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Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods

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I. The position of usages and practices in the CISG

- A. Precedence over contradictory articles of the CISG
- B. Mention of usages and practices in the CISG

II. Article 9 CISG

- A. Theories as a basis for article 9 CISG
- B. Definitions of usages and practices in the CISG
- C. Fairness and good faith
- D. Validity of usages and practices
- E. The way in which parties are bound by usages and practices
- F. Explanation of trade terms, contractual conditions and general conditions
- G. Evidence of usages and practices
- H. Mutual relation between usages and practices

III. Conclusion

I. The position of usages and practices in the CISG

A. Precedence over contradictory articles of the CISG

In the CISG one will not find an explicit provision which determines how usages of trade are to apply as opposed to articles of the CISG. This was the case in article 9(2) of the 1964 Hague Sales Convention (ULIS). That article expressly provides that usages take precedence in the event they are not compatible with an article of the law. During the Diplomatic Conference on the CISG, the delegate of Czechoslovakia [1] proposed to give preference to the article in the event of non-compatibility between an article of the CISG and a usage. With such a proposal, only usages compatible with the CISG would have effect. This proposal was not approved by the Conference.

With various writers as well as with the commentary on article 8 of the 1978 Draft of the Convention (which became article 9 CISG) there is little doubt. Usages applicable to a case take precedence over contradictory articles in the CISG. This precedence is mainly based on the autonomy of the parties in article 6 CISG. Usages that, based on article 9 CISG, are applicable to an agreement, are also part of that agreement. By virtue of article 6 CISG, parties are free to opt out of the CISG or to fit it to their individual needs. A contradictory usage can in that sense be seen as an adaptation of the CISG, agreed between the parties. An otherwise applicable usage can, however, be excluded from an agreement, due to its conflict with a national validity rule.[2]

B. Mention of usages and practices in the CISG

In the CISG, several articles refer to usages and/or practices, this can be both directly and indirectly. For example in article 8(3) it is stated that in determining the intent of a party or the understanding of a reasonable person, due consideration is to be given to practices and usages, among other things.[3] Besides that, practices and usages can be applicable in accepting an offer. In article 18(3) CISG it is stated that offer can be accepted by an act, if practices and usages permit this.[4]

An indirect reference to usages and practices can be found in article 32(2) CISG, regarding carriage of goods. It is stated that carriage must be made under usual terms.[5] Another indirect reference can be found in article 35(2)(a), regarding conformity of the goods to the contract. The goods should be fit for normal use, unless expressly agreed otherwise.[6]

However, article 9 CISG is the most important provision on practices and usages.

II. Article 9 CISG

Article 9 states:

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

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

A. Theories as a basis for article 9 CISG

Article 9 is based on two theories describing the influence of trade usages in commercial contracts. The first is the subjective theory. The main issue in this theory is that usages can only be applicable if parties have agreed to them. The usages are seen as part of the contract. Usages unknown to either party can, in this theory, never be applicable.

Opposite to this is the objective theory. The objective theory is based on the thought that usages are applicable if they represent a legal norm or have normative power. The application of usages in an agreement is independent of the intention of the parties, but comes from the binding force of the usage itself. Even usages unknown to both parties can be applicable to an agreement in this theory. Bonell [7] indicates that these differences are merely theoretical and that in practice the national judges never take such a radical point a view.

However, the difference between the two theories has been of influence in the drafting of article 9 CISG. Delegates from socialist countries and developing countries were especially opposed to the acceptance of usages based only on their objective normative power. Most usages in international trade have their origin in the industrial countries of the western world, and should these usages be applicable on merely objective grounds, parties from other countries might be disadvantaged because, it was said, many parties from those countries do not have enough knowledge about these usages. Article 9(2) CISG is seen as a compromise between the subjective and the objective theory.[8] Nevertheless, as Enderlein and Maskow [9] state, the solution of article 9(2) CISG resembles mostly the objective theory.

The conditions that a usage has to live up to, to be applicable under article 9(2), are mostly objective in character and by way of the implied agreement these usages have great influence, because they are considered to be a part of the agreement.

