Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant

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SUMMARY

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I. INTRODUCTION

Rooted in ancient and medieval mercantile experiences,[1] the law of commercial transactions draws from private agreements, customs and usages,[2] and legislation. In this century, three sources—contract, custom, and code—have transcended national laws and legal institutions. Codification has occurred on an international scale. In particular, the United Nations Convention on Contracts for the International Sale of Goods (CISG)[3] and Incoterms[4] govern many international commercial transactions.

1. *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 333-56 (1983) [hereinafter BERMAN, LAW AND REVOLUTION]; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 657-70 (5th ed. 1956); Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT'L DISP. RESOL. 235, 238-44 (1988) [hereinafter Berman, *Lex Mercatoria*].

2. A crisp semantic distinction between custom and usage is elusive. Although we often speak of both obligatory custom and non-obligatory usage within the category of "customary law," usage is really the broader category; the set of objectively observed trade practices includes those that the practitioners subjectively consider obligatory. As a possible catch-all phrase, "practice" fails to recognize that the law can give binding effect to certain customs and usages. Nor will the terms "prescriptive" and "descriptive" adequately separate custom from usage. Thus, to avoid confusion, this Article speaks of both custom and usage when it refers to the set of trade practices that the law can recognize as binding.

3. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* April 11, 1980, S. TREATY DOC. NO. 9, 98th Cong., 1st Sess. (1983), 19 I.L.M. 671 [hereinafter CISG].

4. INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL RULES FOR THE INTERPRETATION OF TRADE TERMS (1980) [hereinafter INCOTERMS].

Although these agreements reinforce the law merchant's traditionally international character,[5] national commercial law still plays an important role in transboundary contractual disputes. Practitioners can compare international doctrines with familiar domestic principles.[6] Indeed, the jurisprudential perspective of national law influences the continuing development of international commercial law through both legislation and custom. For example, the CISG's resemblance to the Uniform Commercial Code (UCC)[7] has drawn mixed reactions.[8] More important, as changing practices transform international commercial law, national views of the extralegislative law of "international commercial custom in the widest sense"[9] will guide the future of the law merchant.

Among the national systems of mercantile law, the UCC is a Holy Roman Empire, neither uniform, nor commercial, nor a code.[10] This Article explores how the UCC nevertheless captures the essence of the law merchant. Part II places the UCC and its underlying tradition in the international context. Part III discusses failed attempts to insert separate rules for merchants into the UCC. Part IV examines the UCC's provision on trade usage and course of dealing.[11] Properly applied, the UCC transforms usage into an implied term in all commercial contracts, enabling the law of trade to change alongside actual practice. Part V argues that the UCC's usage paradigm is superior to more traditional

5. *See* Berman, *Lex Mercatoria, supra* note 1, at 235.

6. *See* Isaak I. Dore & James E. DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L.J. 49 (1982); Paul Lansing & Nancy R. Hauserman, *A Comparison of the Uniform Commercial Code to UNCITRAL's Convention on Contracts for the International Sale of Goods*, 6 N.C. J. INT'L L. & COM. REG. 63 (1981); Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. 1984 (1984).

7. All UCC references are to the 1989 version of the Code.

8. *Compare* Berman, *supra* note 1, at 295 (noting that American lawyers may find comfort in the CISG's similarities with the UCC) *and* Dore & DeFranco, *supra* note 6, at 6667 (favoring the CISG's similarities to the UCC) *with* Note, *supra* note 6, at 1999-2000 (arguing that the CISG and the UCC are similarly "open-textured" and ill-suited to bridge differences in national laws).

9. Norbert Horn, *Uniformity and Diversity in the Law of International Commercial Contracts*, *in* THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 3, 15 (Norbert Horn & Clive M. Schmitthoff eds., 1982).

10. This Article proves these assertions in reverse order. *See infra* text accompanying notes 12-16 (code), 93-111 (commercial), and 156-72 (uniform).

