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REPORT ON THE QUEEN MARY-UNIDROIT INSTITUTE OF TRANSNATIONAL COMMERCIAL LAW 11TH TRANSNATIONAL COMMERCIAL LAW TEACHERS' MEETING

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1 Introduction

Transnational commercial law has been an important course in some universities since the mid-1990s. A course in transnational commercial law typically covers various subjects, such as the international sale of goods and the Vienna Sales Convention 1980 (CISG), security transactions, and international harmonisation instruments, such as the UNCITRAL[1] or UNIDROIT[2] Model Laws.[3] Transnational commercial law has also been valued as the main engine for boosting the harmonisation and uniformity of commercial law.[4]

Maritime law, by its transnational nature, is an important part of transnational commercial law. The phrase *lex maritima*,[5] which has been consistently used by maritime scholars in their research,[6] carries with it the characteristics of the *lex mercatoria*. Therefore, the study of the general principles of transnational commercial law will add depth to maritime law research, especially on topics such as the application of customs in maritime law and the harmonisation of maritime law.

The main theme of the conference was 'When is Commercial Custom Law? The Dialogue between Commercial Practice and The Law'. This conference brought together academics, senior judges, and practitioners from all over the world. The conference considered how written law and unwritten norms that guide behaviour in commercial spheres interface with each other and the effect of this exchange on modern business, including the use of technology.

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1 United Nations Commission on International Trade law.

2 International Institute for the Unification of Private Law.

3 Such as UNCITRAL Model Law on Cross-Border Insolvency (1997). The guidance, full text and travaux préparatoires may be found at <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency> accessed 30 September 2019.

4 Relevant materials can be found in Roy Goode, Herbert Kronke, Ewan McKendrick, *Transnational Commercial Law: Text, Cases and Materials* (2nd edn, Oxford University Press 2015), chs 5-7.

5 See William Tetley QC, 'The General Maritime Law – The Lex Maritima' (1994) 20 Syracuse JICL 105.

6 Eric van Hooydonk, 'Towards a worldwide restatement of the general principles of maritime law' (2014) 20 JIML 170. See also Massimiliano Romaboschi, 'The reformulation of the general principles of the *lex maritima*' (2016) 22 JIML 393; Robert Veal and Michael Tsimplis, 'The Integration of Unmanned Ships into the *Lex Maritima*' [2017] LMCLQ 304-335.

2 Keynote address

Fabrizio Cafaggi (European University Institute)

The keynote speaker was an expert on supply chains. His presentation was much more about questions than answers.

The speaker began with unfair trade practices (UTPs) in supply chains, noting that there were at least two sets of instruments to address abuses within supply chains: governance and regulatory responses. Governance focused on the causes of UTPs. Regulatory responses addressed mainly the effects of abuse and prohibited practices or imposed restitution on those who benefited from engaging in unfair practice. The former focused more on the causes, the latter on the consequences of power abuse. Legislation would have to coordinate with private regulation at the national level to prevent the rise of UTPs. Breaches of codes of conduct should be considered as unfair trade practice.

The speaker contended that transnational commercial law research should focus on application in each individual industry, such as the global chain. Worldwide trade largely depended on global chains. Trading within global chains was very different from traditional market trading. Questions could, therefore, arise as to how custom or customary rules should change in accordance with the supply chain, which comprises thousands of transactions from production to consumption. Was the supply chain a community for custom? Could the practices within the chain be considered as a pattern of behaviour which had been implicitly integrated into the transaction? Secondly, within the definition of custom, there were two dimensions, namely, *usus* and *opinio juris*. There must, therefore, be an expectation or consent within the community. Within a supply chain, the issue was the expectation or consent of whom? It would not only be the consent of two parties. In the global supply chain, there would be very little to do with consent and the chain leader could introduce the practice in favour of himself or induce first-tier suppliers to adopt the practice in favour of himself with second and third-tier suppliers in order to achieve the objectives set for the chain. The question now was what kind of expectation did the chain leader have? A further question related to the issue of incorporation. What were the techniques for

incorporating customs in hundreds of thousands of transactions within a chain? Did the new supply chain scenario require new techniques which were different from traditional bilateral transactions?

The speaker next considered how to balance the conflict between universalism and local customs in the global chain scenario. The global chain was a transnational structure but had local branches. It was, therefore, problematic to hold the view that custom within the chain was a single reference. New customary rules should include both the general customary rules which existed throughout the chain and local customs, which reflected the local business community. The food supply chain was an excellent example of this. What should be considered was what kind of combination of universality and locality was needed, and the conflicts rules between universal customs and local customs. The speaker argued that we need to design a new architecture of customary rules.

He contended that the legally binding nature of custom originated from business communities' compliance. How to define that community was important. For the purpose of making a customary rule binding, the traditional view was that, , there needed to be homogeneity and an absence of conflict within a community. The current questions in the global chain were, first, whether all participants in a particular chain could be treated as a whole community; and, second, whether such a chain consisted of several communities, each of whom would not recognise the customs of another? In addition, should we substitute the territorial notion of community by a functional notion of community whose customary rules were defined by technology? A question worthy of consideration in the new technological era was how, on the one hand, to balance the conflict between certainty and, on the other, new phenomena?

The speaker also covered the relationship between custom and transnational private standards, which was a very practical question. There were some undergoing debates on this subject, such as the relationship between custom and transnational standards; the differences between custom and legal norms; and how custom and other transnational standards should co-operate.