B. Definitions of usages and practices in the CISG

As opposed to several bodies of rules, among which is the Uniform Commercial Code (hereafter UCC), the CISG does not contain a definition of practices or usages. However, in article 9(1) CISG the two concepts are clearly distinguished. Because of the fact that no definition has been given, the limitation of the concepts has been left to national judges. Due to the fact that national judges are normally familiar with national rules and terms and not with international ones, this might lead to problems.

In international literature there is reasonable accordance regarding the meaning of the word "practice". Generally, one can say that a practice is involved, if in an individual relationship between two parties the parties

act in a similar way in similar circumstances. For the existence of a practice it is not required that the actions by the parties have general validity within a region or a particular branch of industry. Due to the fact that a practice has evolved in an individual relationship between two parties, this practice is therefore only valid between those parties. A business relation of some time is a necessity for the origin of a practice, since for the existence of a certain practice it is required that in previous occasions the parties have acted likewise. Because of the practice followed on previous occasions, there will be an expectation that in future cases parties will act in similar manner. If indeed a practice has evolved these expectations are justified.[10] Because of the fact that practices come from individual relations between parties, these practices are often very specific and arrange the details in the agreement.

When trying to find a definition of the term "usage" in the CISG one will encounter more problems. In determining the definition of a usage it does not seem advisable to look at the definitions given to the term in various national legal systems, since too often these definitions are based on different things and give no clear opinion. Depending on the circumstances, even within one national system, the definition of the term usage can vary. Due to this great diversity of definitions on a national level, it is clear that for the CISG the term should be explained autonomous of other systems. This is a necessity to make an unambiguous explanation possible in various states. If every national legal system would handle its own definition, it would be contradictory to the need to promote uniformity that is stressed in article 7(1) CISG.

The term usage should be defined as broadly as possible to prevent certain usages from being termed inapplicable beforehand, due to a tight definition. In a broad definition a usage would have to comply with the fact that in a certain trade it is common to act according to the usage under certain circumstances. That way of acting has to be widely known and regularly observed in the trade concerned, so that parties can justifiably expect that in given circumstances the usage will be carried through. These conditions are comparable to what is stated in article 9(2) CISG. In any case, a usage will not be limited to the business relation of two individual parties as it is generally known in a particular trade. For the origin of a usage it is not required that a majority of merchants in a particular trade live by the usage for a longer period of time and its growth is spontaneous, as Bonell also signals.[11] A usage can also be of non-spontaneous origin. When a branch-organization issues rules of conduct for its members, these members will act in conformity to these rules. If other parties also start following these rules of conduct, the rules might develop into usages. Consequently usages have evolved that were at first deliberately issued by some organization. These rules cannot be considered spontaneous themselves, however their development toward a usage can. Bonell [12] calls this a conscious creation of usages.

C. Fairness and good faith

In article 7 CISG it is stated that, in the interpretation of the Convention, regard should be had to the observance of good faith in international trade. During the Conference on the CISG the Chinese delegate proposed to insert the word "reasonable" in article 9(2) CISG before the word "usage".[13] This way a usage could only be applicable if, objectively seen, it was a reasonable usage and subsequently these kinds of usages would improve the observance of good faith in international trade. The proposal received some approval, mainly because by some it was seen as an extra protection for parties suddenly confronted with an unknown usage. However, eventually the proposal was rejected. One of the reasons for this rejection was the belief that unreasonable behavior would never develop itself to be a usage, because this behavior would be rejected by the trade before developing into a usage. The delegate of the then Federal Republic of Germany felt that inserting the term "reasonable" would create more problems since the definition of the term "reasonable" was not clear.

Also, in literature there is some uncertainty about the term reasonable. Junge [14] feels that usages are in nature reasonable and therefore promote the observance of good faith in international trade. Usages come from a rational background and develop into usual conduct within a certain trade. Bonell finds the point of view that unreasonable conduct cannot develop into usages dubious, however, he does not regret the rejection of the proposal of the Chinese delegate, because he feels that the term "reasonable" has different meanings in several countries.[15] In his opinion, article 7 CISG can serve as the means to promote the observance of good faith in international trade. Usages applicable on the grounds mentioned in article 9 CISG can still be rejected, because of the fact that they are contrary to the objective of article 7 CISG. With that he implicitly seems to say that good faith is an extra criterion for usages. Therefore in his vision usages are not reasonable in themselves.