11. U.C.C. § 1-205.

views of customary commercial law. Part V also addresses the special problem of unreasonable and fraudulent trade usage, including the subtle ruse of petrifying existing marketplace morality.

II. THE UCC AND THE MODERN LAW OF COMMERCIAL TRANSACTIONS

The UCC is not a code in the Continental sense.[12] Short of "a preemptive, systematic, and comprehensive enactment of a whole field of law,"[13] the UCC deviates from the Continental model of a strictly commercial code with special procedures and rules tailored for merchants.[14] Rather, the UCC "purports to deal with all the phases which may ordinarily arise in the handling of a commercial transaction,"[15] encompassing many transactions that are not necessarily mercantile.[16] Nevertheless, the UCC claims a place in the constellation of national and international commercial statutes. The UCC not only embodies the background national law for American merchants, but also provides a basis for the international techniques of Incoterms and the CISG.

A. The Emergence of American Commercial Law

1. Early Attempts at Unification

The UCC culminated many tortured attempts to create a uniform commercial law in the United States and reflected the legal realists' attitude toward customary law.[17] As early as 1837, Joseph Story proposed

12. *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 311-12 (1973).

13. Steve H. Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code—Part I: The Methodological Problem and the Civil Law Approach*, 31 ARK. L. REV. 1, 13 (1977) (quoting William D. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291, 292); *see also* Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1043 (1961) (distinguishing a "statute" from the more systematic "code").

14. *See* TWINING, *supra* note 12, at 311-12. To the extent that the UCC has special merchant rules, one commentator argues that such rules should apply to all transactions that fall within the UCC. *See* Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve The Good, The True, The Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1160-62 (1985).

15. U.C.C. gen. cmt.

16. *See, e.g.*, U.C.C. § 2-102 (applying Article 2 to "transactions in goods"); U.C.C. § 3-103 (applying Article 3 to all commercial paper except "money, documents of title or investment securities").

17. The legal realists preferred written law to customary law because written law provided a better guide of how judges would resolve particular disputes. *See, e.g.*, Karl

a general commercial code.[18] For nearly a century, the federal common law of *Swift v. Tyson*[19] united interpretations of commercial contracts. Perhaps *Swift*'s apparent appeal to legal uniformity was "more concretely . . . an attempt to impose a procommercial national legal order on unwilling state courts."[20] Regardless, after the Supreme Court overruled *Swift*,[21] attention shifted to commercial codes.[22] Between 1896 and 1933, the National Conference of Commissioners on Uniform State Laws (NCC) promulgated seven uniform commercial statutes, which included the Negotiable Instruments Law and the Uniform Sales Act.[23] The impulse to reform the Uniform Sales Act spawned two projects. First, in 1936, New York merchants sought a new uniform state statute, better suited to international trade.[24] Second, in 1940, other reformers proposed a Federal Sales Act.[25] The route of uniform state law eventually prevailed, and in 1953 Pennsylvania became the first state to adopt the UCC.[26]

2. Custom and Usage in American Courts

Pre-UCC courts both approved and doubted custom as binding law. On one hand, the Supreme Court acknowledged "customs and usages of

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N. Llewellyn, *Thoughts*, *in* MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 181, 190 (1941).

18. *See* GRANT GILMORE, THE DEATH OF CONTRACT 9-11 (1974).

19. 41 U.S. (16 Pet.) 1, 19 (1842); *see* GILMORE, *supra* note 18, at 96-97.

20. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 250 (1977).

21. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 79-80 (1938).

22. Despite *Erie*, federal common law persists in commercial cases implicating a significant federal interest. *See* National Metro. Bank v. United States, 323 U.S. 454, 456 (1945); Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943). More recent cases suggest that the federal interest must outweigh countervailing private interests before a court will invoke federal common law. *See, e.g.*, Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 33-34 (1956).