To understand the relationship between custom and transnational private standards, it was necessary to refer to community-based norms. Community based customary rules would help to identify what were the variables that should be considered in dealing with the relationship between customary rules and international standards. The current position was very confusing, with some scholars treating standards as a part of custom, and some disagreeing with this. According to the speaker, custom was a trade facilitator between parties and did not affect third parties. Standards, on the other hand, were of a regulatory nature and affected third parties. It was also essential to draw a difference between standards whose primary objective was to benefit third parties and trade association standards, such as INCOTERMS. [7] Standards that were issued by international associations, such as the ICC, related to an homogeneous community and could be treated as either custom or transnational regulations. Such distinctions depended on the purpose of that standard, namely, if that standard was truly the codification of existing practices then it was custom. If, however, it was to introduce new rules, then it was regulation.

There were other differences between custom and standard. First, actors could be different. Custom was still for merchants of the business community. Standards could be for more common actors, such as consumers. Second, functions between custom and standard could be different. Custom was generally considered as a facilitator of international trade. However, standards were regulatory in nature. Third, customary rules consolidated over time. On the other hand, standards were generated through procedures; there were written procedures to issue standards for both the public and private sector. Fourth, differences could exist as to how these should be incorporated into a contract. The known custom ought to be recognised by parties and would be integrated into a contract unless the parties agreed differently. However, for standards to be a part of a contract, it was necessary for a clause to provide for this.

[7] For the new version of Incoterms, Incoterms 2020, see <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020-/> accessed 30 September 2019.

3 Customary practices in the modern business context 1: Governance and Enforcement

Enforcement of international-law based rights in cross border commercial transactions (Jeffrey Wool, Oxford University)

The instruments which had been mentioned were transnational commercial law treaties. The speaker contended that when talking about the enforcement of transnational commercial law treaties, he meant two things, first, state-to-state enforcement of international obligations, namely treaties; second, enforcement by national courts of transacting parties' disputes.

Enforcement by national courts presupposed that the state complied with its treaty obligations. The enforcement of treaties by national courts also presupposed several points: there were jurisdictional rules inside or outside the treaties, and the relationship between treaties and national law was clear.

The speaker gave several examples as to how treaty obligations could be breached by contracting states for various reasons.

There were cases of intentional non-compliance and unintentional non-compliance. The first category meant that the non-compliance was caused by acts or omissions intended to have effect or whose treaty-violating consequences were disregarded, generally or specifically, by the contracting state. The reasons for such non-compliance could be government policy or protectionism. Such intentional non-compliance would result in political risks or risks breaching the rule of law. There were two categories of intentional non-compliance, admission breach and judicial breach. Admission breach could happen for various reasons; for example, the authority did not have the motive to act. Judicial breach meant a violation of international treaties by the courts. Could a national court violate international obligations? The quick answer was yes. The judicial system was a state organ. It could be in breach. Therefore, one characteristic of intentional non-compliance was that it was always a systematic breach. Unintentional non-compliance was caused by acts or omissions not intended to have that effect. In this category, the reasons for such breach could be attributed to informational and educational issues.

Unintentional non-compliance could be remedied by enhanced education and improved regulation or procedures.

The speaker concluded that non-compliance with treaties by contracting states was becoming a common issue. The risk was getting higher. To evade or minimise such risk, an empirical study of a contracting state's actual compliance with an international commercial treaty would be essential.

The data on a contracting state's actual compliance could be essential in evaluating the contracting state's compliance with an international commercial treaty. Cambridge University was working on a project to assess the risk of breach of international treaties by countries. The speaker gave a brief introduction to the mechanisms and limitations of this system.

Different approaches to enforcement under customary law, several transnational commercial law instruments, and in new technological environments (Thomas Keijser, Radboud University)

The speaker spoke about the different aspects of the enforcement of security interests as well as a number of typical elements of the enforcement of security interests; the international law instruments relating to the enforcement of security interests; and the future development of technology.

The speaker introduced the rights and obligations of the parties of security interests under normal circumstances and under default rules. There were many such obligations, such as the obligation of notification by the creditor to the debtor.

The rapid growth of cross-border transactions had generated various approaches to intermediation in different jurisdictions, as well as highlighted considerable gaps and inconsistencies in the applicable legislation. Security interest transactions worldwide were very important to international trade and a process of world harmonisation had begun at an early stage. Several international instruments had been developed, including the Hague Securities

Convention[8] and the UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva Securities Convention).[9] The Hague Securities Convention addressed the discrete area of conflict of laws while the Geneva Securities Convention related to a wide array of substantive law issues. The *lex mercatoria* as reflected in standard agreements, such as the Global Master Repurchase Agreement (GMRA), was a very important instrument in the formation of a harmonised system.

The speaker also introduced recent developments in security interests under the Cape Town Convention.[10] That Convention focused on party autonomy and the limited role of independent third parties.

The core character or rationale of the above-mentioned international instruments on the enforcement of security interests was commercial reasonableness. Such commercial reasonableness would be vital in the new technology era. In the context of new technologies, especially artificial intelligence, the content of rules and actors of the secure transactions was shifting. Whether such developments had an effect on rules regarding the enforcement process, such as notifications, valuation, distribution of proceeds, was a significant question. It could, therefore, be argued that changes in the actors or the content of the enforcement process, such as artificial intelligence, might lead to standardization of 'commercial reasonableness' and a lesser role for human actors.

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8 Hague Conference Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary <https://www.hcch.net/en/instruments/conventions/full-text/?cid=72> accessed 30 September 2019.