Although not commonly accepted, the point of view of the then Federal Republic of Germany during the Conference that unreasonable conduct cannot develop into a usage [16], can be approved. For the development of a usage the support of a large number of participants in a particular place or trade is required. The fact that a large number of parties observe the usage indicates that they do not find the usage unreasonable. If they should do so, they would not voluntarily act according to that usage. A type of conduct that is unreasonable in itself, will never be developed into a usage by a certain trade. The conditions in article 9(2) CISG are in that sense sufficient to indicate when a party knew or ought to have known a usage. Inherent to these conditions is that a party may be confronted with an unknown usage. In certain cases a usage may seem unreasonable to a party, but this will mostly be as seen from the subjective view of the party.

D. Validity of usages and practices

Article 9 CISG indicates when parties are to be bound by usages. It has to be kept in mind however that the validity of usages is not dealt with in the CISG. Due to article 4 CISG [17] the question whether a usage is valid, remains to be answered by a national court confronted with the case. The law upon which such a usage is tested will normally be the national law that, according to the rules of international private law, would be applicable if the CISG did not apply. The reasons for rejection of a usage under a national law can be diverse. As Bonell [18] mentions, the reason for rejection can be in the content of the usage, but also in the way in which parties have agreed to make a usage applicable. A usage can be conflicting because of its content, if this usage is contradictory to a national legal rule of public policy. The usage is applicable to the agreement between parties, but is not valid under the domestic law applicable by virtue of the rules of private international law. This could be the case when the applicability of a usage is in conflict with a certain form of agreement in the national law concerned. A usage can also be non-valid when the consent of the parties to the usage is not valid. This occurs if a party was wrong about the content of a usage, but it is certainly the case if one of the parties was forced to consent to a certain usage. That force can be deceit or threat, but in international trade it is more likely that the force will result from one party being economically stronger, and therefore can enforce certain usages upon the weaker party who may be dependent on the stronger party. That can be a case of abuse of an economical position.

The possibility for national courts to declare international usages non-valid is harmful to the uniformity in explaining the CISG. Because of the fact that different national legal systems have different rules for party autonomy and validity of usages and practices, this national test perhaps has too much influence on international contracts of trade.

E. The way in which parties are bound by usages and practices

In article 9(1) CISG it is mentioned that parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. Practices originate between parties in an individual relation, usually of some duration (see above). Based on a certain pattern of conduct during the relationship, a party can have the justified expectation that in future cases the parties will behave in a similar manner, given the circumstances. A practice is in principal automatically binding for both parties and for that reason an exclusion of a practice has to be made expressly. Besides that, it can happen that the circumstances are so different from a previous case that the expectation of a particular behavior is not justified, in which case the practice will not be valid.[19]

Also for usages it is mentioned that parties are bound by them if they have agreed to that, as stated in article 9(1) CISG. Basically it can be assumed that the consent for a usage can be both expressed and silent.[20] In the event that a usage has been agreed to expressly, there will be little trouble in determining that the usage is applicable under the CISG. The only problem which could arise would be that one or both parties have agreed to the usage on unsuitable grounds (see above). The parties are autonomous and basically can agree to every usage they wish to agree to, based on the autonomy given to them in article 6 CISG. The fact that a usage is objectively not applicable to an agreement, because the usage is only applicable to agreements in another place or trade, has little influence. When parties consent to a usage, it becomes part of the agreement and binds the parties as such, irrespective of whether this usage is also objectively seen as applicable.

The assumption of a silent agreement about a usage can lead to more problems. The silent agreement can come from the fact that, during the negotiations, parties behave exactly like a usage in a place or trade. Also, some expression by either party can lead to the assumption of a silent agreement, but then these expressions should normally reflect to the usage in the place or trade concerned. Close attention has to be paid to the fact that a silent agreement should not be assumed without solid reason, for this could mean that article 9(2) CISG would remain unused together with the extra conditions for the implied applicability. Bonell feels that a usage, that has silently been agreed to in article 9(1) CISG, should comply with the conditions mentioned in article 9(2) CISG.[21]

At first sight, article 9(2) CISG might seem to be a further clarification of the silent agreement from article 9(1) CISG, but normally this is not believed to be the case.[22] Article 9(2) CISG is applicable to usages that parties have not agreed to according to article 9(1) CISG. In article 9(2) CISG, parties are supposed to have made applicable the usages that comply to the conditions mentioned in article 9(2) CISG. Therefore it can happen that parties are bound to usages, which they did not agree to.