23. *See* U.C.C. gen. cmt.; TWINING, *supra* note 12, at 273; Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 799 (1958). The other uniform statutes were the Uniform Warehouse Receipts Act, Uniform Stock Transfer Act, Uniform Bills of Lading Act, Uniform Conditional Sales Act, and Uniform Trust Receipts Act.

24. *See* Berman, *Lex Mercatoria*, *supra* note 1, at 243 (citing 1 N.Y. LAW REVISION COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE 348 (1955)).

25. *See* Braucher, *supra* note 23, at 799; Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 483-86 (1987); *see also* TWINING, *supra* note 12, at 276-78 (describing the proposed Federal Sales Act as but one result of efforts to reform the Uniform Sales Act). *See generally* Symposium, *The Proposed Federal Sales Act*, 26 VA. L. REV. 537 (1940).

26. Act of April 6, 1953, Pub. L. No. 1, 1953 Pa. Laws 3.

civilized nations" as authoritative sources of international law.[27] On the other, courts invoking the plain meaning rule confined custom and usage to the interstitial role of clarifying ambiguous language.[28] In commercial cases immediately preceding the UCC, American courts identified at least three general problems in recognizing custom and usage. First, how would courts resolve conflicts between trade practice and the apparently plain meaning of contractual terms? Second, how would courts exclude unreasonable practices? Third, would courts distinguish custom from usage, and if so, how?

Two opinions by Judge Learned Hand addressed the first two issues. In *Kunglig Jarnvägsstyrelsen v. Dexter & Carpenter*,[29] Hand held that an insurance certificate not signed by the insurer, but issued by a New York broker nevertheless, satisfied the requirement that a seller provide insurance on a c.i.f. contract:

> When a usage . . . has become uniform in an actively commercial community, that should warrant enough for supposing that it answers the needs of those who are dealing upon the faith of it. I cannot see why judges should not hold men to understandings which are the tacit presupposition on which they deal.[30]

To give the usage binding force, Hand dismissed the plain meaning rule. Contrary to one of his earlier opinions,[31] he declared that courts should look to practice over language as the basis of commercial understandings: "Words mean what the parties who use them want them to mean. . . ."[32]

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27. The Pacquete Habana, 175 U.S. 677, 700 (1899).

28. "Usage . . . may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." Barnard v. Kellogg, 77 U.S. (10 Wall.) 383, 390-91 (1870) (quoting Blackett v. Royal Exchange Assurance Co., 149 Eng. Rep. 108 (Ex. 1832)).

29. 299 F. 991 (S.D.N.Y. 1924).

30. *Id.* at 994; *cf.* Hostetter v. Park, 137 U.S. 30, 40 (1890) ("[P]arties who contract on a subject-matter concerning which known usages prevail, incorporate such usages by implication into their agreements . . ."); Dixon, Irmaos & Cia. v. Chase Nat'l Bank, 144 F.2d 759, 762 (2d Cir.), *cert. denied*, 324 U.S. 850 (1944) (same quotation). The UCC has adopted *Kunglig*'s rule at U.C.C. § 2-320(2)(c), which provides that a c.i.f. seller may "obtain a policy or certificate of insurance." *See* Berman, *Lex Mercatoria, supra* note 1, at 284.

31. *See* Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911) (Hand, J.) ("A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties"), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913).

32. *Kunglig*, 299 F. at 995; *cf.* Biddell Bros. v. E. Clemens Horst Co., [1911] 1 K.B. 934, 954 (C.A.) (Kennedy, L.J., dissenting) (defining "net cash" terms according to international merchants' understanding), *rev'd*, 1912 App. Cas. 18.

In *The T.J. Hooper*,[33] Hand announced that no trade may set the legal standard of care through an unreasonable usage. He declared that "[c]ourts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."[34] Though involving a tort rather than a commercial contract, *Hooper* suggested a simple method for managing trade usages: allow merchants to develop a private customary law, but retain judicial discretion to deny enforcement to unreasonable practices.[35]

Most important, some pre-UCC courts distinguished custom from usage by recognizing trade usage that did not rise to the level of custom.[36] Unlike practitioners of a trade usage, practitioners of a custom feel some sense of legal obligation.[37] For instance, both public international law and English common law require that a binding trade practice rise to custom. In public international law, custom "means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor."[38] English common law pre-

33. 60 F.2d 737 (2d Cir. 1932).

