
[64] See Muylem (n 18) 27.
[65] See also section 'Proof'.
[66] CISG Art 7(1): 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'.
[67] *Smith v Wilson* (1832) 3 B & AD 728.
[68] See *Warren's Kiddie Shoppe, Inc v Casual Slacks, Inc* 171 S.E.2d 643, 1969 (teenage clothing trade; UCC).
[69] *Michael Schiavone & Sons, Inc v Securalloy Co, Inc*, 312 F Supp. 801 (UCC).
[70] *Nanakuli Paving and Rock Co v Shell Oil Co*, 664 F.2d 772 (1981) (UCC); or, according to a TU, the contract price, despite the detailed provisions on it, may be merely treated as an 'estimated' price (see *Columbia Nitrogen Corp v Royster Co* 451 F.2d 3 (1971)).

express provisions. Their ability to do so may be limited by the applicable law. English law, for example, only admits usages that are consistent with an express term or 'the tenor'[71] of the contract as a whole.[72] This approach is desirable in international trade because it promotes legal certainty, responsible and careful contract drafting, whilst reinforcing the traders' ability to rely on their written contracts.[73]

TUs do and should have a greater role to play when it comes to injecting specific meaning into an express clause with an apparent technical connotation. These clauses may not have a clear natural meaning and be determinable without recourse to a TU. The examples include those where a TU points to: the 'pure basis' clause indicating a two percent rebate from the contract price in the Moroccan seed trade;[74] 'an active breeder' implying a registered yearling bull;[75] or the letters 'FO' qualifying 'the term 'freight' under C.I.F. and C.F.R. contracts, [with] the expenses connected with discharging the goods from the vessel [being] included in the 'freight''.[76] Another example can be found in a case,[77] where the contract provided for the delivery of 'A-quality' beech logs, which were to be 'clean outside' and have no 'inner barks'. One question was whether the goods with 'scars' were conforming. The tribunal held that 'inner bark' referred to 'the calix formed during the growth of the trees' and the term employed in the timber industry to describe it was a 'scar', resulting in the goods being non-conforming.

Secondly, TU may supplement a rule in the applicable sales law, such as those relating to the description, quality, packaging or other aspects of the goods. For instance, sellers have been held liable under the UCC merchantable quality test where the carbon content in the steel was not within the range between 1010 and 1020, as required by the usage in respect of steel of 'commercial quality'.[78] Similarly, a TU may stipulate what

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[71] *London Export Corp v Jubilee Coffee Roasting Co Ltd* [1958] 1 WLR 661.
[72] *Les Affréteurs Réunis Société v Leopold Walford (London)* [1991] AC 801.
[73] See (n 120). Contrast this approach with that sometimes taken by the US courts (see *Columbia Nitrogen* (n 70); *cf Southern Concrete Services Inc v Mableton Contracts, Inc* 407 F Supp. 581, 584 (1975)).
[74] *Peter Darlington Partners Ltd v Gosho Co Ltd* [1964] 1 Lloyd's Rep 149.
[75] *Campbell Farms v Andrew Wald*, 578 N.W.2d 96 (N.D. 1998) (UCC).
[76] ICC, No. 7645, March 1995 <http://cisgw3.law.pace.edu/cases/957645i1.html> accessed 1 December 2018.
[77] CIETAC, 4 November 2002, (CISG) <http://cisgw3.law.pace.edu/cases/021104c1.html> accessed 1 December 2018.
[78] *Ambassador Steel Co v Ewald Steel Co* 190 N.W.2d 275; *Shannon Christenson v James Milde* 402 N.W.2d 610.

matters comprise 'quality' in the first place. Thus, the presence of a chemical in the rubber used to preserve and coagulate (paranitrophenol) was found not to be such a matter.[79] Many legal tests depend on such broad notions as 'usual', 'common', 'ordinary' or 'reasonable'. Specifically, some tests of conformity require the goods to be fit for 'the purposes for which goods of the same description would *ordinarily* be used'[80] or 'all the purposes for which goods of the kind in question are *commonly* supplied',[81] to be 'contained or packaged in the manner *usual* for such goods'.[82] These imprecise notions are context dependant and TUs and, more generally, industry standards and practices are likely to influence the precise meaning of, say, 'ordinary' or 'common' use of goods or a 'usual manner' of packaging. For example, there may be industry usages (or at least norms or understandings) that it is 'usual' for 'frozen products' to be packaged in non-transparent bags, whereas the same would be 'unusual' for 'filled pastry products',[83] or that it is not usual to ship fully dried cow's liver fungus in refrigeration at –14ºC.[84]

Thirdly, a TU may limit or exclude a rule in the applicable law.[85] A TU concerning 'unplanned timber' may require that if non-correspondence with its contractual description is trifling or negligible, the buyer is not entitled to reject the goods and terminate the contract,[86] as is normally the case under the applicable law.[87] Finally, implying a usage in a contract may create rights, obligations and liabilities that are not expressly provided for. This implication can concern the formation of a sales contract, any aspect of its performance or consequences of its breach. For example, by virtue of a TU a term may be implied to the effect that: in a pharmaceutical industry, an offeree's

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[79] *Steels & Busks, Ltd v Bleecker Bik & Co, Ltd* [1956] 1 Lloyd's Rep 228, 237 (the court applying the 'commercial or market standard of pale crepe rubber').
[80] CISG Art 35(2)(a).
[81] Sale of Goods Act 1979 ('SGA') s 14(2B)(a).
[82] CISG Art 35(2)(d).
[83] District Court Hamburg, 31 January 2001 (Germany) (CISG), <http://cisgw3.law.pace.edu/cases/010131g1.html> accessed 1 December 2018.
[84] CIETAC, 30 March 1994 (CISG) <http://cisgw3.law.pace.edu/cases/940330c1.html> accessed 1 December 2018.
[85] See eg (n 81) s 55(1).
[86] *Montague L Meyer Ltd v Vigers Bros Ltd* [1939] 63 Ll L Rep 10. See also *Yates v Pim* (1816) 6 Taunton 446.
[87] See (n 81) s 13(1); also *Arcos Ltd v EA Ronaasen and Son* [1933] AC 470, similarly involving timber but requiring strict compliance with contract description. The presence of a usage in *Montague* (n 86) 12 was what distinguished the approach in *Montague* from that in *Arcos*. See also *Figgie International, Inc v Destileria Serralles, Inc* 190 F.3d 252 (the buyer's remedies were limited by a TU).

reference letter supporting an offeror's application to the US Federal Drug Administration (FDA) for approval of a drug constitutes acceptance of an offer to supply this drug to the offeree;[88] the offeree's silence following the offeror's letter of confirmation is an acceptance;[89] the seller must deliver fish that is 'from the current catch';[90] the documents must conform to certain requirements, such as a b/l having to be 'clean' or issued in a transferrable form;[91] the document, such as a mate's receipt, amounts to a 'document of title';[92] the buyer must give notice of non-conformity to be able to rely on the latter;[93] in a sale 'by sample', the sample is subject to nothing more than a visual examination;[94] a particular method of examining the goods must be used, such as where the seller must be given an opportunity to be present at the examination;[95] the buyer must rely only on a particular type of evidence to be able to bring a certain claim.[96]

5. Preconditions

5.1. Certainty

Some legal systems, such as English law, require a TU to be sufficiently *certain* or definite as to its existence and content. In the common law, this requirement originates

[88] *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc* 201 F.Supp.2d 236 (CISG).
[89] District Court Kiel, 27 July 2004 (Germany) (CISG) <http://cisgw3.law.pace.edu/cases/040727 g1.html> accessed 1 December 2018.
[90] Supreme Court, 27 February 2003 (Austria) (CISG) <https://cisgw3.law.pace.edu/cases/030227 a3.html> accessed 1 December 2018.
[91] See (n 197); also CIETAC, 16 December 1991 (CISG), <http://cisgw3.law.pace.edu/cases/ 911216c1.html> accessed 1 December 2018.
[92] *Kum* (n 13).
[93] Supreme Court, 15 October 1998 (Austria) (CISG) <http://cisgw3.law.pace.edu/cases/981015a3.html> accessed 1 December 2018(excluding Arts 39 and 44 CISG).
[94] *Steels & Busks* (n 79) 239.
[95] Helsinki Court of Appeal, 29 January 1998 (Finland) (CISG) <http://cisgw3.law.pace.edu/cases/ 980129f5.html> accessed 1 December 2018, resulting in the evidentiary value of the examination, conducted contrary to the TU, being damaged.
[96] CIETAC, 15 December 1998 (CISG) <http://cisgw3.law.pace.edu/cases/981215c1.html> accessed 1 December 2018 ('according to international trade customs, [the Buyer] must provide a certificate of inspection issued by a qualified inspection organization if he claims…damages due to non-complying goods. However, [the Buyer] has not provided such a certificate of inspection.').

from the common law's 'passion for full and precise pleading',[97] seeking to ensure that an alleged TU truly exists in a form that can be handled and enforced by a court.[98] A TU must be shown to be 'clear and intelligible'.[99] This exercise is thought to raise the question of *evidence* and *fact*.[100] This precondition is also treated as an issue of validity:[101] a failure to meet it will invalidate an alleged TU. It may also be treated as connected with some other preconditions, such as reasonableness. For instance, if the content of a TU or even its consequences are deemed by the court to be commercially insensible or unfair, a TU may be found to lack certainty,[102] or vice versa.[103] It must be stressed that adjudicators not infrequently arrive at a conclusion on the (non-)existence of a TU by reasoning whether the TU is expedient, desirable or workable.[104] Apart from the cases where such reasoning indicates the plausibility of the existence of a TU,[105] this approach is problematic.[106] The expediency of a TU or its consequences is not a matter of certainty of its existence or content.[107] This approach prevents the certainty requirement from