9 See <https://www.unidroit.org/instruments/capital-markets/geneva-convention> accessed 30 September 2019.

10 See <https://www.unidroit.org/instruments/security-interests/cape-town-convention> accessed 30 September 2019.

4 Commercial custom as a source of law in civil and common law jurisdictions

The law and reality of customary law in a civil law country: the experience of Japan (Souichirou Kozuka, Gakushuin University)

Customary law under Japanese law was complex and the terminology problematic. Academics had introduced a distinction between customary law and custom as a fact, which may be equivalent to usage. The former concept was law, while the latter was not. However, there were disagreements about this. Thus, the word 'practice' had also been mentioned in commercial disputes but this word did not appear in any Japanese statutes. The status of 'practice' under Japanese law was, therefore, not clear.

In private law, statutes generally prevailed over custom. However, art 92 of the Japanese Civil Code provided that: 'In cases where there is any custom which is inconsistent with a provision in any law or regulation not related to public policy, if it is found that any party to a juristic act has the intention to abide by such custom, such custom shall prevail'. [11] When dealing with commercial disputes in Japan, the Commercial Code normally prevailed over the Civil Code. Therefore, in commercial disputes, customs had been given a strong priority.

The speaker argued that distinctions between custom and statute arose from the drafting history of the Japanese Civil and Commercial Codes. First, ambiguity had been caused by the transplant of western civil codes into Japan. Both the Japanese Civil and Commercial Codes were drafted in the late nineteenth century and many of the drafters had studied in France. They were, therefore, deeply influenced by the French Code Civil and merely copied relevant provisions from it without carefully exploring the background of these provisions. Second, the reality of local customs in late nineteenth century Japanese society also had an impact on the drafters. During that period, custom played an important role in Japanese society, especially in rural areas. In the absence of positive law, custom could be referred to by judges as the foundation of the judgment. Finally,

[11] See <http://www.japaneselawtranslation.go.jp/law/detail/?id=2252&vm=04&re=02> accessed 30 September 2019, for an English version of the Civil Code.

the ambiguity between custom and statute also reflected the difference between the drafters' attitudes toward the status of custom.

The Japanese courts were playing an important role in overcoming such complexity. They were very careful in identifying customary law, particularly in commercial contexts, and accepted the existence of usage or practice more easily. In contrast, there were only three cases which recognised customary law.

The development of the Himalaya clause – a study in the change of the law through commercial practices (Bruno Zeller, University of Western Australia)

The speaker reviewed the development history of the Himalaya clause in England and other common law countries. He suggested that the emergence and development of the Himalaya clause reflected the transnational nature of maritime law and the fact that the development of law should respect commercial reality.

The Himalaya clause arose as the result of a decision of the English Court of Appeal in the case of *The Himalaya*.[12] The major objective behind the clause was to break the privity rule in maritime contracts. Following this decision, specially drafted Himalaya clauses benefiting stevedores and others began to be included in bills of lading. In England, the extension of rights in favour of third parties by virtue of Himalaya clauses had been acknowledged since the decision of the Privy Council in *The Eurymedon*.[13] In *The New York Star*,[14] the Privy Council held that since the contract of carriage ended at delivery to the consignee the stevedore was within the contract terms and could benefit from the exemption clauses of the bill of lading. In response to longstanding criticism of the privity rule, the Contracts (Rights of Third Parties) Act 1999 was passed in the UK.[15]

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[12] *Adler v Dickson (The Himalaya*) [1955] 1 QB 158.

[13] *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154 (PC).

[14] *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd (The New York Star)* [1981] 1 WLR 138 (PC).

[15] See <http://www.legislation.gov.uk/ukpga/1999/31/contents> accessed 30 September 2019.

In Canada, the right of stevedores to benefit from a Himalaya clause was, at first, denied by the Canadian court. The Supreme Court, in *The Lake Bosomtwe*[16] relied on S*cruttons Ltd v Midland Silicones Ltd*[17] and denied the right of a stevedore to benefit from a Himalaya clause. However, following *The Eurymedon*, the validity of the Himalaya clauses were finally recognised in the *Miida Electronics Inc v Mitsui OSK Lines Ltd*[18] by the Supreme Court of Canada.

The Australian courts followed the Privy Council's judgment in *The New York Star* and held in *Godina v Patrick Operations Pty Ltd*[19] that consignees rarely took delivery of goods at ship's rail and that therefore the contract of carriage was contemplated to have extended until delivery. Himalaya clauses had also been upheld in *Rockwell Graphic Systems Ltd v Fremantle Terminals Ltd*.[20]

The speaker concluded that the development of the same principle in different jurisdictions clearly showed the transnational nature of maritime law. In addition, the speaker contended that by using legal transplants the maritime world could achieve harmonisation.

References in statute to trade usages and practices: Lessons from the OHADA Law (Roland Djieufack, University of Bamenda)

The speaker delivered his presentation from Cameroon via Skype. He gave a very brief history and overview of the Organisation for the Harmonisation of Corporate Law in Africa (OHADA).[21] The aim of this system was to harmonise or unify business law in Africa. OHADA included nine validated Uniform Acts. The speaker concentrated on the Uniform Act Relating to General Commercial Law. Custom and usages under this Act mainly related to the law relating to intermediaries and agent and were given strong emphasis. If custom and usages were well-known or should be known, they were binding on the parties. For instance, art 145 provided that:

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16 *Canadian General Electric Co Ltd v Pickford & Black Ltd (The Lake Bosomtwe*) [1971] SCR 41, 43-44.
17 [1962] AC 446, 474.
18 [1986] 1 SCR 752, 782-794.
19 [1984] 1 Lloyd's Rep 333.
20 (1991) 106 FLR 294.
21 The original French version was 'Organisation pour l'harmonisation en Afrique du droit des affaires'.