In article 9(1) CISG the will of the parties is decisive in determining whether a usage is applicable. This is not the case in article 9(2) CISG. The implied applicability in article 9(2) CISG can be seen as a fictional consent.[23] The parties have not expressly agreed to a certain usage, but based on the circumstances they are supposed to have done so. This shows that the decisive factor in article 9(2) CISG is not the will of the parties, but the normative power of a usage to which the Convention itself binds the parties. The usages have to comply with the conditions in article 9(2). Both Bonell [24] and Holl & Keßler [25] feel that this is the only way to explain that in article 9(2) CISG it is mentioned, that parties are entitled to expressly exclude a usage that would be applicable according to the conditions mentioned in article 9(2) CISG. If the decisive factor in article 9(2) CISG would have been the will of the parties, this fragment would make the article innerly contradictory.

In article 9(2) CISG two requirements are mentioned to which a usage has to comply to be applicable under this provision. One of those requirements is that that usage should be widely known and regularly observed by parties to similar types of contracts in the same trade. From this it immediately shows that a usage does not have to be universally known. It is sufficient that parties in similar circumstances know and regularly observe the usage. Normally, usages will only be applicable in a certain place or with regard to certain contracts or products. To determine if a usage was implicitly made applicable, the usage should, in its pragmatic and spatial range, objectively fit the circumstances of the case.

Article 9(2) CISG states expressly that the usage has to be international. This does not mean, however, that regional or national usages can never be applicable. For such a usage to be international, it is in any case required that the usage is also regularly observed in international transactions and not just local transactions, and also that a large part of the foreign participants in the trade acknowledge the usage. This could be the case with a local usage in a harbor regarding loading and unloading of vessels, when this usage is also used in contracts with an international character. Bonell [26] gives the example of an internationally orientated fair or auction in which local usages are observed.

The requirement that a usage has to be regularly observed is also of influence to the applicability of usages. It could happen, for instance, that certain usages originating from western industrial countries are known in developing countries but are never observed because of the circumstances. The implied agreement with such a usage cannot be automatically assumed in such a case.[27]

The other article 9(2) CISG requirement is that the parties knew or ought to have known of the usage.[28] If parties indeed knew of a certain usage, there would be no problem. The fact that usages, which the parties did not know of but should have known of can also be applicable, shows that parties may be bound by usages they were not aware of. Also in this case the particular trade in which parties are involved and the type of contract will be determinative of the objective applicability of usages. This means that in particular newcomers to a trade will have an enlarged chance to be confronted with usages they were not aware of. Some attention has been given to this subject [29], but in article 9(2) CISG it has not been especially reckoned with. Only in very exceptional cases will an appeal be honored based on the fact that a party did not actually know of a usage. This could be the case, for instance, if a producer just once by necessity has to make a foreign purchase and through that is confronted with different usages from the ones he knows from his local market.[30]

F. Explanation of trade terms, contractual conditions and general conditions

In international trade it is inefficient and not common to discuss every single detail of an agreement. Leaving everything to unregistered usages however, is sometimes also troublesome, because for certain parts of an agreement some security is wanted. The trade terms settled by international organizations and standard-contracts are therefore an aid to drawing up contracts. These often have a clear meaning and by simply mentioning a particular trade term parties can obtain some certainty about this issue, without having to invest too much time in it.