[97] Levie (n 14) 1105.
[98] ibid.
[99] Thomas (n 51) 441.
[100] See eg *General Reinsurance* (n 49) 876; Supreme Court (Austria) (CISG) (n 90).
[101] Thomas (n 51) 441.
[102] *General Reinsurance* (n 49) 876.
[103] *Kum* (n 13) 444 (the analysis whether a TU was certain was solely based on its expediency and reasonableness).
[104] *Montague* (n 86) 12; ICC Arbitration, No. 9083, August 1999 (CISG) <http://cisgw3.law.pace.edu/cases/999083i1.html> accessed 1 December 2018 (a usage - that certain discrepancies in quantity were not a lack of conformity as long as the difference was made up within the overall delivery time by subsequent deliveries - seemingly established on the basis that: '[s]hipments cannot always consist of an equal number of goods being shipped with each shipment'; '[t]he ability to ship goods depends on the space available and the manner in which such goods are loaded'); Civil Court Basel, 3 December 1997 (Switzerland) (CISG) <> accessed 1 December 2018.
[105] Such as where the TU is incapable of being applied to the goods or transaction in question. See eg ICAC Arbitration, 16 February 2004 (CISG) <http://cisgw3.law.pace.edu/cases/040216r1.html> accessed 1 December 2018 ('Taking into account the exclusively specific characteristics of the subject of delivery, particularity its production, transportation and application, this [testing-before-delivery] condition cannot be regarded as a generally accepted and commonly known usage...For the same reasons it cannot be even regarded as a local usage on the market for such products, as well as because such specific conditions as the one alleged by the representatives of the [Buyer] (1,000 items of goods) can be determined only by the agreement between the parties fixed in the contract and not otherwise.').
[106] See similarly Thomas (n 51) 441.
[107] In *Re An Arbitration between Walkers, Winser & Hamm and Shaw, Son and Co* [1904] 2 KB 152, 159, a party argued that the requirement in English law that a TU ought to be reasonable prevented a TU from being certain because it would depend on 'the idiosyncrasies of the arbitrator'. The court rightly rejected this argument because reasonableness was often used in law and 'there must be variations of opinion as to the reasonableness of a custom' (ibid). This position is also correct because accepting this argument would mean that TUs would never have legal effect in English law.

serving its purpose and function, muddles the distinction between various preconditions of a TU, undermining the robustness and predictability of the rules of commercial law that give force to a TU. Expediency and similar considerations, if deemed important, should only be covered by such preconditions as reasonableness[108] or legality.[109]

It is submitted that the certainty requirement is desirable in international sales. First, the reasons and policies underlying the UIS can only be relevant and be implemented if a TU truly exists, which this requirement seeks to ensure.[110] Secondly, the danger that an alleged usage is a fiction is particularly real in international trade because of: the diversity of participants and trade sectors; numerous sources triggering an allegation of a TU; the diversity of legal cultures and environments, such as those in litigation or arbitration, with arbitrators being more favourable to finding a TU;[111] the debate about *lex mercatoria*, with its advocates being prone to recognising a TU; adjudicators' establishing a TU on weak or no evidence.[112] The requirement for a TU to be certain seeks to directly mitigate this danger.

But this requirement has its drawbacks. First, it can duplicate the generic proof and evidentiary requirements, normally applicable in civil or commercial cases.[113] Unless it imposes a higher evidentiary threshold in respect of a TU, there is little to be gained from duplicating an already existing and similar evidentiary requirement.[114] Secondly, it

[108] See sub-section 'Reasonableness'.
[109] See eg *Oricon Waren-Handelsgesellschaft MBH v Intergraan NV* [1967] 2 Lloyd's Rep 82, 96; JJ White and RS Summers, *Uniform Commercial Code* (6th edn, West 2010) 145.
[110] Cf Kraus and Walt (n 23) 203.
[111] I Schwenzer, P Hachem and C Kee, *Global Sales and Contract Law* (OUP 2012) 27.08; Goode (n 19) 15; also the discussion in this work.
[112] This is not to say that some of these reasons will not be relevant (in terms of leading to the finding of a TU that is a fiction) in the domestic context, particularly in large countries.
[113] See eg these cases where the CISG, containing no certainty requirement, was applicable: Supreme Court (Austria) (n 90) ('The existence of a trade custom must be qualified as a question of fact and must already be pleaded at the Trial Court level...All methods of proof of the [Austrian Code of Civil Procedure] may be used in the determination of this question of fact.'); Appellate Court Dresden, 9 July 1998 (Germany) <http://cisgw3.law.pace.edu/cases/980709g1.html> accessed 1 December 2018 ('[the buyer] has neither explained such an alleged trade usage in detail, nor proven it').
[114] This is the case in English law. See *General Reinsurance* (n 49) 876: 'I do not…read [the certainty requirement] as meaning more than that the usage relied upon it so be established by the application of ordinary standards of proof and that what the usage is must be clearly defined' (Oliver LJ); Thomas (n 51) 443.

is arguable that the certainty requirement can possibly lead to unfairness[115] where the evidence supports a TU's existence, but lacks detail as to its content.[116] Even a vague TU, as part of the context for contract interpretation, may be relevant and valuable.[117] It may, for example, influence what is regarded as normal, usual or reasonable in a given sector.[118] This means that an adjudicator may have to be flexible in applying this standard to the *content* of a TU. That said, if there is an ambiguity in an alleged TU, preventing it from being workable unless a guess or an assumption is made, then such a TU ought to be regarded as uncertain. Take an English case,[119] involving an alleged usage in the cattle food trade. According to it, if a clause in a standard form contract (No 15) of the Cattle Food Trade Association - providing for how the final weight of goods was to be fixed - could not be applied, payment was to be made 'on the bill of lading weight'. The court rightly doubted that such a TU was sufficiently certain because it did not specify whether the b/l weight referred to the 'net' or 'gross' weight. Without assuming[120] or guessing which of the two was relevant, this TU is incapable of being applied.

Finally, the certainty requirement provides a tool and leeway, additional to other preconditions, for an adjudicator to police what constitutes a (valid) TU. As such, it creates additional complexity[121] and costs for the parties. A lack of guidance and

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[115] Although it is also arguable that this is rather a matter of the limits of institutional competence of courts and tribunals.

[116] See Hoffman (n 15) 74, including footnote 163, where the author criticises the US court's decision in *Bagwell v Susman* 165 F.2d 412 (1947) for rejecting an alleged usage concerning the return of defective goods because one of the three witnesses disagreed not as to the existence of a usage but as to the time frame for an expected return of the goods. However, on closer reading it is clear that the real reason for this decision concerned the witnesses' reliance on the experience of their respective companies and merely broad and unsupported references to a 'usual' practice of 'most manufacturers'. It was this evidence that was deemed to be 'thin' and insufficient to meet the requirements of the universality, imperativeness, uniformity and certainty of a usage (ibid 416).

[117] S Macaulay, 'Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein' (2000) 94 Northwestern University School of Law 775, 803; Kraus and Walt (n 23) 203.

[118] See eg the discussion in the main text accompanying (n 83).

[119] *Oricon* (n 109).

[120] The court was prepared to assume that 'gross' weight was meant (ibid 97). However, the usage was still not admitted because of its inconsistency with the 'gross delivered weight provisions' in the contract notes and the contractual clause in question (ibid).

[121] From the CISG perspective, this domestic law requirement raises yet another complexity depending on whether it is an issue of 'validity', not governed by the CISG (Art 4(a)). If so and a usage is not deemed to be 'certain', it will not be recognised due to its invalidity, even if the Convention's requirements of a usage have been met (Art 9(2)). Contrary to some suggestions (see CL Sun, 'Interpreting an International Sale Contract' (2005) <https://www.cisg.law.pace.edu/cisg/biblio/sun1.html> accessed 1 December 2018), it is

uniformity regarding what amount of and detail in the evidence makes a TU 'sufficiently certain' can lead to uncertainty. The greater the clarity with which adjudicators articulate the considerations relevant to this requirement,[122] the more legal certainty and predictability are promoted, making it a more effective and valuable precondition. Crucially, this requirement must be used for *its* purpose of establishing the TU's existence and content and not to mask the adjudicator's views on the expediency or reasonableness of a TU.[123]

5.2. Reasonableness

Some legal regimes, such as English law or the UPICC, require a usage to be 'reasonable'.[124] This requirement raises the question of *law*[125] as it necessitates an evaluation of compliance with this external and value-based standard. It provides much scope for an adjudicator to police a usage, whether it is characterised as a precondition for[126] or an issue of validity of a TU.[127] A TU is reasonable if: it would be adopted by 'fair and proper,…reasonable, honest, and fair-minded'[128] business persons; it does not contravene the notions of good commercial practice or is not based on a 'atypical' practice;[129] it does not offend or '[outrage] justice and common sense';[130] and it does not contravene public policy and the applicable law,[131] in which case it converges or overlaps with what is a separate exception in some systems – namely, legality. The reasonableness

submitted that because validity is to be defined by the CISG and because the certainty requirement was not incorporated by the drafters, who were well aware of its existence in some systems, this requirement should not be part of 'validity' of a usage under the CISG.

[122] As the court did in *Oricon* (n 109).

[123] See also the point in the main text accompanying (n 106).

[124] Other systems, using this requirement, include: Austria, Denmark, Germany, Greece, the Netherlands, Portugal and Spain, see Official Comments on Art 1:105 of the Principles of European Contract Law (PECL) in O Lando and H Beale (eds), *Principles of European Contract Law: Parts I and II* (Kluwer Law International 2000) 106.

[125] See eg Hoffman (n 15) 64; Thomas (n 51) 441.

[126] ie merely the issue of the applicability of a usage (see MJ Bonell in CM Bianca and MJ Bonell, *Commentary on the International Sales Law* (Giuffrè 1987) 112).

[127] Thomas (n 51) 441. From the CISG perspective, it is suggested that this requirement should not be used as a ground for potentially 'invalidating' a contract, governed by the CISG (see (n 121)).