> The principal and the intermediary on the one hand, and the intermediary and the third party involved on the other hand, shall be bound by the customs and usages which they knew or should have known, and which, in trade are widely known and generally followed by parties involved in matters of agency of the same nature in the commercial sector under consideration. They shall also be bound by the practices established between them.[22]

Custom and usage could also override express contractual terms. Article 161(2) provided that:

> 'Where the commission contract contains specific instructions, the commission agent shall strictly comply with them except, where need be, he takes the initiative to have contract terminated on the ground that such instructions are against the nature of the contract or the customs and usages of the commercial sector'.[23]

Custom and usage could also be used to fill the contractual gap. Thus, art 182 provided that:

> Remuneration that is not agreed upon by the parties shall be paid on the basis of the existing tariff. Where no tariff exists, remuneration shall be fixed in accordance with the established customs and usages.[24]

Custom and usage could also be used to interpret contracts. Article 206 provided that:

> In order to determine one party's intention or that of the reasonable man, it shall be necessary to take into account factual circumstances, particularly negotiations which might have taken place between the parties, any customs and usages established between them, and even customs and usages in force in the profession concerned.[25]

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[22] Uniform Act Relating to General Commercial Law, art 145.
[23] Ibid art 161(2).
[24] Ibid art 182.
[25] Ibid art 206.

5 Customary practices in the modern business context 2: The impact of Digitalisation

The limits of commercial custom as a source of cybersecurity law (Jane Winn, University of Washington)

The speaker began by speaking about a cyber-attack on the Bank of Bangladesh in 2016. This attack illustrated the weakness of the cyber system and how it could easily be attacked. The attack was on the SWIFT system. Thirty-five fraudulent instructions were issued by security hackers via the SWIFT network to illegally transfer about US$1 billion from a Federal Reserve Bank of New York account belonging to Bangladesh Bank. After the attack, SWIFT recognised that such incidents might result in systematic risk for the banking system and published a mandatory standard on cyber-security for its members to follow. However, this does not make the system safer.

The establishment in the USA of the Information Sharing and Analysis Centre (ISAC) to tackle the cyber-attacks on American banks had been a huge success. Information about potential cyber-attacks and cybersecurity problems that American banks might encounter had been communicated and shared via the central system. In this case, banking was policing itself to adopt measures to tackle cyber-security issues and generate mandatory rules gradually. This self-governance system had proved to be significantly successful in dealing with cybersecurity which, in reality, could not be solved. By contrast, the government-led or institution-led risk management system was not accurate science and was still evolving.

In the context of cybersecurity, the problem-solving resolution was the only conceivable and possible response.

In the speaker's view there would be a system of twenty-first century commercial customs if there was a resilient, self-governing system. Through learning from each other and sharing information, the banking community could develop its policies to cope with rapid developments in cybersecurity issues.

International standards and state-of-the-art practices in the formulation of transnational commercial law rules for emerging technologies (Teresa Rodriguez de las Heras Ballel, Universidad Carlos III de Madrid)

The topic related to ongoing research on the legal framework for emerging technologies and could be divided into three parts. The first was that the world had to face disruptive technologies. The second was that transnational commercial law assumed that we were still living in a world with borders and domestic laws. However, with the emergence of the platform economy, the platform had become the new regulator and had developed into a stateless community which required its own legal system. Third, it was necessary to ask the question to what extent the outbreak of new technologies required new regulatory and legal standards. The research also needed to consider the idea of both technical and legal standards. What was the meaning of that? What would be the role of such standards in the future elaboration and formation of rules for new technology? How state of the art could standards work as a tool to identify the expected behaviour in the context of technological disruption?

Emerging technology was creating a sophisticated and complex technological ecosystem. What were the consequences from a legal perspective of the fact that all the new technologies, such as blockchain and AI, were working together to create a disruptive effect?

The speaker argued that, for now, we could still apply principles such as technological neutrality and functional equivalence to the new reality. There was, therefore, no need to change the law. We can apply the law in the same way, provided that we could still be neutral towards the new technology and find the functional equivalent. However, if the new technology ecosystem was too disruptive, then perhaps we needed to reconsider these principles.

The speaker opined that maybe the most effective way of regulating new emerging technology was by using technical standards. The use of technical standards could achieve predictability, certainty and, in the context of liability, safety to mitigate the risk of new technology. However, was it enough just using technical standards? Legal standards based upon technical standards could be a mid-way tool, which could connect principal rules and technical standards. The idea

of devising a legal framework for all the new emerging technologies was quite difficult unless agreement could be achieved as to what the emerging technologies were.

The interactive new technological ecosystem had numerous features: first, these technologies were not all new; second, they connected with each other, and the connection was creating a disruptive effect in traditional legal analysis; third, there was a high level of autonomy of these technologies; finally, there was an increasing level of complexity, lack of transparency, and a high degree of automation. Some instruments already existed to adapt to these new technologies, such as the UNICITRAL Model Law on Electronic Commerce.[26] All current instruments were based upon the idea of neutrality.

The real question was whether it was still possible to apply the principles of neutrality and functional equivalence to the emerging new technology? In the speaker's view, functional equivalence could not adapt to the new emerging technology. Functional equivalence tried to find the same legal effect by different methods. However, the new technologies were simply not replacing this way of doing things. Instead, they were creating new models, new architectures. One of the fascinating things with the new technology world was that we were now able to organise our relationship under a completely new architecture. Therefore, if new technology enabled us to change or reshape the way organised business activities or social interaction took place, we could not regulate these new patterns of business with the same functional equivalence approach. We would have to formulate a new architecture of functional equivalence and a new architecture of neutrality.