In contrast to ULIS, the CISG has no explicit article about the interpretation of these trade terms. In ULIS it was determined that trade terms should be explained according to the meaning that was usually given to them by parties in a similar trade.^[31] The reason for not having the same sort of article in the CISG was, on the one hand, the fear that parties would be bound too easily to a certain explanation of a term they did not know and, on the other hand, that article 9(2) CISG was meant to determine the applicability of usages and that this issue was concerned about interpretation. For this reason, this sort of issue should be handled according to article 8 CISG. Bonell ^[32] feels that both arguments mentioned above are not very convincing. It seems that, especially because there is no clear statement about this in the CISG, there can be uncertainty about this issue. Because there is no uniform statement, national courts are apt to interpret the trade terms according to national law. For a foreign trader in an international agreement this will cause severe uncertainty about his position in a trial or in the agreement. The argument that article 8 CISG is sufficient to deal with this matter is questionable, according to Bonell ^[33], because this article was drafted with general statements in mind and it does especially reckon with the issue of trade terms and general conditions.

Trade terms are not always usages, because sometimes they are drafted and observed by members of an organization only. Mostly, however, these terms or conditions are explicitly mentioned in a contract, which solves the problem of applicability of the usage. Through the explicit mention, they have become part of the contract and are applicable as such. In these cases, the interpretation given to those terms and conditions will become the actual usage.

Most writers agree that the CISG lacks a specific article about the interpretation of trade terms and general conditions, and they would rather have seen such an article absorbed in the CISG. There is no unanimity about the present solution. Several authors ^[34] are of the opinion that a judge should be aware of and act accordingly with respect to standard international terms, such as Incoterms or the UCP, both issued by the International Chamber of Commerce. These authors see this method as an intelligent way to approach the interpretation of a contract without having to use article 9 CISG. In international agreements, it is more logical that parties would refer to international trade terms, than to certain national rules. Therefore these international interpretations should be followed.

Bonell ^[35] hopes that judges will consider the interpretation of Incoterms to be silently agreed to by the parties under article 9(1) CISG, because these rules are so widely known. Holl and Keßler ^[36] prefer to interpret the terms according to article 8 CISG. Through article 8(3) CISG the terms can be interpreted according to the usual meaning given to them in the trade concerned. A problem could occur if a term is also interpreted via the "reasonable person" standard of article 8(2) CISG. The meaning of the term "reasonable" is not very clear and therefore leaves room for uncertainty if national courts have to interpret according to such a term.

The best solution would be that whenever parties mention a trade term or general condition they also mention which rules of interpretation should apply. This would end all uncertainties. If parties have not clarified this issue, the most logical would be that a national court would take into account the fact that an international contract is at stake. This makes it obvious that both parties had an international interpretation in mind when absorbing a trade term into their agreement. Assuming a national interpretation of a trade term by a national court would show that a court had little insight in a case, but still this is a possibility, because the CISG does not deal with the matter effectively. Should a national court decide to use an international interpretation to a trade term on delivery, it would be best to make a connection to Incoterms. This set of rules is so widely known and widespread in international trade, that in many cases it may be assumed that parties were in fact meaning this interpretation.

G. Evidence of usages and practices

Due to the fact that usages and practices are an important part of an agreement and parties base their expectations from an agreement partly on the usages and practices they feel are applicable, it is very important to be able to prove that certain usages or practices are in fact applicable to the agreement. The basic issues in an agreement -- which type of product, quality demands, pricing and delivery -- are usually orderly, because parties deal with these matters expressly. After all, this is the core of the agreement between the parties. Besides that, there are numerous details which will not be expressly dealt with, yet can cause problems. These details are often silently or impliedly agreed to through usages and practices. If a party assumes that a usage is applicable and this is later disputed by the other party, considerable costs will occur if indeed a usage seems to be not applicable after all.

In a contract, parties often make a choice for an applicable law. Consequently it is somewhat possible for the parties to foresee what they can expect in court. The parties can either make applicable a certain law, or can choose a certain court or arbitration. From article 6 CISG it shows that parties are also more or less free to declare the CISG applicable to their contract. However, rules regarding evidence are not recited in the CISG and therefore over such issues parties will be in the hands of a national court or an arbitration tribunal.

In the various national legal systems there is no unanimity in the application of usages and practices in an agreement. Commonly, usages are considered to be facts that have to be proven.^[37] However it can happen that a judge applies a usage by virtue of his office. This last option, however, especially in national courts, is difficult because the applicable usages will almost always be very specialized within a certain trade. The possibility that a broadly orientated judge knows about such specialized usages and also uses them is very small.