[128] *Produce Brokers Company, Ltd v Olympia Oil and Cake Co, Ltd* [1916] 2 KB 296, 298.

[129] UPICC, the Official Commentary on Art 1.8(2), point 5.

[130] *Produce Brokers* (n 128) 301.

[131] See Hoffman (n 15) 73 (with further references to case law).

requirement can overlap or be linked with other preconditions, such as certainty,[132] knowledge and observance of a TU, or those concerning its relationship with the express contractual terms. For instance, parties who have entered into a transaction with the *actual* knowledge of a TU may be required to bear a greater burden of proof when challenging reasonableness than that expected without such knowledge.[133] An example of where a TU was deemed unreasonable is one where the weight of goods was to be fixed with reference to a b/l weight, but a TU was silent on whether the b/l weight was to be 'gross' or 'net'.[134] An example of a reasonable TU is in a case, involving a TU that prevented the buyer from rejecting the barley for variations in quality, unless they were 'excessive or unreasonable'. This qualification to the limitation of the right to reject was what made a TU reasonable.[135] Otherwise, a TU would have been too prejudicial to the buyer by depriving it of its right to reject for variations in quality.[136]

It is suggested that incorporating the 'reasonableness' requirement is not a good strategy for governing international sales transactions. First, there is some tension between this requirement and the policy of aligning commercial law with commercial reality, which is premised on the idea that the business community knows best how it should be governed.[137] The reasonableness requirement rejects any such deference by not giving effect to what is otherwise a TU, if it is not deemed 'reasonable' by an adjudicator: the business community cannot be fully trusted with how it chooses to govern itself. It is arguable that there is nothing wrong with this policy choice because commercial law should only protect the businesses' 'reasonable' expectations. Whilst this argument has force, it is contended that if the thresholds of knowledge and observance of a TU are properly set and enforced, then, together with the certainty requirement, they ensure that only reasonable TUs are given effect. The preferable approach is that of the UCC and CISG that presumes that knowledge and the regularity of observance of a TU by the

[132] See the main text accompanying (n 102-107).
[133] *Produce Brokers* (n 128) 301; Thomas (n 51) 442.
[134] See also (n 119) and the accompanying main text.
[135] See *Re An Arbitration* (n 107) 157-159.
[136] ibid.
[137] See (n 12-13) and the accompanying main text.

business community make a TU reasonable. These regimes lay their trust in the business community, making it the arbiter of expediency or reasonableness.

The second related point is that this requirement may lead to an unjustifiable interference in what may be a perfectly reasonable TU. Take the example in the Official Comments on the UPICC[138] of a TU that authorises a buyer to raise a claim for non-conformity only if it is verified by a certificate by an internationally recognised inspection company. It may be that the branch of this company in the port where the buyer received the goods is unavailable (eg, due to a strike) and the nearest branch is in a different port, accessing which is difficult and prohibitively expensive. According to the Comments, this TU is unreasonable and the buyer may rely on a non-conformity that is not verified by an internationally recognised company.[139] It is argued, however, that this TU should be given effect, protecting the party relying on a TU,[140] the seller in this case. The content of a TU is certain and assuming it meets the knowledge and observance requirements, the buyer can be taken to know the TU and protect itself by incorporating a relevant clause. The effect of recognising a TU should be similar to that of any default rule, which is applicable unless derogated from by the parties.[141] The approach advocated here promotes responsible and careful business planning and contract drafting by parties, such as the buyer in this case.

Finally, reasonableness is notoriously vague and open to diverging interpretations, as demonstrated by this work's disagreement with the Comments on the UPICC. Its vagueness undermines the traders' ability to rely on a TU and predict their legal positions and, ultimately, the UIS.[142] It creates unnecessary complexity, uncertainty

[138] UPICC, the Official Commentary on Art 1.8(2), point 5.
[139] ibid.
[140] See Chen (n 24) 121-122, possibly taking a similar view.
[141] The reasons why a TU should apply to newcomers to the market have already been set out. See (n 28, 29) and the accompanying main text.
[142] Added to the problem of predictability is the fact that some decisions fail to elaborate on why a TU was unreasonable and provide guidance as to the relevant factors and their balance.

and the drafting and dispute resolution costs.[143] It is thus submitted that its conceptual, policy and practical weaknesses strongly outweigh its benefits.[144]

5.3. Knowledge and observance

Any regime, recognising a TU, requires some level of knowledge and/or observance of a TU. It is the knowledge and observance by a business community that give a TU its legitimacy[145] and define whether it exists under the applicable law. The justification, effectiveness and viability of the UIS largely depend on how *these* requirements are formulated and applied in practice. English law requires a usage to be 'universal'[146] or 'notorious'[147] and based on a 'continuity of acts'[148] in the sense that an alleged TU must have existed for a sufficient time to be become known to and accepted by members of the trade.[149] Rarely, is it possible for universality of knowledge (or observance) to be established[150] and that is why in practice English law relies on a lower threshold of a TU having to be 'generally accepted [and followed] by those who habitually do business in the trade or market concerned'.[151] The evidence of 'general familiarity'[152] with a TU and its incorporation into 'a large number of contracts'[153] in the given trade is likely to suffice.

The threshold in the UCC and CISG is formulated more precisely. Under the UCC a usage is that of which the parties engaged in the relevant 'vocation or trade…are or should be aware'[154] and which has 'such regularity of observance in a place, vocation, or

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[143] Such as the parties' having to argue and present evidence regarding what is reasonable.
[144] The reasonableness requirement does have benefits. For example, it enables adjudicators to police TUs that originate from monopolies.
[145] Coetzee (n 8) 11.
[146] See eg *Oricon* (n 109) 96 (citing with approval a source referring to a TU having to be 'universally acquiesced').
[147] *General Reinsurance* (n 49) 872, 876-877.
[148] 'Those acts have to be established by persons familiar with them, although…they may be sufficiently established by such persons without a detailed recital of instances' (*Cunliffe-Owen* (n 49) 1438).
[149] Thomas (n 51) 438.
[150] But not impossible, where eg the relevant market is small (see *Nanakuli* (n 70)).
[151] *Kum* (n 13) 444.
[152] *General Reinsurance* (n 49) 877.
[153] In *Re An Arbitration* (n 107) 158.
[154] UCC §1-303(d).

trade as to justify an expectation that it will be observed with respect to the transaction in question'.[155] The CISG, to alleviate the concerns of developing counties,[156] establishes more extensive requirements not only in respect of knowledge and observance in a particular trade sector, but also in respect of the knowledge of the contracting parties: 'The parties are considered…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'.[157]

Whilst these knowledge and observance requirements have a common sense-like quality to them, they give rise to difficulties of interpretation and application. First, the requirement that an alleged TU must be *known to* and regularly *observed* by parties in the relevant trade ideally demands an empirical and statistical inquiry. It is a fact, not an opinion. However, cases hardly reveal any statistical evidence of knowledge and observance in the relevant sector. A UCC case[158] that resembles an attempt to do so is one where a US court rejected a motion, seeking to exclude testimony regarding the existence of a TU. In this case, there was evidence that eleven out of one hundred oil trading companies were familiar and followed an 'industry practice of pricing payback barrels'. An argument that this did not constitute 'regular observance' was rejected because these eleven companies were 'major players in the industry…responsible for eighty-percent of all crude oil trading'.[159] Such cases are extremely rare and in most cases, the knowledge and observance requirements are at best decided upon on the basis of testimonies of experts, who rely on their 'beliefs' or experiences.[160] At worst, the knowledge and observance (and ultimately existence of a TU) are asserted or assumed.[161]

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[155] §1-303(c) UCC.
[156] See (n 30, 31) and the accompanying main text.
[157] CISG Art 9(2).
[158] *Lion Oil Trading & Transportation, Inc v Statoil Marketing and Trading (US)* 2011 WL 855876, 1.
[159] ibid 8.
[160] See R Craswell, 'Do Trade Customs Exist?' in Kraus and Walt (n 23) 126, arguing that only general beliefs, not detailed information, are internalised by experts, leaving room for judgment about the content of a TU.
[161] See eg ICAC, 6 June 2000 (CISG) <http://www.cisg.law.pace.edu/cases/000606r1.html> accessed 1 December 2018, ('It is commonly known that the mentioned 10% [ie that added to 100% covered by the insurance under a CIF contract, as determined by Incoterms, which whilst not applicable, were taken to reflect the practices of international trade] covers the expected profit of the buyer and is the ordinary

Although judges proclaim that establishing TUs is not a matter of opinion,[162] a lack of statistical evidence inevitably results in decisions, based on an adjudicator's *intuitive judgement*.[163] At the same time, a sophisticated empirical and statistical analysis is rarely feasible, especially in the international context. Doubts will therefore remain about whether an adjudicator's decision regarding the (non-)existence of a TU truly and accurately reflects the reality.

Secondly, these requirements are almost universally treated as questions of fact,[164] which is somewhat problematic. Take the CISG that requires a TU to be widely known to and regularly observed by parties 'to contracts of the type involved in the particular trade concerned'. This provision does not specify the *number* of parties. According to cases, it requires the *majority* of, and not all, the parties in the sector to have the knowledge of and regularly observe a TU.[165] This approach rests on *interpreting* this provision with reference to a particular threshold to be applied to the facts. Consequently, in the case of the CISG, the application of the knowledge and observance requirements does not raise only the questions of fact because this interpretative choice is a question of law. Whether the *majority* knows and regularly observes a TU is a question of fact. These requirements further raise the question of law when it comes to the implied knowledge, such as the UCC's reference to a usage of which parties 'should be aware'

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amount of profit in the practice of international trade'); (n 185-187, n 192-193) and the accompanying main text; see also Bernstein (n 34) 79, making the same point in the context of US law. This is, of course, not always the case and sometimes arbitration tribunals do not easily infer a usage. See CIETAC, 23 April 1995 (CISG) < http://cisgw3.law.pace.edu/cases/950423c1.html> accessed 1 December 2018, where the tribunal refused to recognise an alleged usage (that a letter of credit ought to be opened 15 days before shipment) in the wool industry, based on the evidence of an experience of one company: 'the…evidence that this is ChinaTex Raw Materials Trading Corporation's practice when doing international trade of wool, cannot prove that it is a widely known and observed practice in the international wool industry'.