What could be done now was to work on rules based on the design of the new technology. This included how to design the platform to comply with legal or regulatory obligations. We should not focus on the functional equivalent, but on design and architecture. We also needed to have a dynamic observation of the new technology. Therefore, there was a need for monitory duties.

[26] See <https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf> accessed 30 September 2019.

We needed to monitor and supervise the design. The design needed to comply with legal and regulatory obligations.

A further aspect for consideration was transparency. A level of transparency was necessary for the third party to understand how the new technologies were designed. In this respect, we had to consider how to design legal standards where it was possible to identify a value or principles which needed to be protected. However, how could we ensure that the design of the technology was going to achieve that particular principle and obligation?

6 Conceptions (and misconceptions) of the nature of commercial custom: an interdisciplinary approach

Closure, not custom— past and present (Lisa Bernstein, University of Chicago; Emily Kadens, Midwestern University)

There was a claim that the *lex mercatoria* consisted of customary rules which had been followed by merchants throughout Middle Ages Europe. However, there was no evidence of the existence of such customary rules. Using historical and modern evidence, when asking about the existence of custom on the trade, did merchants describe mandatory and universal usages that were clear enough to be used as rules in judicial disputes? In the speaker's view, the answer was 'no'. Three merchant communities were used as evidence: the seventeenth century London grocery market, the late nineteenth century and early twentieth century commodity market in the USA, and the late twentieth century Texas farm market. These were all communities in which customs were supposed to flourish. They were all closely related business communities operating on day-to-day business transactions. This meant that the information about proper customary behaviour could easily be spread; reputation was a powerful force in discouraging commercial misbehaviour. Nevertheless, despite the fact that all the ideal conditions for the emergence of customs and usages were present, merchants involved in these trades were unable to agree on the content of the alleged customs, even in a context where they believed custom existed.

The 1621 London grocery market was a private ordering community, a geographically small group. The members of the market were closely interconnected. However, trade practice was not well-defined and unified. For example, witnesses during trials always disagreed significantly with the details of customs which they allege existed. Sometimes, the same witness even testified that two contradictory pieces of evidence could represent the same custom. In the late twentieth century Texas farm market, the understanding of even the most simple phrase, 'bale of hay', could be different from state to state and town to town. Indeed, disagreement was so significant that farmers within the same association needed to ask the government to issue a standard for recognising a 'bale of hay'.

It could, therefore, be concluded that: first, every trader only knew about practice of some aspects of the community and assumed that these practices were general. However, that did not mean that they were; even if they were general, that did not mean that the merchants themselves understand them to be mandatory. Second, even when all people believed that the trade followed a general usage, a member of that community may understand the content of that custom in various ways; there were no means or incentives for the members to gather information about what the others knew. Third, when asked about custom, merchants had different purposes such as that they might wish to support or defeat the party who was proposing them. They might also not be particularly conscious about how exactly to follow the norms which they had been asked about. Consequently, when asked about their practice, such merchants may guess or give what they believe to be the preferred or ideal answer in order to look good or to please the questioner. Finally, the formulation of the questions about the relevant custom might also determine the answer. When asked a general question about the custom, the merchant might agree that the custom existed; however, when asked a specific question about the details of the alleged custom, the answer might show significant disagreement. This high level of discrepancy could hardly provide any guidance for courts.

In addition, research from the two American examples showed that there was no consensus about the meaning to be attached to the most common terms in the trade. Further, the customary method of payment had no meaning to the transactors.

There were considerable hurdles to forming a well-accepted mandatory custom, even within a small, inter-related business community. In addition, demonstrating the existence of well-accepted custom from historical studies was not reliable.

7 The historical role of commercial custom

Evolving standards of custom as terms in contracts for the sale of goods from the common law of the nineteenth century to the Uniform Commercial Code by way of the English Sale of Goods Act and the Uniform Sales Act (Henry Gabriel, Elon University)

The speaker gave an historical introduction to the application of custom and trade usages under American law and English law.

If anyone wished to understand the American Uniform Commercial Code (UCC),[27] reference had to be made to the early editions of *Benjamin on Sale of Goods*[28] and the Sale of Goods Act 1893[29] because these were the sources of the American UCC. The speaker traced the early English law cases which, prior to the Sale of Goods Act 1893, proved that English law was the basis for the UCC and the American Uniform Sales Act.[30] He argued that, under US law, trade usages which were used today as a source to explain terms in an agreement could also add additional terms in an agreement. Trade usages could be used to explain the language of contractual terms, which was the most common practice.

The speaker examined the history of this subject by referring to cases in Lord Mansfield's time. The use of trade usages to interpret contractual terms had been codified in s 17 of the Sale of Goods Act 1893 and then adopted in the US codification, the American Uniform Sales Act. Although this did not expressly specify the use of trade usages to interpret contractual terms, the

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[27] American Uniform Commercial Code: see <https://www.law.cornell.edu/ucc/index.html> accessed 30 September 2019.

[28] The first edition of *Benjamin's Treatise on the Law of Sale of Person Property with References to the French Code and Civil Law* appeared in 1868. See Suman Naresh, 'Judah Philip Benjamin at the English Bar' (1996) 70 Tulane LR 2487.

[29] 56 & 57 Vict, c 71.

[30] See <http://source.gosupra.com/docs/statute/221> accessed 30 September 2019.

drafter of the Act was clearly of the view that trade usages could be used that way because the Act simply followed the Sale of Goods Act 1893.

The speaker referred to contemporary English law to prove two points. First, there had long been a practice to use business or trade usages to explain contractual terms and to bring in new terms under English law. Secondly, trade usages and custom were not the same thing at common law.