In arbitration cases, however, more often a usage will be found applicable by virtue of its office. If parties make a choice for an arbitration procedure often this will guarantee some knowledge of the trade on the part of the arbitrator; this can be better suited for their agreement and their trade than when the parties seek refuge with a national judge. The arbitrator who knows the trade concerned most likely has insight in the usages that are applicable in that trade. With this knowledge an arbitrator can declare certain usages from a particular trade or place applicable, and subsequently the existence of such a usage would no longer have to be proven by one of the parties. Bonell feels ^[38] that this application of usages by an arbitrator, by virtue of his office, through various rules of arbitration is allowed, and through some even demanded. Because of the present knowledge and the larger possibility to apply usages by virtue of its office, the choice for arbitration seems to be more appropriate than the choice of national courts, but of course in particular cases this can be different.

The fact remains that in a trial one of the parties can still be required to prove the existence of a usage and its applicability to the agreement between the parties. When proving practices only applicable between two particular parties it will be enough to show that in previous cases under comparable circumstances parties acted in a certain way.^[39] The expectation of a party that the usage will be lived up to is then justified. At first sight, proof of a usage is not as easy to obtain, since there is no clear individual relation between two parties with clear examples of what happened in the past, as is the case with practices. If a usage is concerned, one has to deal with a more general rule followed in a certain place or trade. Should a usage have to be proven in national courts, a party could seek assistance of a Chamber of Commerce in his town. Most likely this Chamber of Commerce will have insight in a particular trade, but even then it is questionable if also international usages are known and recognized, since the Chamber of Commerce will be mainly nationally orientated. If no assistance can be provided by the Chamber of Commerce, then the best solution would be to consult an international expert, who could decide about the existence and applicability of a certain usage.

H. Mutual relation between usages and practices

In a relationship between two parties several practices and usages will likely be applicable. It is conceivable that two of those usages or practices could collide with each other. However, a collision between two international usages within one trade appears to be almost impossible, since a valid usage will often be observed by a majority of parties in a certain trade. Subsequently the remaining minority will not easily be able to develop a colliding usage. For development of a usage however, it is by definition not required that a majority of traders are concerned with the usage.^[40] Article 9(2) CISG mentions that a usage has to be widely known in the trade

concerned, which does not automatically mean a majority of traders. Clinging to the idea that a majority of traders concerned has to observe the usage, can and will obstruct the development of new usages. In extraordinary cases, a collision between two international usages can be possible. There is a possibility that local usages collide, although the requirements for the international character are strict. Bonell feels that in such a collision both usages exclude each other.^[41] In that case the solution is to be found in the "gap-filling" provisions of article 7 CISG.

Collisions between general usages and practices exclusively valid between two parties are more likely to happen. Practices are usually more affected with the details of the individual relation between parties. It seems logical that silent practices will have precedence over silent usages, because the practices are more closely related to the situation between the parties. As soon as parties have expressly made a usage applicable, it is logical that this usage has precedence over the silent practice, because by choosing for the usage the conflicting practice has been put aside.^[42]

III. Conclusion

As has been made clear in the essay above usages are a very important part of the CISG. Their existence and applicability can make or break a contract or agreement, sometimes even without the parties knowing it. Uncertainty of their existence and difficulty to prove their applicability make the effect of usages a difficult subject.

Although sometimes a disadvantage, usages and practices also bring something good. By using them parties can save a lot of time and consequently money, because they do not have to discuss every single detail of their agreement. This is advantage is so big, that every trader will use usages and practices, sometimes even to regulate the core of the agreement.

FOOTNOTES

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1. *See* A/CONF.97/C.1/L.40. This proposal was made before the start of the Conference. The various delegations still had a possibility to modify the concept of the CISG at that time.

2. *See* article 4 CISG: ". . . except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of *any usage* . . ." *See* section II.D, *infra*, for comments on validity issues that can impact upon usages.

3. *See* article 8(3) CISG : "In determining the intent of a party or the understanding a reasonable person would have, due consideration is to be given to all relevant circumstances of the case including the negotiations, *any practices which the parties have established between themselves, usages* and any subsequent conduct of the parties."