[162] *Cunliffe-Owen* (n 49) 1438.

[163] This problem is exacerbated by another, noted earlier, where a TU is established based on the adjudicator's views of the expediency of a TU (see (n 103-113) and the accompanying main text). In addition, because expert witnesses also exercise their judgment (see n 160), an adjudicator's reliance on their testimonies necessarily involves normative judgment, not a factual finding (see Craswell (n 160) 139). See also (n 182) below and the accompanying main text.

[164] See eg Supreme Court (Austria) (n 93); Schmidt-Kessel (n 61), Art 9, para. 21; Thomas (n 51) 441; *Kum* (n 13) 444.

[165] Supreme Court, 21 March 2000 (Austria) <http://cisgw3.law.pace.edu/cases/000321a3.html> accessed 1 December 2018. (International TUs 'are widely known and regularly observed in the sense Art. 9(2) CISG demands, when these are recognized by the majority of persons doing business in the same field'); Supreme Court (Austria) (n 93).

or the CISG's reference to a usage, of which the contracting parties 'ought to have known'.[166]

Thirdly, the existence of a TU rests not just on the traders' knowledge of it but equally on its being followed. However, the emphasis is often placed on the knowledge of a TU, with its observance being downplayed, merged with or treated as secondary to knowledge, or even ignored. For example, in a CISG case, a US court 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 article 9(2)'.[167] The TU was established without examining whether the INCOTERMS were also 'regularly observed', as required by Article 9(2). This approach weakens the requirements seeking to ensure that a TU truly exists and undermines confidence in the credibility of the UIS.

Being essential ingredients of a TU, the knowledge and observance requirements are necessary for the UIS. The legal regimes in question are, it is submitted, right not to require the universality of knowledge and observance. Otherwise, it would be impossible to establish a TU in most cases, undermining any benefits of the UIS. Compared with the 'general familiarity' and observance, the approach of English courts,[168] the 'majority' requirement in the CISG cases seems preferable: it is more precise (more than fifty percent) and conducive to legal certainty. Contrary to the prevailing view,[169] this requirement is a result of *interpreting* the CISG, raising the question of law. It is therefore subject to the Convention's uniformity requirement, with adjudicators having a duty to promote this interpretation.[170]

As shown, the application of the knowledge and observance requirements is far from perfect, raising doubts about the correctness of decisions on the (non-)existence of TUs. The evidentiary imperfection must be accepted because obtaining sophisticated data is hardly practicable. But what adjudicators can be expected to do is to: (1) strictly enforce both the knowledge and observance requirements; and (2) resist the finding of a TU by

[166] See also points made in (n 160, 163) that also question the extent to which these are entirely issues of fact.
[167] *BP Oil International v Empresa Estatal Petroleos de Ecuador* 332 F.3d 333 (5th Cir. 2003).
[168] See (n 151-153) together with the accompanying main text.
[169] See (n 164).
[170] CISG Art 7(1).

asserting its existence, not based on any evidence. If these are not improved, the UIS is in serious doubt.[171]

5.4. Persons of a certain 'vocation' or 'trade'

5.4.1. General

There is no universal classification of trade sectors and it may be difficult for adjudicators to define the relevant 'trade'. This issue is important because it concerns the boundaries of the business community, within which the knowledge and observance requirements need to be established. In some cases, the specialist differentiation between the potentially relevant markets can be necessary. In a case involving the sale of durum wheat, it was critical whether the market was one of 'grain trade or feed market' or for 'for human consumption', with a usage - that the buyer ought to accept defective wheat subject to price reduction - existing only in the former market.[172] Sometimes markets are distinguished on the basis whether they concern seasonal goods or are those where prices are volatile. In one case, the court held that a TU in respect of seasonal goods[173] did not apply to goods with strong price fluctuations.[174] In some other cases, determining the relevant trade may not pose problems, such as where a usage concerns members[175] of a trade association (TA) or a clause in a standard form contract (SFC) produced by a TA.[176] In most cases, adjudicators characterise the market with reference to a commodity or its genus, such as: teenage clothing trade;[177] 'steel business' in a sale of steel;[178] oil trade;[179]

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[171] An argument, that the problem of evidentiary imperfection may not vary in kind from other inquiries that adjudicators must make and that involve quantitative judgments, does not in any way diminish the difficulties with or doubts as to the viability of the UIS. For the issue of the appropriateness of applying a TU from one commercial context to another, see the next section.
[172] *Urbana Farmers* (n 17) 90, 92-93.
[173] Established in a decision of the German Federal Supreme Court, 12 December 1990 (NJW 1991, 1292).
[174] Appellate Court Hamm, 12 November 2001 (Germany) (CISG) <http://cisgw3.law.pace.edu/cases/011112g1.html> accessed 1 December 2018. Another reason why the Supreme Court decision (n 173) was not relevant to establishing a usage in this case was the use of the C&F trade term in the former case.
[175] In *Re An Arbitration* (n 107) (London Corn Exchange).
[176] See *Oricon* (n 109) and the accompanying main text.
[177] *Warren's Kiddie Shoppe* (n 68)
[178] *Ambassador Steel* (n 78) 279.
[179] *Lion Oil Trading* (n 158) (see also the accompanying main text).

the Austrian timber trade;[180] 'poultry trade' in a sale of chicken.[181] It seems inevitable that adjudicators have no choice but to apply 'common sense' about how to define a trade sector.[182]

5.4.2. Usages: sector-specific or generic?

It may be questioned whether a TU is always attached to a particular trade or sector. In the context of a domestic transaction, a supplier of asphalt was held to have a duty to price protect an asphalt paving contractor in Hawaii, bidding for a contract with the government that banned the price escalation clauses in its contracts. Applying the UCC, a US court distinguished between usages in a particular trade from those applicable to *all* businesses in a given locality and held that the supplier was bound by this *generic* usage in Hawaii.[183] Thus, at least domestically usages may be generic, not confined to a 'sector'.

There is a view that such generic usages also exist in international trade.[184] There are many pronouncements to this effect in cases, particularly those resolved by non-specialist arbitration tribunals that are often keen to recognise the existence of 'international trade' 'custom', 'usage' or 'practice'. Some such decisions employ a TU as a contract interpretation technique. For instance, one tribunal held that 'when a contract specifies a delivery date as the month of November of 1994 without otherwise an actual final date, international trade usage would interpret it as the last day of November of 1994, which is 30 November 1994'.[185] It seems that interpreting the parties' intentions without any recourse to a TU would have produced the same outcome.[186] The notion of a 'usage', whose existence is doubtful in the absence of evidence, was probably used to reinforce the tribunal's interpretation.

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[180] Supreme Court (Austria) (n 93).
[181] *Frigaliment Importing Co v BNS International Sales Corp* 190 F.Supp. 116 (1960) 119 (New York law).
[182] Craswell (n 160) 139.
[183] *Nanakuli* (n 70) 791.
[184] See Comment A on Art 1:105(2) PECL in Lando and Beale (n 124); also possibly *Kum* (n 13) 444.
[185] CIETAC, 17 October 1996 (CISG) <http://cisgw3.law.pace.edu/cases/961017c1.html> accessed 1 December 2018.
[186] See Art 8(2) CISG, providing for contract interpretation from the perspective of a reasonable person.

The correctness of some other decisions, such as those recognising the INCOTERMS as a generic international TU (to be used to define a contractual trade term)[187] is genuinely debatable, given the prominence of the INCOTERMS. Still, these decisions were reached without any evidence of how widely known the INCOTERMS really are across the world and whether they are regularly observed in all or most trade sectors. Even more controversial are decisions recognising some other instruments, such as the CISG[188] or the UPICC,[189] as reflecting 'international trade practice' and/or being TUs. These instruments are substantively different and cannot, each in their entirety and both simultaneously, reflect the alleged international trade practice. More importantly, whilst these instruments or their certain provisions can potentially grow into a TU,[190] treating them as a usage for the *entire* international trade contravenes the reality, as evidenced at least by various SFCs in the commodities sector routinely excluding the CISG.[191]

Even more controversial and arguably flawed are decisions that simply assert some specific TU, probably on the basis of the adjudicator's experience or preference of how international sales contracts are or ought to be governed.[192] The CISG cases are replete with examples that include the positions that: 'in light of the customs and practices of international trade, liquidated damages in the amount of 20% of the total contract price

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[187] See eg ICAC, 16/1999, 17 September 2001 (CISG) <http://cisgw3.law.pace.edu/cases/010917r1.html> accessed 1 December 2018 (INCOTERMS 1990 are taken to reflect TUs); ICAC, 6 June 2000 (n 161) (treating the INCOTERMS as the practice of international trade); *St. Paul Guardian Insurance Co v Neuromed Medical Systems & Support* No. 00 Civ. 9344(SHS), 2002 U.S. Dist. LEXIS 5096 (S.D.N.Y. Mar. 26, 2002); possibly, Appellate Court for the Volgo-Vyatsky Circuit, 20 December 2002 (Russia) <http://cisgw3.law.pace.edu/cases/021220r1.html> accessed 1 December 2018. See further sub-section 'Trade terms'.

[188] eg CIETAC, 30 June 1999 <http://cisgw3.law.pace.edu/cases/990630c1.html> accessed 1 December 2018 (treating the CISG as evidence of 'international practice').

[189] eg ICAC, 5 June 1997 <http://cisgw3.law.pace.edu/cases/970605r1.html> accessed 1 December 2018.