The speaker was of the view that custom in common law was the law. Trade usages were not the law; they were a means for interpreting an agreement. This distinction had been built in at the drafting stage of all three instruments. Custom was used differently from trade usages. Under US law, both trade usages and custom could be used to interpret the law but could not be used to overrule a default rule by principle.[31] However, under English law, trade usages could be used to overrule a default rule in the law. Trade usages under US law could also be used to add a subsidiary obligation.

The role of customary law in shaping the system of the maritime carrier's liability (Caslav Pejovic, Kyushu University)

The speaker reviewed the developmental history of maritime law. He argued that maritime law was probably one of the oldest parts of transnational commercial law and began with the legislative history of maritime law. He noted that the Code of Hammurabi of c 1754 BC had some maritime law provisions such as that liability for the loss of goods carried by sea was based upon custom. The speaker also noted that the origin of general average could be traced back to Rhodian law. Therefore, some maritime law terminology had a historical background. The speaker gave, by way of example, the definition and content of general average in medieval European maritime law, such as the *Law of Wisby* of c 1350 and *Consolato del Mare* of c 1340.

The speaker next suggested that there were two provisions of the carrier's liability in the European Middle Ages: the first was liability based upon presumed fault, the second was liability

[31] The US Supreme Court in 1879 held that at common law a party could not use trade usages as a basis for getting around default rules in the contract law.

under bills of lading. There was a clear link between Roman law and relevant provisions of Napoleon's Code Civil of 1804 relating to the strict liability of the carrier. Accordingly, under general maritime law principles recognised by the early nineteenth century in both civil law and common law systems, carriers were held strictly liable for cargo damage or loss.

It could also be argued that seaworthiness developed from Middle Ages Europe. For example, the *Consolato del Mare* contains several provisions resemble the modern concept of the cargoworthiness of the ship. Some of these old principles have become part of English law today.

Finally, the speaker considered the development of the Hague Rules, Hague-Visby Rules, Hamburg Rules, and Rotterdam Rules as part of the process of unification of the law relating to the carriage of goods by sea.

8 Commercial custom and codification: the evolution of standards

The role of customs and usages in the practical application of various uniform law instruments, (Ulrich G Schroeter, University of Basel)

The speaker contended that, during the drafting process of international commercial instruments, such as procedure law and also soft instruments, one underlying principle was designing a level playing field in that area with the goal of having every trade party comply with the same set of legal rules. This principle raised the issue of the harmonisation of commercial law.

The first question was whether we should harmonise or unify the law artificially or just leave it to usages? This was often answered in favour of codification in many areas. The next question was how do we deal with existing usages? Since most usages were local, allowing such usages to prevail over uniform law would be disruptive to contractual parties who are not aware of such local usages. In many cases, therefore, prerequisites for applying usages had been introduced into uniform law instruments by the drafters.

The speaker next reviewed the kinds of requirements international instruments, such as the CISG[32] and the Brussels Convention,[33] had imposed, examining the case law that had developed under those international instruments. The speaker summarised what kind of usages had actually been applied in practice, given those international prerequisites in the law.

The most influential section was art 9(2) of the CISG,[34] which had inspired other similar international instruments. The speaker concluded that there were three different requirements for establishing the existence of trade usages: the most common was that trade usages must be sustainable and notorious in a particular trade. Second, the parties specific awareness requirement must be fulfilled, meaning that parties to the particular contract or trade were aware or should be aware of the usages. Third, the trade usages must be reasonable. Each of these three requirements, in various combinations, had been referred to by the drafters of international instruments.

Referring to the case law, the speaker demonstrated that there were four categories of usages that had been applied. The first was codified trade usages, such as INCOTERMS. However, the rationale for this had not been explained in these cases. Second, trade usages that were specific to global trade. There were, however, only a limited number of cases involving this category of usage. Most usages had not been identified or codified, but some had been incorporated into trade agreements by certain trade organisations, such as the trade of wood or fish. This category of usages could be demonstrated by experts. Third, there were some specific usages which related to German law. Fourth, certain trade usages had been alleged but not proved.

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[32] United Nations Convention on Contracts for the International Sale of Goods 1980.

[33] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.

[34] Art 9(2) of the CISG provides that: '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'.

The speaker concluded that, in light of the above study of the cases, the notorious requirement of usages had played no part in practice whatsoever. The same was true of the parties' awareness requirement. The reasonable requirement had not been raised in court as an issue.

Instruments of uniform sales law and usages (Miklós Király, Eötvös Loránd University)

The speaker's presentation covered the transplant of usages, the codification of sales law, and international instruments of sales law.

In the speaker's view, trade usages were soft and flexible for unification and could unify the behaviour of the commercial community. The speaker therefore asked what the relationship was between the unification of law by usages and by codification. Trade usages had been mentioned in various international instruments, such as the Hague Convention 1964,[35] the CISG, and the UNIDROIT Principles of International Commercial Contracts (PICC). The attitude and approach of these international instruments toward usages was not the same. The reason for such differences could be explained by the changing nature of usages. Usages could be easily abandoned or created by merchants. Such uncertainty was beyond the control of formal lawmaking.

It was not common for international conventions to give a definition of usages. One murky example of the definition of usages could be found in the Hague Convention 1964, art 13 of Annex 1 stating that: 'Usage means any practice or method of dealing, which reasonable persons in the same situation as the parties usually consider to be applicable to the formation of their contract'.[36]

Reasonableness was a common requirement under international instruments to prove usages. Article 9 of the CISG and art 1.9 of the PICC were examples of similar requirements.[37] According

[35] Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague Convention 1964).

[36] Annex 1, art 13 of the Hague Convention 1964.