4. *See* article 18(3) CISG : " However, if, by virtue of the offer or as a result of *practices which the parties have established between themselves or of usage*, the offeree may indicate assent by performing an act . . .,"

5. *See* article 32(2) CISG : "If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation."

6. *See* article 35(2)(a) CISG : "Except where the parties have agreed otherwise, the goods do not conform with the contract unless they : (a) are fit for the purposes for which goods of the same description would ordinarily be used; . . .".

7. See Bonell M.J., *Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980*, in OESTERREICHISCHE JURISTISCHE BLAETTER p. 389 (1985), and Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) - p. 110.
8. See Bonell M.J., *Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980*, in OESTERREICHISCHE JURISTISCHE BLAETTER p. 389 (1985), p. 391 and See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) - p. 110. See also Holl V., Keßler O., "Selbstgeschaffenes Recht der Wirtschaft" und Einheitsrecht - Die Stellung der Handelsbräuche und Gepflogenheiten im winer UN-Kaufrecht, in RECHT DER INTERNATIONALEN WIRTSCHAFT, (1995) p. 458.
9. See Enderlein F., Maskow D., *Kommentierung edr Konvention der vereinten Nationen üuber Verträge über den Internationalen Warenkauf vom 11.4.1980* in INTERNATIONALES KAUFRECHT (1991) p. 68.
10. Holl and Keßler mention that this is an aspect of trust in the relationship between the parties (See Holl V., Keßler O., "Selbstgeschaffenes Recht der Wirtschaft" und Einheitsrecht - Die Stellung der Handelsbräuche und Gepflogenheiten im weiner UN-Kaufrecht, in RECHT DER INTERNATIONALEN WIRTSCHAFT (1995) p. 457).
11. See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) - p. 111.
12. See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) - p. 111.
13. See Honnold J.O., *Documentary History of the Uniform Law for International Sales* (1989) p. 484. The Chinese proposal is registered as A/CONF.97/C.1/L.24.
14. See Junge in *Das Uebereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf - CISG Kommentar* (1995) p. 110.
15. Bonell signals that the test of fairness in the Anglo-American system has nothing to do with the validity of usages, but it is concerned with exactly pointing out under which conditions the usages that parties have not expressly agreed to, are nevertheless applicable. (See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) - p. 113).
16. During the First Committee Deliberations the delegate of the then Federal Republic of Germany recognized that a usage should be reasonable, but he felt that an express mention in the article was neither wanted nor needed. In his opinion a usage should be existing and valid. If a usage was unreasonable it would not exist.
17. See Article 4 CISG : ". . . except as otherwise expressly provided in this Convention, it is not concerned with : a. the validity of the contract or of any of its provisions or of any usage. . ."
18. See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) - p. 112.
19. See Honnold J., *Uniform Law for International Sales Under the 1980 United Nations Convention*, 2d ed. (1991) p. 175.
20. But see Eörsi, who has the opinion that article 9(1) CISG only covers the explicit agreement to a usage. (Eörsi in Galston N.M., Smit H., *International Sales : The United Nations Convention on Contracts for the International sale of Goods* (1984), ◆ 206).