[190] See ICC, No 5713, 1989 <https://www.cisg.law.pace.edu/cases/895713i1.html> accessed 1 December 2018, treating Art 39 CISG as a generally accepted TU). Some model contracts recommended by some international organisations are modelled on the CISG. See ICC Model International Sale Contract (Manufactured Goods) (2020) <ICC Model International Sale Contract (Manufactured Goods) - ICC United Kingdom (iccwbo.uk) > accessed 13 December 2020; ITC Model Contract for the International Commercial Sale of Goods; ITC Model Contract for the International Long-Term Supply of Goods (2010) <http://www.intracen.org/uploadedFiles/intracenorg/Content/Exporters/Exporting_Better/Templates_of_contracts/3%20International%20Commercial%20Sale%20of%20Goods.pdf> accessed 13 December 2020.

[191] See further (n 256-262) and the accompanying main text.

[192] Helsinki Court of Appeal (n 95).

[are] obviously too high', resulting in the reduction of damages by fifty percent because that was deemed to be an 'appropriate amount';[193] 'according to international trade usages and the Chinese ports' practices, the unloading time shall start from a reasonable time after the submission of unloading notice and the completion of inspection';[194] '[i]t is a standard procedure in foreign trade that objections should be made in the written form and that any oral objection should be immediately confirmed in writing'.[195] These assertions are not evidence based, raising grave doubts about where there are such international TUs. Even if an adjudicator has encountered these 'usages' in certain sectors, they cannot be extrapolated to the entire and diverse world of international trade. Doubts about the soundness of legal and evidentiary analysis in these decisions are reinforced by their failure to apply the CISG's preconditions for a TU.[196]

Whilst the existence of generic usages for the entire international trade cannot, in principle, be ruled out,[197] it is submitted that any recognition of such TUs must be reached by strict and evidence based application of the knowledge and observance requirements in the context of, at least, most major sectors of international trade. This must be a high threshold, which the cases noted in this section are from reaching. These cases can turn non-existent practices/norms into international TUs if these cases are subsequently relied upon as evidence of TUs.[198] The danger is particularly real in the context of the international instruments requiring uniformity in their application to be promoted.[199]

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[193] CIETAC, 6 February 1997 <http://cisgw3.law.pace.edu/cases/970206c1.html> accessed 1 December 2018.
[194] CIETAC, 17 December 1996 <http://cisgw3.law.pace.edu/cases/961217c1.html> accessed 1 December 2018.
[195] See also Appellate Court Ghent, 11 October 2004 (Belgium) <http://cisgw3.law.pace.edu/cases/041011b1.html> accessed 1 December 2018; CIETAC, 17 October 1996 (n 185), Helsinki Court of Appeal (n 95), ICC, No. 9083 (n 104), CIETAC, 15 December 1998 (n 96) and the accompanying main texts.
[196] Primarily those relating to knowledge and observance of a TU.
[197] It is arguable that some well-known trade terms, such as CIF or FOB, or some requirements of conformity of a b/l, such its having to be 'clean' (see eg *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc (The Galatia)* [1980] 1 WLR 495; Art 27, the Uniform Customs and Practice for Documentary Credits (UCP) 600; D Saidov, *Conformity of Goods and Documents – The Vienna Sales Convention* (Hart 2015) 260-261), are such generic usages.
[198] See section 'Non-industry sources'.
[199] CISG Art 7(1); UPICC Art 1.6(1).

5.4.3. Can an international TU be local?

The contracting parties are normally free to agree on any usage, practice or any other standard, no matter whether these are local or global. There can be an implicit agreement to this effect, such as where the seller has previously supplied the same goods to the buyer and therefore knew about the existence of a local usage. Being part of the context specific to these parties, this usage may be implied in this contract *in fact*. The question, however, is whether default rules, requiring a usage to be implied *in law* without a context-specific intention, require a usage to be global or international. Where a national law is applicable to an international sales contract, it seems that for a usage to be implied in *law*, a usage would have to be internationally recognised. Otherwise, how can the parties from different countries be in the position to know and regularly observe that usage? International instruments, such as the CISG and UPICC, put this point beyond doubt by expressly requiring a usage to be recognised in 'international trade'. A merely local or regional usage should thus not be given legal effect.[200]

Many usages have their origins in a particular locality.[201] If with time, local usages gain global recognition within international trade generally (generic) or a trade sector (sector-specific), they can become 'international'. In the context of the international instruments, it is sometimes suggested that a usage should be implied *in law* if the contracting parties are from or frequently transact in the area/region where a particular usage exists. In a CISG case concerning Austrian wood usages, the court held that to be applicable under Article 9(2), 'these usages must be known or ought to be known to parties which either have their place of business within the area of these usages, or which continuously do business in this area for a considerable period of time'.[202] It is submitted that whilst this position may be justifiable to imply a usage in fact,[203] it is not correct in this type of case to imply a usage under the default rules in Article 9(2) CISG,

[200] See eg P Schlecthriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* (Manz 1986) 40-41.
[201] '…a custom is unlikely to be "applicable all over the world" until it has first been applied in various localities' *Kum* (n 13) 443-444 (partly citing a judge of the Malaysian Court of Appeal).
[202] Supreme Court (Austria) (n 165).
[203] In the case of the CISG, under Art 9(1).

requiring a usage to exist in international trade. The parties' knowledge of a local or regional usage in itself does not 'internationalise' it.[204]

A related point concerns the position that a usage should be implied in law if a usage is recognised by or emanates from the laws of the contracting parties' countries. One CISG case concerned a potential usage, pursuant to which silence in response to a letter of confirmation amounted to an acceptance of an offer. Relying on Article 9(2), the court held that '[such commercial usage can be assumed if the parties have their places of business in countries whose laws contain rules on commercial letters of confirmation and on the legal effects of silence on the part of the addressee and if these rules are similar to that under German law'.[205] A similar decision was reached in another CISG case:

> 'in both Austria and Switzerland the contractual effect of commercial communications of confirmation (in domestic contractual relations) is not denied… As the legal systems of both States generally agree on this issue for domestic contractual relationships, it is not to be assumed that other rules are applicable to contracts for the supply of textiles in international relationships between contractual partners established in Switzerland and Austria. A corresponding commercial usage…in the sense of Article 9(2) CISG, is thus confirmed'.[206]

This position is subject to two criticisms. First, as noted, the parties' mere knowledge and observance of a TU[207] does not make it international. In these cases, a TU should have been implied in fact,[208] not in law. Secondly, the mere existence of a rule in a legal system does not make it a TU, which is a norm or practice adopted by the *business community*, not a legislator. It is possible for a legal rule to generate a new TU or codify

[204] Schlechtriem (n 200) 41.
[205] District Court Kiel (n 89).
[206] Civil Court Basel, 21 December 1992 (Switzerland) (CISG) <http://cisgw3.law.pace.edu/cases/921221s1.html> accessed 1 December 2018; Supreme Court (Austria) (n 93); Appellate Court Frankfurt, 5 July 1995 (Germany) (CISG) <http://cisgw3.law.pace.edu/cases/950705g1.html> accessed 1 December 2018.
[207] Flowing from the parties' being from the countries where such a usage exists.
[208] See CISG Art 9(1): 'The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves'.

the existing TU,[209] but both these scenarios require evidence if an adjudicator wishes to resolve a case by resorting to a TU. Without evidence of the business community's knowledge and observance of any such TU, these judicial statements cannot be seen as correct.[210]

6. Industry sources: evidence of or competition with a usage?

6.1. General

There are many sources, emanating from the business community, that can govern international sales contracts. They include the Rules and SFCs of TAs or transnational law codes, such as the INCOTERMS.[211] Because these sources reflect a widely used practice, norm or shared understanding, they may evidence a TU. They may equally reflect a norm or understanding *recommended* as a starting or reference point in contract negotiations.[212] What is the relationship between them and a possible TU? This section will examine this question in the context of these two sets of sources.

6.2. TAs' Rules and SFCs

There are a number of TAs in the world today, many of which have their Rules, usually incorporated in contracts between its members. The contracts themselves are often based on a SFC,[213] produced by a TA. In the case of well-established TAs, their SFCs and, where relevant, their Rules, interpreted by their specialist arbitration

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[209] See Appellate Court Frankfurt (n 206), where a legal rule that silence in response to a letter of confirmation was regarded as a TU in Germany.
[210] Similarly, see P Schlechtriem in HM Flechtner (ed), 'Transcript of a Workshop on the Sales Convention' (1999) 18 J L Commerce 191, 247.
[211] There are others, such as: industry standards or codes (see D Saidov, 'Standards and Conformity of Goods in Sales Law' [2017] LMCLQ 65, 83-91); other ICC instruments, such as the UCP 600 (on the relationship between the UCP and the seller's documentary obligations, including the view that the UCP are a usage by virtue of which these obligations can be implied see: ICC, 7645 (n 76), para. [29]-[31], [61]; CIETAC, 25 June 1997, at: <http://cisgw3.law.pace.edu/cases/970625c1.html>); model contracts (see n 190).
[212] See eg *London Export* (n 71) 676.
[213] For further discussion of SFCs in this book, see CP Gillette, 'Are Commercial Standard Form Sales Contracts Efficient?'.

mechanisms, are the framework that governs sales transactions in these sectors. For example, it is estimated that 85% of the global trade in oils and fats is governed by FOSFA contracts,[214] whereas the GAFTA[215] SFCs govern the terms on which 80% of the world's grain trade is shipped.[216] Similarly, the majority of cotton traded internationally is governed by Bylaws and Rules of the International Cotton Association.[217] It is submitted that if the contract is based on TA's SFC and/or Rules, the question whether this SFC and/or the Rules evidence a TU is unlikely to arise because their terms are already part of the contract. *If* a party relies on a TU, based on a SFC provision from which the parties have derogated, such reliance ought to be rejected because the intention was to depart from this provision, regardless of whether it evidences a TU.