[37] Art 1.9 states that: '(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 bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable'.

to these international instruments, usages were also applicable as implied terms in a contract. Usages could also override default rules, subject to the words of international instruments. However, it was generally agreed that usages did not prevail over mandatory rules. The forthcoming Common European Sales Law (CSEL) also contained an article stating that usages did not bind parties if they conflicted with contractual terms.[38] Article 67(3) of the proposed CSEL provided that: 'Usages and practices do not bind the parties to the extent to which they conflict with contract terms which have been individually negotiated or any mandatory rules of the Common European Sales Law'.[39]

The speaker concluded that relevant articles existing in different international instruments were adopting different words toward the application and status of usages. Accordingly, there was no standard solution or fundamental agreement among the international instruments about usages.

The paradox of form and authority: codifying commercial customs through an international organization (Fabrizio Marrella, Università 'Cà Foscari' Venezia)

The speaker argued that without previously locating international trade usages in a legal system, there might be a disconnection between issues of form and authority. The question which needed to be asked was how international trade usages entered a specific legal system or how international trade usages were admitted by international treaties, such as the CISG?

Understanding the codification of custom through international organisations was important because the reality was that under certain conditions in the international legal system the codification of trade usages as transnational law by such organisations could be more influential than a multilateral treaty.

Referring to the success of ILC's work,[40] the speaker argued that international organisations, such as UNIDROIT and the ICC, should play a more confident part in forming future international trade

[38] The proposal for this regulation can be found at <https://eur-lex.europa.eu/legal> accessed 30 September 2019.
[39] See art 67(3).
[40] International Law Commission. The relevant work of ILC can be found at <http://legal.un.org/ilc/> accessed 30 September 2019.

customs. This objective could be achieved by filling the codification gap of trade usages. The speaker reviewed the historical debates on the value of codification and the transnational nature of the *lex mercatoria* and concluded that codification did not mean to limit trade usages to domestic law. Codification by international organisations could boost the international development of trade usages and experience could be drawn from the work of the ILC on legislation. For example, to have an efficient codification, there had to be a substantially open consensus by different actors involved in the law. There would be greater utility if the underlying subject matter was sufficiently stable; long-term utility was likely to happen if other mechanisms in international society allowed the adaptation of otherwise inflexible codifications. One merit of soft law codification by international organisations was that it could be flexible.

There were also some drawbacks in the work of the ILC; for example, the style of soft law was more like a treaty. Moreover, codified rules may be a danger to innovation. There was also an issue of accessing how the international trade usages codified at international level could be derogated by subsequent practice or subsequent instruments of international law. Finally, the codification of trade usages by international organisations could, under international law principles, be considered as the writings of highly qualified publicists.

The codification of trade usages by international organisations should be done by experts, and academics as had occurred with the UNIDROIT Principles of International Commercial Contracts (UPICC).

The speaker concluded that the codification of international trade usages was a manifestation of an intention to bring order to world trade through institutions and law. Codification was important in clarifying the meaning of transnational commercial law and bringing predictability into this field.

9 Commercial custom in out-of-court dispute resolution

Are the UNIDROIT PICC usages pursuant to Art 9 of the CISG and Art 28(4) of the UNCITRAL Model Law on International Commercial Arbitration (MAL)? (Edgardo Muñoz López, Universidad Panamericana, Guadalajara)

The speaker's aim was to resolve the question whether the terms of the UPICC should be recognised as trade usages for the purposes of the CISG or UNCITRAL Model Law on International Commercial Arbitration (MAL).[41]

Referring to his own experience as an arbitrator, the speaker suggested that parties often rely on usages at some level. When one party argued usages, the other party tended to agree. Therefore, usages existed to some extent.

It was generally agreed that the UPICC are not usages. However, the speaker referred to the Unilex database[42] where there were around 600 arbitral cases where arbitrators and courts had considered the UPICC as reflecting practice. The speaker wondered, therefore, why there was such a division between the opinions of scholars and practitioners.

The speaker first referred to the preamble of the UPICC to ascertain the rules of application of usages. The preamble states that:

> Parties to international commercial contracts who cannot agree on the choice of a particular domestic law as the law applicable to their contract sometimes provide that it shall be governed by the 'general principles of law', by the 'usages and customs of international trade', by the lex mercatoria, etc.[43]

The speaker argued that the preamble seemed to make equivalent the concept of the *lex mercatoria* and usages of trade. However, the *lex mercatoria* was not equal to the PICC. The

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41 See <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 30 September 2019.

42 See <http://www.unilex.info/> accessed 30 September 2019.

43 See preamble 4.b of the UPICC.

speaker therefore argued that the *lex mercatoria* had an a-national nature and flexible character which was different from the UPICC. However, there were some scholars who believed that the *lex mercatoria* were general principles of law. According to that argument, the UPICC was the *lex mercatoria* since the UPICC were general principles of law. The speaker nevertheless argued that the UPICC were not usages. There would, otherwise, be no need for art 1.9.

The speaker also suggested that the roles of usages were different from one international instrument to another. Under art 9 of the CISG, the role of usages was to supplement the contract. Usages were above everything else, except the contract. Under art 28(4) of the MAL, usages did not have a role in supplementing the contract.[44]

By examining the wording of art 9(1) of the CISG, it was clear that the concept of usage was not important, because the parties could simply agree what they wanted, including UPICC.

Could the UPICC be seen as usages under art 9(2)? The speaker's answer was 'no'. He concluded that the whole of the UPICC was not a usage. The reasons could be found in the character and background of the UPICC. First, some of the articles in the PICC were not common practice. For example, art 6.2.2 of the UPICC dealt with hardship, which was an exception and not a practice.[45] Second, the UPICC had been drafted by law professors with no consultation between the drafters and business community. Third, the drafters intended to draft principles that would last for a long time. However, trade usages were not stable rules in this way.