34. *Id.* at 740; *cf.* Brown Jenkinson & Co. v. Percy Dalton (London) Ltd., [1957] 1 Q.B. 621, 633 (C.A.) (refusing to enforce an indemnity agreement acquired in exchange for the improper issue of a clean bill of lading for defective orange juice).

35. *But cf.* Shipley v. Pittsburgh & L.E. Ry., 83 F. Supp. 722, 751 (W.D. Pa. 1949) (suggesting that a court should recognize unreasonable usage to interpret a contract if both parties intended to accept the usage).

36. *But see* UNIFORM SALES ACT § 71 (1906) ("Where any right, duty, or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or . . . by custom, *if the custom be such as to bind both parties* to the contract or the sale." (emphasis added)), reprinted in LAWRENCE VOLD, HANDBOOK OF THE LAW OF SALES app. at 478 (2d ed. 1959). The Uniform Sales Act also regarded custom as extrinsic to the parties' agreement and subject to exclusion as parol evidence. *See, e.g.*, Chase Manhattan Bank v. May, 311 F.2d 117, 119 (3d Cir. 1962), *cert. denied*, 372 U.S. 930 (1963).

37. *See, e.g.*, Berman, *Lex Mercatoria, supra* note 1, at 286; Joseph H. Levie, *Trade Usage and Custom Under the Common Law and the Uniform Commercial Code*, 40 N.Y.U. L. REV. 1101, 1102 (1965); *cf.* CLIVE M. SCHMITTHOFF, INTERNATIONAL TRADE USAGES paras. 35-37 (1981) (classifying normative, contractual, and factual trade usages). This Article discusses custom as "normative" and usage as "factual." Because both custom and usage derive legal force from sources outside individual contracts, they differ from Schmitthoff's "contractual" usages, which are "incorporated by the parties into their contract, by exercising their autonomy." *See id.* para. 36.

38. JAMES L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 59 (6th ed. 1963); *see also* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, ¶ 1(b), *reprinted in* 1986 U.N.Y.B. 1232, 1234, U.N. Sales No. E.90.I.1.

scribed an even more rigorous test of custom. A party seeking to modify legal rights with custom must prove that the custom is (1) legal, (2) notorious, (3) ancient or immemorial, (4) reasonable, (5) certain, (6) universal, and (7) obligatory.[39]

The Second Circuit, in *Dixon, Irmaos & Cia. v. Chase Nat'l Bank*,[40] rejected the traditional tests of custom while applying trade usage to the contract. In *Dixon*, the confirming bank refused to accept a prime bank's offer of indemnity in lieu of a full set of bills of lading, which had been delayed by the 1940 German invasion of Belgium. The court found that New York banks universally honored offers of indemnity from prime banks. Although the confirming bank presented banking experts who testified that banks had discretion to reject indemnity offers, the court found that no other bank had ever refused such an offer. Consequently, the court held that the confirming bank was bound by this practice.[41] More influential than *Dixon*'s result,[42] the court's reasoning sparked heated debate.[43] Together with *Kunglig* and *Hooper*, *Dixon* established a jurisprudence for drafting the UCC.[44]

B. The UCC and International Commercial Law

Although primarily an expression of American law, the UCC has international links. Because the desire to align the Uniform Sales Act

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39. *See* Levie, *supra* note 37, at 1103; *cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES *67-69; Henry M. Hart & Albert M. Sacks, The Legal Process 448 (Tent. ed. 1958); Note, *Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law*, 55 COLUM. L. REV. 1192, 1198 (1955) (similar formulations). Only the last requirement of "obligation" reflects custom's distinctive *opinio necessitatis*.