The question whether a SFC and/or the Rules evidence a TU is thus relevant where they are not part of the contract and a party relies on them to evidence a TU that supports its case. It is argued that such reliance is unjustified since by contracting on different terms to those in a well-known SFC and/or Rules, the parties manifest an intention to exclude the terms in the SFC and/or the Rules. Nevertheless, because legal systems adopt different thresholds for an effective exclusion of a TU, the question of the SFCs' and/or the Rules' ability to evidence a TU may still arise. In principle, a SFC may reflect an existing TU or, if widely used, generate a new TU,[218] including that concerning the interpretation of a provision in the SFC.[219] The rules of some trade bodies, such as the Milan Chamber of Commerce,[220] may reflect TUs in a certain sector or area.[221] Ideally, whether this is the case should be determined by a factual inquiry into, amongst

[214] 'The Federation of Oils, Seeds and Fats Associations Ltd (FOSFA) is a professional international contract issuing and arbitral body concerned exclusively with the world trade in oilseeds, oils and fats with 1,128 members in 90 countries' (<https://www.fosfa.org/about-us/> accessed 1 December 2018).
[215] 'Gafta is an international trade association with over 1700 members in 90 countries' that aims to 'promote international trade in agricultural commodities, spices and general produce, and to protect [its] members' interests worldwide' (<https://www.gafta.com/about> accessed 1 December 2018).
[216] See <https://www.gafta.com/Membership> accessed 1 December 2018.
[217] See <http://www.ica-ltd.org/about-ica/> accessed 1 December 2018.
[218] See similarly Coetzee (n 8) 4.
[219] See *Oricon* (n 109) and the main text accompanying (n 119-120), (n 134).
[220] Di Brozolo and Marchisio (n 56) 64-66.
[221] Their interpretation is a question of law.

others, the drafting history and context of the SFCs and/or Rules.[222] In reality, the whole point of relying on them to evidence a TU is to avoid a detailed and impractical factual investigation.

It is therefore submitted that, in the absence of such factual evidence, the SFCs and Rules cannot evidence a TU.[223] A choice by a trading community to codify what may be a TU reflects an intention to turn it into this community's 'formal rule', whose precise formulation may also differ from that TU. There is a strong argument that such formalisation of a TU leads to its death, the view rightly taken by one UK court:

> 'After a time…the London Corn Trade Association was formed, and that association had, and still has, its own form of contract in which there is an express clause more or less corresponding with this alleged custom. From this I should myself have drawn the inference that the members of the association, as men of business, thought it more convenient that such a matter should be expressed in the contract itself rather than that it should be left to the understanding of the parties, and that they therefore put it into the common form of contract in order that parties to any particular contract might agree to it…or might leave it out if they did not wish for it. If the parties put a provision to this effect into their contract, it destroys the custom as a custom, for a custom is something so well understood that it is unnecessary to expressly insert it in a contract.'[224]

The proliferation and use of the TAs' SFCs and/or Rules thus largely marks the end of TUs in these sectors.[225] A TU may certainly be alleged to add to or qualify a provision in a SFC. In this respect, the position of English law – that a usage must not be inconsistent with an express contractual term – is preferable.[226] Industry SFCs reflect and formalise this industry's preferred and carefully drafted solutions and standards. The

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[222] '… courts would need to engage in a detailed game theoretic analysis of the associations' rules-creation process, an inquiry that is likely to exceed the limits of their institutional competence' (Bernstein (n 34) 89, footnote 101)
[223] See similarly a US case *Western Industries, Inc, v Newcor Canada Ltd* 739 F.2d 1198 (UCC), para [29]; Thomas (n 51) 440. See also *Emco Mills v Isbrandtsen* Co, 210 F.2d 319 (8th Cir.1954).
[224] *Re An Arbitration* (n 107) 160.
[225] M Bridge, *The Sale of Goods,* (3rd edn, OUP 2014) 1.19.
[226] See (n 71-73), (n 120) and their accompanying main text.

SFCs should be seen as the definitive statement of the industry's preferences and practices, leaving little or no room for TUs.[227] This perspective promotes legal certainty and the traders' reliance on SFCs and is likely to correspond to some commodities sectors' expectations.[228]

6.3. Trade terms

The extensive use of trade terms, such as CIF or FOB, is a major feature of international sales contracts distinguishing them from their domestic counterparts.[229] Incorporating a trade term has significant implications for the parties' rights and obligations.[230] Some trade terms had probably originated as usages,[231] but were then captured by domestic laws and the INCOTERMS. Does this 'capture' exclude the possibility of an unwritten usage(s) on trade terms that exist(s) outside and independently of the INCOTERMS or domestic laws?

It is difficult to answer definitively. On the one hand, some terms, particularly such prominent ones as CIF/C&F or FOB, are well known and their basic features - such as what they stand for, the passage of risk, the significance of documents or even certain remedial consequences in a CIF/C&F contract,[232] or an FOB seller's duty to place the goods on board the vessel – are likely to be known nearly universally. On the other hand,

[227] See *Les Affréteurs* (n 72) 808-809.
[228] See empirical work by Bernstein (n 33) on the US National Grain and Feed Association (NGFA).
[229] For further discussion of trade terms in the context of English law and the INCOTERMS in this book, see M Bridge, 'CIF and FOB Contracts in English Law: Current Issues and Problems' and J Coetzee, 'Incoterms® and the Standardization of the International Sales Law' respectively.
[230] Such as those concerning: the meaning of 'delivery'; passage of risk of loss of/damage to the goods; the seller's documentary obligations; the parties' obligations concerning notices, such as a notice of appropriation in a CIF contract (see n 233) or a notice of vessel's readiness to load in an FOB contract; the price structure; the CIF seller's or the FOB buyer's obligation to make a carriage contract; the obligation concerning the payment of export or import duties.
[231] See eg C Murray, D Halloway and D Timson-Hunt, *Schmitthoff*: *The Law and Practice of International Trade*, (Sweet & Maxwell 2012) 2-001
[232] eg adjudicators sometimes regard timely stipulations in CIF/C&F contracts as being of the essence, giving the buyer the right to terminate the contract (in the CISG context, this means that the seller is deemed to a commit a fundamental breach (see Art 25)). See Appellate Court Hamm (n 174); ICC, No. 7645 (n 76).

there are no universal answers to detailed questions,[233] such as the requirements governing a CIF seller's documentary duties, or the precise duties of an FOB buyer, amplified by different types of FOB contracts. It is suggested that whilst some decisions recognise international TUs regarding some trade terms,[234] their content cannot be *comprehensively* determined in the abstract. Only some domestic laws and the INCOTERMS can inject detail into an alleged TU on a trade term.

The experience of domestic laws, particularly that manifesting in cases, can evidence an international TU by reflecting the reality of and understandings within international trade.[235] This approach can be seen in a CISG case where the tribunal regarded English law as 'an expression of an internationally recognized understanding of the CIF [and CFR] clause'.[236] Being independent from national laws and designed for international trade, the INCOTERMS are even more suitable for evidencing an international TU than domestic laws. That is why many treat the INCOTERMS as international TUs.[237]

The question whether the INCOTERMS evidence international TUS, assuming they exist, arises where: a contract specifies a trade term, but does not incorporate the INCOTERMS (intended to apply only when incorporated); or is governed by the law that has nothing or little to say on trade terms. If the INCOTERMS are seen as (evidencing) international TUs, they will define the contractual trade term. But are the INCOTERMS an international TU or evidence thereof? Given their transnational nature and the absence of other comprehensive sources on trade terms, the proponents of *lex mercatoria* may answer affirmatively, treating the content of a trade term as the question of law. From a more traditional perspective, the answer depends on the criteria for giving effect to a TU

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[233] Although see CIETAC, 21 May 1999 (CISG) <http://cisgw3.law.pace.edu/cases/990521c1.html> , accessed 1 December 2018 where an international TU was recognised in respect of a CIF term, with some relatively detailed guidance given on notice of appropriation.

[234] See eg ICC, 7645 (n 76); Commercial Appellate Court, 31 October 1995 (Argentina) <http://cisgw3.law.pace.edu/cases/951031a1.html> accessed 1 December 2018; CIETAC, 21 May 1999 (n 233); CIETAC, 9 January 1993 <http://cisgw3.law.pace.edu/cases/930109c1.html> accessed 1 December 2018; Commercial Appellate Court, 31 October 1995 (Argentina) <http://cisgw3.law.pace.edu/cases/951031a1.html> accessed 1 December 2018.

[235] See section 'Non-industry sources'.

[236] ICC, No. 7645 (n 76); similarly, Bridge (n 2) 10.63.

[237] See eg CIETAC, 25 June 1997 (n 211); *BP Oil International* (n 167); (n 187) and the accompanying main text.

under the applicable law. As explained, the US law, English law and CISG require a usage, at least, to be well known to and regularly observed by traders, raising questions of both fact and law. Whether the INCOTERMS meet these requirements requires a largely empirical inquiry into all trade sectors, a difficult undertaking. In the absence of such data, some advocate a presumption that the INCOTERMS are an international TU, unless otherwise is proved in the context of a particular sector.[238] Such a presumption, it is suggested, is not justifiable because: a 'factual' presumption[239] contravenes the need for the knowledge and observance requirements to be *actually* applied; even absent empirical data, it is well known that not all sectors follow the INCOTERMS.[240]

It is thus unlikely that the INCOTERMS are a usage for the *entire* international trade. Probably, the INCOTERMS (or some of them) are TUs only in certain sectors. When determining if they are widely known to[241] and regularly observed in a given sector, it is relevant whether the contract is based on a TA's SFC. If a SFC uses a trade term without incorporating the INCOTERMS, they cannot be seen as a TU in that sector for the reasons, explained earlier.[242] If the SFC specifies the applicable law with well-developed rules on trade terms, the SFC reinforces an understanding that the INCOTERMS are not usages in that sector. The INCOTERMS can constitute a TU in sectors where a TA's SFCs and/or Rules incorporate them, but in this case the question whether the INCOTERMS evidence a TU is irrelevant.[243] It is only relevant in sectors that do not have a TA or SFCs. A party alleging a TU should then prove that in that sector the INCOTERMS meet the preconditions for a TU under the applicable law.