Article 28(4) of the MAL does not set out clear standards for the recognition of trade usages. The speaker concluded that the scope of usage under art 28(4) of the MAL should be defined in the light of the relevant requirements under art 9 of the CISG and art 1.9 of the PICC.

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[44] Art 28(4) provides that 'In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade'.

[45] Art 6.2.2 states: 'There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.'

Custom as the Lex Mercatoria (Orsolya Toth, University of Nottingham)

The speaker talked about trade usages from the perspective of a well-known shipping case, *The Achilleas*,[46] which also concerned remoteness of damage and potential liability for consequential losses. There were distinctions between domestic law and trade usages. Currently, the role of trade usages had been largely constrained to interpret contract or to fill gaps in a contract and had not been recognised as equal to domestic law. This kind of struggle between domestic law and trade usages was still ongoing. *The Achilleas* was a very good example.

The speaker covered the facts of the case, the arguments of the parties, and the decision by all three courts. The majority of arbitrators had given an award for the owners, as had the Commercial Court and Court of Appeal. However, the House of Lords had reversed these decisions and found for the charterers.

In this case, a specific point raised by the charterers as a defence was that the overrun measure was the wisdom of the industry and which should be followed. Although the charterer had not mentioned trade practice expressly, but if the charterers' description of the overrun measure was examined carefully, it had implied that it was a trade usage of the shipping market that the charterer would only be responsible for late delivery according to the overrun measure.

In the speaker's view, the entire case was underpinned by the hidden dimension of trade usages. When considering whether a cargo fixture was usual or unusual, we could say both. It was usual in the sense that it was entered into with a market rate for a standard term; the cargo fixture could be unusual because it was the result of unusual market volatility.

When looking at this issue from the perspective of English law, the speaker argued that, we could not meaningfully do justice to the case because the key to it was the existence of the overrun measure as the trade usage of the market. Therefore, the usual course of things test in *Hadley v*

[46] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61. The High Court judgment can be found at [2006] EWHC 3030 (Comm), [2007] 1 Lloyd's Rep 19 and the Court of Appeal judgment at [2007] EWCA Civ 901, [2007] 2 Lloyd's Rep 555.

Baxendale[47] could not be applied to a highly specialised market because the market said the extraordinary was the ordinary.

An alternative approach to this case was to recognise that there were trade usages in the market, and the charterer was liable according to the overrun measure. The wisdom of the industry was that trade usages had already balanced the respective interests of the parties and that could be relied upon by the court when delivering judgment.

Common approaches to the enforcement of jurisdiction (Satya Mouland, Queen Mary University of London)

The speaker considered the role of custom in international law and the enforcement of international arbitration awards.

The speaker discussed the first part of her PhD research. There were various sources of international law, such as treaties and conventions, but custom was also a very important source. The definition of custom under international law was different from its meaning under transnational commercial law. Custom was a practice followed by two or more nations in the course of dealing with each other. These practices could be found in diplomatic correspondence, policy statements, or official government statements. In order to become custom, there had to be a consistent and recurring practice over a significant period of time. Nations had to recognize that the practice or custom was binding and had to follow it because of a legal obligation and not mere courtesy. Customs might, in due course, become codified in international treaties.

International arbitration was very popular. Compared to court judgments, arbitration was seen to be less expensive and more private. Typically, there would be an arbitration clause in the contract specifying the arbitrator or the means of selecting the arbitrator. Contractual parties could refer to international organizations, such as the ICC, to conduct the arbitration. However, an arbitral award was not a judgment. If the losing party did not honour the award, the winning party still needed to approach a court to enforce the award. Such enforcement was protected by

[47] (1854) 9 Exch 341.

international instruments, such as the United Nations Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention).

Roundtable discussion: The future of transnational commercial custom (Miriam Goldby, Nicolas Lozada Pimiento, Jane Winn)

There were three speakers, each of whom discussed their understanding of the future of transnational commercial custom before opening up the discussion to the audience.

Miriam Goldby contended that defining the business community was crucial for further research on custom. She had closely studied the London insurance market, which was a very well-defined community. The London insurance market was transitioning to modernise its way of doing business. This kind of transition ws not new and had been going on since the emergence of the London insurance market. The market reformed itself. It was driven by practice over many centuries and this could be seen from the codified provisions of the Marine Insurance Act (MIA) 1906. Market practice was also reflected in the MIA 1906, such as s 21. Market practice was evolving so that the market could adapt to the new changes. For example, since 2006 Lloyd's had set up platforms for all aspects of the business to be undertaken electronically. Thus, declarations were made electronically as were certificates issued electronically over the platform. The function of a slip, stated in s 21 of the MIA 1906, had been replaced by the Market Reform Contract (MRC). Section 22 of the MIA 1906, stating that the policy was the only acceptable evidence of the insurance contract, had been treated by the insurance market as not even existing. Precedents about the way things were done could not be relied upon any longer, because circumstances were changing. The evidence proved that the market could itself adjust to changing circumstances. In the upcoming new technology era, market practice would also play an important role. Customary practice could be used to cope with the development of technology, and the MIA 1906 was still in force. One question which did exist was how did we know what was customary now?

Nicolas Lozada Pimiento gave a very brief introduction to emerging new technologies and how, in his opinion, the law would be changed.

Jane Winn argued that social practices and social values changed in response to the emergence of new technology. In order to form the future legal system, legal scholars would have to be open-minded and understand value propositions from both the producer and the customer.