Under English law, custom satisfying these tests can create a document of title. *See* Kum v. Wah Tat Bank Ltd., [1971] 1 Lloyd's Rep. 439, 443-44 (P.C.).

40. 144 F.2d 759 (2d Cir.), *cert. denied*, 324 U.S. 850 (1944).

41. *See id.* at 761-62.

42. *See* Dana C. Backus & Henry Harfield, *Custom and Letters of Credit: The* Dixon, Irmaos *Case*, 52 COLUM. L. REV. 589, 598 (1952) (characterizing *Dixon* as a "dead letter"); Harold J. Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1431 (1963); *cf.* U.C.C. § 2-323(2)(b) (permitting beneficiary of a bill of lading sent from abroad to tender an adequate indemnity in lieu of documents).

43. *Compare* Backus & Harfield, *supra* note 42 (condemning *Dixon* as an infringement on freedom of contract) *with* John Honnold, *Letters of Credit, Custom, Missing Documents, and the* Dixon *Case: A Reply to Backus and Harfield*, 53 COLUM. L. REV. 504 (1953) (defending *Dixon* as a workable model for incorporating trade usage into commercial contracts).

44. *Dixon* in particular influenced the original draft of the Code's trade usage provision. *See* Roger W. Kirst, *Usage of Trade and Course of Dealing: Subversion of the UCC Theory*, 1977 U. ILL. L.F. 811, 828-31.

with transnational commercial law inspired its drafters,[45] the UCC's interplay with the transnational law merchant has drawn attention.[46] For example, although the UCC defines such documentary terms as c.i.f., f.o.b., and f.a.s.,[47] Samuel Williston argued that the UCC inadequately covered some aspects of foreign sales.[48] More pointedly, some commentators have criticized the UCC's drafters for failing to join the Rome Institute's international codification projects.[49] Nevertheless, civil law did influence the drafting of the UCC.[50] For example, Karl Llewellyn drew upon German legal philosophy and German commercial law.[51]

1. The Role of National Legal Systems in International Commercial Law

Before locating the UCC within the institutions of international commercial law, one should observe the nearly religious nature of the debate surrounding the law merchant.[52] Short of adopting a naive faith, the modern scholar may choose from the positivistic, the pragmatic, or the historical vision of the law merchant.[53] Strict positivists deny the exist-

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45. *See supra* text accompanying note 24.

46. *See, e.g.*, LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 35-36 (1983); Wilbert Ward and Morris S. Rosathal, *The Need for the Uniform Commercial Code in Foreign Trade*, 63 HARV. L. REV. 589 (1950); Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 563 (1950); *see also* sources cited *supra* note 6.

47. *See* U.C.C. §§ 2-319 to 2-324.

48. *See* Williston, *supra* note 46, at 563. According to Williston, the need to elaborate international trade terms would be fulfilled by such transnational agreements as Incoterms or explicit definitions in individual contracts. *Id.*

49. *See* TWINING, *supra* note 12, at 312-13. First established by Italy as a League of Nations body, the Rome Institute is an organization designed to develop uniform systems of private international law. *See* Berman, *Lex Mercatoria*, *supra* note 1, at 289-90 n.57.

50. *Cf.* Nickles, *supra* note 13 (comparing the UCC's underlying judicial theory with that of civilian commercial codes).

51. *See* Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1125, 1130 (1982); Wiseman, *supra* note 25, at 514 & nn.219-20; James Whitman, Note, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987).

52. *See* EUGEN LANGEN, TRANSNATIONAL COMMERCIAL LAW 11-12 (1973) (classifying scholars according to their view of law merchant as an autonomous source of customary law).

53. *See generally* Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779 (1988) (synthesizing legal positivism, natural law, and the historical school of jurisprudence) [hereinafter Berman, *Integrative Jurisprudence*].

ence of an international mercantile law independent of treaties and individual states' municipal law.[54] Although intellectually coherent, the positivistic view crumbles in the face of overwhelming practical evidence of a customary law of international sales, while the pragmatic and historical views finds more support.