In practice, adjudicators will resort to the INCOTERMS to define a trade term, even where they are not contractually incorporated, because they are the only relevant transnational code. As a matter of legal analysis, to avoid the preconditions for

[238] Schmidt-Kessel (n 164) para 27 (with further reference).
[239] Whether a TU is widely known to and regularly observed is largely a factual inquiry (see sub-section 'Knowledge and observance').
[240] See Bridge (n 2) 10.62, giving an example of dry commodities trade, as opposed to oil trade where the INCOTERMS are often used.
[241] It can also be argued that if the INCOTERMS are almost universally known, the fact that they are not incorporated in the contract indicates the parties' intention not to apply them (see ibid).
[242] See sub-section 'TAs' rules and SFCs'.
[243] If the INCOTERMS are excluded from a SFC that otherwise incorporates them, such an exclusion is likely to evidence an intention not to be governed by them.

establishing a TU, it is better to rely on the INCOTERMS as simply reflecting a widely shared international understanding of trade terms that do not necessarily amount to a TU. Instead of acquiring binding force, which is usually the effect of implying a usage, the INCOTERMS are a factor in contract interpretation. Other sources evidencing an international understanding of a trade term – the experience of domestic laws and arbitration case law giving an international meaning to trade terms - may be consulted *together with* the INCOTERMS.

7. Non-industry sources

There are non-industry sources that can evidence the existence and content of a TU. One is cases. Because cases can reveal commercial reality, they can evidence an international TU,[244] even if the applicable law is different from that under which these cases were decided.[245] In a CISG case, involving parties from Germany and China, a German court relied on cases decided under German and English law to infer a 'general understanding' that a clause stipulating a 'net' or 'net cash payment' meant the exclusion of the debtor's right to make deductions (set off).[246] The reliance on case law from a non-applicable regime (English case law in this case) is a *factual* exercise, not subject to the treatment it would receive if it raised questions of law.[247]

This ability of cases to evidence an international TU has far reaching consequences. First, cases, especially court decisions in economically influential jurisdictions, can impact on and trigger a response by the industry. For instance, one UK

[244] cf Appellate Court Hamm (n 174).
[245] See further (n 236) and the accompanying main text.
[246] Appellate Court Hamburg, 5 October 1998 (Germany) <http://cisgw3.law.pace.edu/cases/981005g1.html> accessed 1 December 2018. As this case demonstrates, adjudicators sometimes infer a TU from the commonalities between legal systems (see also E Jolivet, G Marchisio and F Gélinas, 'Trade Usages in ICC Arbitration' in Gélinas (n 18) 225, 229 and 231). Such findings are often doubtful because the fact of similar or identical rules in more than one legal system does not in itself establish a TU. Such rules are more likely to reflect the same legislative choices than a business practice. See also (n 209, 210) and the accompanying main text.
[247] See similarly, Schmidt-Kessel (n 164) para 21, in the CISG context ('Since the issue is merely one of determining facts, decision from non-Contracting States are…to be considered. The determination of a trade usage can therefore generally not be challenged with appellate procedures limited to questions of law.').

court recognised the 'overriding importance of establishing on adequate evidence for the market as a whole whether the alleged trade practice or usage exists or not'.[248] In a US law case, the court rejected the allegation of a TU, contravening the express contractual clause, because that would signal the courts' reluctance to enforce legal rights resulting 'in an industry-wide waiver of such rights'.[249] The court was also reluctant to encourage the introduction of an exclusion clause, 'yet another standard boilerplate provision in commercial contracts'.[250] Secondly, by recognising a TU, a case can entrench the TU firmly by lending it 'an appearance of law'.[251] Courts in subsequent cases may continue to recognise this TU,[252] eventually leading to its becoming so well known that courts will take judicial notice of it, in which case there will be no need for proving a TU.[253] The same, if not greater, expansion of TUs occurs in arbitration because arbitrators seem readier than courts to take judicial notice of TUs[254] and the rules of most arbitration institutions require usages to be taken into account.[255] The said consequences pose no concerns if initially a TU is properly established under the applicable preconditions; but, as shown, this is rarely the case, resulting in a real danger of 'phantom usages' being created.[256]

Another potential source of a TU is an international instrument, such as the CISG or UPICC. As seen, they are sometimes treated, whaolly or partly, as evidencing an

[248] *Baker v Black Sea & Baltic General Insurance Co Ltd* [1998] 1 WLR 974, 984.
[249] *Southern Concrete* (n 73).
[250] ibid.
[251] Hoffman (n 15) 111-112.
[252] See eg *Southland Farms, Inc v Ciba-Geisy* Corp 575 So. 2d 1077 (1991). It has been rightly argued that judicial recognition is unnecessary in order for a TU to be recognised as such (Goode (n 19) 10-11). Otherwise, how can a TU be a binding business practice or norm before judicial recognition? At the same time, paradoxically, it cannot be definitively stated (given the applicable law's preconditions for a TU) that something is a TU unless and until there is a court decision to this effect. *Cf General Reinsurance* (n 49) 876 (Oliver LJ).
[253] *Moult v Halliday* [1898] 1QB 125, 129; also (n 271) and the accompanying main text.
[254] *Oricon* (n 109) 96; Goode (n 19) 15; Schwenzer, Hachem and Kee (n 111).
[255] See eg Art 21(2), Rules of Arbitration of the ICC (2017); Art 28(4) UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006). See, further, CR Drahozal, 'Commercial Norms, Commercial Codes, and International Commercial Arbitration' (2000) 33 Vanderbilt J Transnational L 79. See also Gélinas (n 44) 268, 277-278, contending that arbitral practice and arbitration awards constitute an international 'business practice', forming TUs.
[256] Hoffman (n 15) 111-112. See also Goode (n 19) 13; Jolivet, Marchisio and Gélinas (n 246) 225-228.

international usage.[257] In addition to the already noted problems with this position,[258] it must be pointed out that both instruments were not drafted by the business community[259] and do not reflect *pre-existing* usages. Another point concerning the CISG is that recognising it as a usage may require a court of a Non-Contracting State to apply this Convention.[260] It is also arguable that commonly 'conventions fail to gain acceptance precisely because they do not reflect the practices or perceptions of the dominant commercial community'.[261] Whilst the CISG has been ratified by many countries,[262] it has not been accepted by the commodities sector, and does not reflect practices therein. Looking forward, these instruments can generate sector-specific or even generic international TUs, but the applicable preconditions then need to be duly proved. Given all the noted difficulties, this will not be an easy task.

Finally, general principles of law, such as *pacta sunt servanda* or *rebus sic stantibus*, are sometimes treated by arbitrators as sources of an international TU.[263] This approach, seeking to add 'respectability'[264] to their decision or help resolve the issues[265] through broad and flexible concepts, is unfortunate. A TU is a creature of the trading community, whereas general principles of law are so generic as to transcend any trading activity,[266] constituting even a source of public international law.[267] Even if some general principles originate from a usage,[268] they have long been detached from practices and norms of the trading community.[269]

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[257] See (n 188, 189) and the accompanying main text.
[258] See the main text accompanying (n 188-190).
[259] Goode (n 19) 22.
[260] ibid 24.
[261] ibid 22.
[262] 90 countries.
[263] '…general principles of law began to contaminate the notion of usages as early as the 1970s…' (Jolivet, Marchisio and Gélinas (n 246) 231).
[264] Goode (n 19) 18.
[265] Jolivet, Marchisio and Gélinas (n 246) 221.
[266] ibid 17.
[267] Art 38(1)(c) of the Statute of the International Court of Justice.
[268] Goode (n 19) 16-17.
[269] See also (n 246).

8. Proof

One issue involved in proving a TU or an aspect thereof is whether it raises the question of law or fact. Whilst establishing a TU involves mixed questions of law and fact, it can become so well known that courts and arbitrators will take judicial notice of it.[270] Adjudicators can then invoke a TU and determine its content by their own motion.[271] Consequently, a party relying on a TU will not need to raise a TU or bear the burden of proving it, although it may have to present arguments and sources as to its precise content.[272]

Proponents of *lex mercatoria* regard TUs as the 'common law' for all international commercial contracts.[273] However, according to the more traditional analysis, establishing a usage is subject to the applicable law's preconditions. A party, relying on it, normally bears the burden of proving these preconditions under the applicable standard of proof,[274] such as the 'balance of probabilities' in English law.[275] The *potentially* relevant evidence includes: expert witnesses; affidavits;[276] industry standards or other information, such as circulars or brochures;[277] statements by the

[270] See also (n 253-254) and the accompanying main text.
[271] '…trade usages generally…need to be proven...Only in such cases where the law itself refers to a usage or local custom, does this no longer require a usage established between the parties, but constitutes a more specific definition of the law which generally does not need to be proven and which the judge applies by virtue of his position. It is however also possible that a certain trade usage is notorious to the Court and consequently does not need to be proven. Facts are considered notorious to the Court if they are generally known or known to the judge as a result of his or her profession. Such facts need to be weighed by the judge in his or her decision by virtue of their position…The Court of Appeal is of the opinion that the margin in the textile trade is not a fact notorious to the Court, which is why the [buyer] would have had to prove this trade usage.' (Appellate Court Basel, 5 October 1999 (Switzerland) (CISG) <http://cisgw3.law.pace.edu/cases/991005s1.html> accessed 1 December 2018); also G Saumier, 'Trade Usages in the Convention on Contracts for the International Sale of Goods' Gélinas (n 18) 139; Bonell (n 126) 110.
[272] See P Glenn, 'The Law Merchant and Choice of Law' in Gélinas (n 18) 243.
[273] Treating aspects of TUs as questions of fact is seen as downgrading the significance of a TU (Gélinas (n 44) 274-275).
[274] For an argument that different standards of proof should apply, depending on the function for which a TU is relied upon, see Hoffman (n 15) 65.
[275] Thomas (n 51) 443. In the Netherlands, a usage is only recognised if approved by a commission with the Ministry of Justice (Schwenzer, Hachem and Kee (n 111) 27.30).
[276] See eg *Figgie International, Inc v Destileria Serralles*, Inc 190 F.3d 252 (4th Cir. 1999).
[277] Thomas (n 51) 443.