21. See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) - p. 107 and See Bonell M.J., *Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980*, in OESTERREICHISCHE JURISTISCHE BLAETTER (1985), p. 387 - 388.
22. The text of the Secretariat Commentary leaves some room and is not clear.
23. See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) - p. 107 and See Bonell M.J., *Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980*, in OESTERREICHISCHE JURISTISCHE BLAETTER (1985), p. 387 - 388 see also Holl V., Keßler O., "Selbstgeschaffenes Recht der Wirtschaft" und Einheitsrecht - Die Stellung der Handelsbräuche und Gepflogenheiten im winer UN-Kaufrecht, in RECHT DER INTERNATIONALEN WIRTSCHAFT (1995) p. 459.
24. See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) - p. 108.
25. See Holl V., Keßler O., "Selbstgeschaffenes Recht der Wirtschaft" und Einheitsrecht - Die Stellung der Handelsbräuche und Gepflogenheiten im winer UN-Kaufrecht, in RECHT DER INTERNATIONALEN WIRTSCHAFT (1995) p. 459.
26. See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) - p. 109.
27. See Enderlein F., Maskow D., *Kommentierung edr Konvention der vereinten Nationen über Verträge über den Internationalen Warenkauf vom 11.4.1980* in INTERNATIONALES KAUFRECHT (1991) p. 70.
28. But see Enderlein F., Maskow D., *Kommentierung edr Konvention der vereinten Nationen über Verträge über den Internationalen Warenkauf vom 11.4.1980* in INTERNATIONALES KAUFRECHT (1991) p. 69 : they feel this condition is superfluous, because know or ought to have known follows automatically from the econd condition that a usage has to be widely known and regularly observed.
29. During the Conference by Goldstajn, delegate of Yugoslavia. (See Honnold J.O., *Documentary History of the Uniform Law for International Sales*. (1989) p. 484).
30. See Enderlein F., Maskow D., *Kommentierung edr Konvention der vereinten Nationen über Verträge über den Internationalen Warenkauf vom 11.4.1980* in INTERNATIONALES KAUFRECHT (1991) p. 70.
31. See Article 9(3) ULIS: "Where expression, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usaully given to them in the trade concerned."
32. See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) p. 113 - 114.
33. See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) p. 114.
34. See Honnold J., *Uniform Law for International Sales Under the 1980 United Nations Convention*, 2d ed. (1991) p. 174, see also Enderlein F., Maskow D., *Kommentierung edr Konvention der vereinten Nationen über Verträge über den Internationalen Warenkauf vom 11.4.1980* in INTERNATIONALES KAUFRECHT (1991) p. 71, see also Burghard Piltz, *Internationales Kaufrecht - Das UN-Kaufrecht (Wiener Uebereinkommen von 1980) in praxisorientierter Darstellung* (1993) 181, see also Bianca C.M. and Bonell M.J., *Commentary on usages*

and practices, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) p. 115.

35. See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) - p. 115.

36. See Holl V., Keßler O., "*Selbstgeschaffenes Recht der Wirtschaft*" und Einheitsrecht - Die Stellung der Handelsbräuche und Gepflogenheiten im winer UN-Kaufrecht, in RECHT DER INTERNATIONALEN WIRTSCHAFT (1995) p. 460.

37. Bonell adds that if a party has indicated the existence of a usage, the decision of applicability that has to be made by the court is a question of law (See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) - p. 111.

38. See Bianca C.M. and Bonell M.J., *Commentary on usages and practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW - THE 1980 VIENNA SALES CONVENTION (1987) - p. 112.

39. See Holl V., Keßler O., "*Selbstgeschaffenes Recht der Wirtschaft*" und Einheitsrecht - Die Stellung der Handelsbräuche und Gepflogenheiten im winer UN-Kaufrecht, in RECHT DER INTERNATIONALEN WIRTSCHAFT (1995) ♦ III.1.

40. See Junge (von Cämmerer en Schlechtriem *Das Uebereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf - CISG Kommentar* (1995) p. 110) He thinks that such a majority is needed for the development and conservation of a usage. Subsequently he comes to the conclusion that international usages can never collide, because if a usage has support from a majority, a minority can never develop a new colliding usage.

41. Bonell M.J., *Die Bedeutung der Handelsbräuche im Wiener Kaufrechtsübereinkommen von 1980*, in OESTERREICHISCHE JURISTISCHE BLAETTER (1985), p. 391.

42. *But see* Holl V., Keßler O., "*Selbstgeschaffenes Recht der Wirtschaft*" und Einheitsrecht - Die Stellung der Handelsbräuche und Gepflogenheiten im winer UN-Kaufrecht, in RECHT DER INTERNATIONALEN WIRTSCHAFT (1995) p. 458 : "Sofern die entstandenen Gepflogenheiten einen spezieller Charakter aufweisen als die ausdrücklich vereinbarten Gebräuche und demnach zu einer genaueren Regelung des konkreten Vertragsverhältnisses beitragen, so gehen sie vor."

Pace Law School Institute of International Commercial Law - Last updated June 1, 1999

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