industry bodies;[278] the parties' conduct, such as their reliance (or specific exclusion of)[279] on the alleged usage in their prior dealings;[280] trade codes and SFCs; case law, domestic or international; rules in a national legal system(s); transnational law codes, such as the INCOTERMS. The admissibility of and weight to be given to evidence are matters for the applicable law.[281]

The expert witnesses are the most frequently presented evidence of TUs. Experts called by the parties often disagree, sometimes relying on 'competing empirical hunches'.[282] It is up to judges and arbitrators to resolve such disagreements and make judgements about whether the preconditions for a TU are met. Adjudicators must be aware of the danger that establishing a TU upon mere assertions or 'opinions', as opposed to facts[283] undermines the viability and credibility of the UIS. The danger is particularly real given that the experts' incentive to please those who hired them.[284]

9. The UIS: The way forward

The role of TUs in governing international sales contracts may appear significant. There has been much discussion of the rationale of giving effect to TUs, possibly reflecting the commercial law community's belief in the prominent role of TUs. Most commercial laws and many well-developed sales law regimes, such as English law, the CISG and UCC, and arbitration rules are premised on the existence of TUs. Additionally, usages *are* invoked and relied upon by adjudicators at the dispute resolution stage. Nevertheless, it is argued that TUs are in decline. Traders increasingly prefer to be governed by those industry sources that are more formalised, detailed and comprehensive

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[278] Appellate Court Dresden, 9 July 1998 (Germany) (CISG) <http://cisgw3.law.pace.edu/cases/980709g1.html> accessed 1 December 2018 (suggesting that suitable evidence could have been that given by the ICC or similar body).
[279] Schwenzer, Hachem and Kee (n 111) 27.32.
[280] ICC Arbitration, No. 9083 (n 104); *Columbia Nitrogen* (n 70).
[281] See eg Supreme Court (Austria) (n 90) and (n 113); Hoffman (n 15) 77-79.
[282] Kraus and Walt (n 23) 200; see also *Frigaliment* (n 181).
[283] '… fact testimony about numerous specific transactions will be the best evidence of the existence and prevalence of the asserted usage; opinion testimony is much less reliable…' (Hoffman (n 15) 66).
[284] Macaulay (n 117) 790; *General Reinsurance* (n 49) 872 ('the general tenor of the evidence was not given any partisan spirit') (Kerr LJ).

than fragmented usages.[285] National laws and international instruments also incessantly develop, providing an additional and detailed layer of regulation. There is little room left for usages, squeezed between these two forces, as seems to be evidenced by a relative paucity of cases involving TUs.[286]

Even if the view that TUs are in decline is incorrect, it is still submitted that the way forward is to limit their role. This argument flows from the assessment of how adjudicators have handled the preconditions for a TU, revealing many difficulties. First, the preconditions are sometimes muddled, with their functions not duly implemented, such as where a TU is held (un)certain depending on its expediency.[287] Secondly, some key requirements, such as that concerning observance of a TU, are frequently ignored.[288] Thirdly, the latter and another essential requirement of knowledge, are almost never established on the basis of statistical and/or empirical evidence. The decisions are frequently reached through intuitive judgements of adjudicators, who at best rely on expert witnesses. However, what is particularly concerning is a willingness of adjudicators to establish a TU on either weak or no evidence. On occasions, TUs are simply created by adjudicators, giving rise to phantom usages which can be entrenched by subsequent cases. All these findings throw the credibility and viability of UIS into doubt.

That said, the social phenomenon of usages undoubtedly exists, although only a court or tribunal can definitively establish its existence as a *legal* concept. The rationale for the UIS is convincing. Therefore, it is suggested that regimes, governing international sales, should continue to recognise TUs subject to the robust application of the relevant preconditions. It is argued that the optimum set of preconditions is as follows. The certainty requirement is desirable only if it does not duplicate the generic standard of

[285] See section 'Non-Industry Sources'.
[286] The experience of English law reveals a small number of commercial law, let alone sales law, cases involving TUs. The UCC experience reveals a much higher number of cases, but mostly domestically. The CISG experience reveals approximately 140 cases involving usages (with only 37 cases reported on implied usages under Article 9(2)). Given a high number of the Contracting States, the Convention's application worldwide and the total number of cases estimated at well over 4,500, the number of cases on TUs seems modest.
[287] See (n 102), (n 107) and the accompanying main text.
[288] See the paragraph, accompanying (n 167).

proof under the applicable law and is not used to mask other preconditions or considerations, such as reasonableness or expediency. The reasonableness requirement should not be used because its inherent weaknesses outweigh its potential benefits. *Both* essential requirements of knowledge and observance must be strictly enforced. Whilst sophisticated statistical evidence is hardly practicable, establishing them must be based on evidence and not on mere opinions, let alone assertions. The CISG's position requiring knowledge and observance of a TU by the 'majority' of persons in the sector is more precise than the approaches of English law and the UCC. Adjudicators should continue to apply their common sense to defining a 'trade sector'. Together, these preconditions form a high threshold for establishing a TU, which is essential for the integrity of the UIS. It is also required because of the gravity of legal consequences flowing from a TU: it usually has a binding effect on the parties, *dictating* how a contract must be interpreted.

Well-developed economic and legal systems[289] lead to well-organised trade sectors, which, in turn, may seem to provide conditions most conducive to the development of TUs because they may comprise: homogeneity of interests amongst traders in that sector; repeat dealings within the same, possibly closely knit, community; the effective transmission of information.[290] However, these well-organised communities choose to govern themselves by an elaborate institutional (TAs and their Rules) and/or contractual (SFCs) framework, rather than usages.[291] There is and should be little room for TUs on matters covered by SFCs and/or Rules of TAs. The environment with greater scope for TUs is that with the opposite characteristics, comprising: traders with heterogenous interests; fewer repeat and more one-off dealings; the absence of the centralised communication system.[292] But this environment calls for generic, rather than sector specific, TUs. Whilst generic TUs cannot be ruled out,[293] they are rare and difficult to establish since they concern the entire international trade. It is sector specific TUs that have the greatest value and relevance to commercial law.

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[289] Goode (n 19) 16.
[290] See Gillette (n 26) 8-10.
[291] See ibid 14-15, suggesting that TUs may be 'informally' enforced in such communities, such as by means of reputational sanctions.
[292] ibid 15-16.
[293] See (n 197) and the accompanying main text.

The argument for a TU's limited role is not against aligning commercial law with commercial reality. As long as the applicable rules on contract interpretation are context sensitive – and all regimes under consideration are such[294] - business practices and norms will impact on the parties' rights, obligations and liabilities. As part of the *context* for and *factors* in contract interpretation, their influence and weight vary from case to case. This 'soft' legal consequence is aligned with the absence of rigorous preconditions, such as those applicable to a TU. The absence of such preconditions (setting high thresholds and expectations of extensive knowledge and observance), less drastic consequences and possible non-applicability of such norms or practices in a given case, alleviate concerns that they may be illusory or fictitious. The commercial context exerts its soft influence on contract interpretation in many nuanced ways. For instance, it can inject precision into broad standards in the contract or the applicable law, such as those based on reasonableness or referring to 'usual', 'normal', 'common' or 'ordinary' understandings or conduct.[295] Similarly, it can be part of the background knowledge on which to draw when interpreting a particular clause or provision.[296] Specifically, as regards the INCOTERMS, it has been suggested that, instead of being elevated to an international TU, they reflect a wide international understanding of what trade terms are likely to mean.

10. Conclusion

This work has set out the framework for understanding the legal concept of a TU. Relying on it, the reality of the application of TUs has been examined from the perspectives of three major sales law regimes – English law, the CISG and UCC. This examination has revealed many weaknesses in how adjudicators deal with various preconditions for a TU, pointing to a real danger that what is held to be a TU in a court decision or arbitral award is a fiction. If so, a UIS is flawed, undermining the credibility

[294] In English law, for example, contracts are not just interpreted within their 'factual matrix' (eg *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989), but are also construed with reference to 'commercial common sense' (*Rainy Sky SA v Kookmin Bank* [2011] UKSC 50), an additional vehicle for incorporating business practices, norms or understandings. The CISG is highly fact sensitive as it requires 'all relevant circumstances' to be taken into account in interpreting the contract (see Art 8(3)).
[295] See the main text accompanying (n 79) and (n 84). See also eg *Steel & Busks* (n 79) 239.
[296] See the main text accompanying (n 184) and (n 186), (n 246).

of modern commercial law, exemplified by the three regimes in question. Whilst sceptical about the UIS, this work does not advocate abandoning the UIS, despite the apparent decline of TUs. This is so because TUs undoubtedly exist as a social phenomenon and the rationale for the UIS is strong, which means that a finding of a TU may well be justifiable in a particular case.

Nevertheless, it has been argued that there should be little scope for the legal concept of a TU in international sales. TUs are potentially relevant and applicable outside well-organised trade sectors with established TAs and/or SFCs. These TUs will mostly be generic, not sector specific. It is difficult, however, to credibly establish generic TUs, which further limits the scope for the legal concept of a TU. Where there is such scope, this work has proposed an optimum set of preconditions. Finally, it has been argued that despite the limited role of a TU, modern commercial law remains well attuned to commercial realities. The context sensitive rules of contract interpretation mean that commercial practices and understandings will, where appropriate, continue to make a nuanced impact on the contracting parties' rights, obligations and liabilities.