The purely positivistic vision finds support in the Eastern European notion that only legislation and mutual agreement can bind trading partners.[55] Conversely, in binding parties to "widely known" and "regularly observed" international trade usages,[56] the CISG acknowledges that merchants must heed rules not made by any particular state.[57] Western national laws also recognize the law merchant. The international commercial community traditionally preferred arbitration, partly because it assumed that national courts would not enforce obligations based solely on the law merchant.[58] Although some older cases have required that contractual obligations stem from some national law,[59] more recent cases express judicial willingness to rely on general principles of private international law, if not a willingness to acknowledge the law merchant outright.[60] In addition, statutes expressly incorporate trade

54. *See, e.g.*, Georges R. Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 TUL. L. REV. 575, 577 (1988); Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613 (1988); *cf.* John S. Ewart, *What Is the Law Merchant?*, 3 COLUM. L. REV. 135, 138 (1903) (calling early commercial law "nothing but a heterogenous lot of loose undigested customs, which it is impossible to dignify with the name of a body of law").

55. Eastern European law typifies this view. *See, e.g.*, GENERAL CONDITIONS OF DELIVERY OF GOODS BETWEEN ORGANIZATIONS OF THE MEMBER COUNTRIES OF THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE § 2(1) (1979), *reprinted in* IVÁN SZÁSZ, THE CMEA UNIFORM LAW FOR INTERNATIONAL SALES app. at 240 (2d rev. ed. 1985) (defining contract formation narrowly as a written offer and acceptance). This notion also thrives in English law. *See* Biddell Bros. v. E. Clemens Horst Co., [1911] 1 K.B. 214, *rev'd*, [1911] 1 K.B. 934, *rev'd*, 1912 App. Cas. 18.

56. CISG, *supra* note 3, art. 9, S. TREATY DOC. No. 9 at 24, 19 I.L.M. at 674.

57. *See* Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, *in* LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 139, 143 (Thomas E. Carbonneau ed., 1990).

58. *See* Christopher W. Stoecher, *Lex Mercatoria: To What Extent Does It Exist?*, J. INT'L ARB., Mar. 1990, at 101, 108-09.

59. *See, e.g.*, Judgment of June 21, 1950, Cass. civ., 1951 D. Jur. 749 (Fr.).

60. *See* Judgment of Dec. 9, 1981, Cass. civ. 2e, [1983] 1 D.S. Jur. 238, 239 (Fr.); Judgment of Oct. 9, 1984 (Pabalk Ticaret Ltd. Sirketi v. Norsolor S.A., Cass. civ. 1re, [1985] 1 D.S. Jur. 101 (Fr.), *enforcing* 1984 Y.B. Com. Arb. 109, 110 (arbitral award November 9, 1979), *aff'd*, 1984 Y.B. Com. Arb. 159 (Aus. Sup. Ct. Nov. 18, 1982); Deutsche Schachtbau-und Tiefbohr gesellschaft m.b.H. v. R'As al Khaimah Nat'l Oil Co., [1987] 3 W.L.R. 1023, 1031-35 (C.A.).

usages into positive law.[61] Such statutes are "nothing less than the loophole through which the transnational law merchant enters into national law and even supersedes the predominantly non-mandatory national rules."[62]

Examination of the American legal system vindicates the positivistic view, but only in the sense that the law merchant as international customary law ironically relies on elements drawn from national law. Together with federal law, the UCC contributes to a pragmatic accommodation of the law merchant. Federal courts will honor commercial parties' forum selection clauses unless they are unfair or unreasonable,[63] and federal law grants similar deference to arbitration clauses and arbitral decisions.[64] These federal law doctrines and the UCC typify the generally receptive American attitude toward the law merchant. American perspectives have substantially influenced the development of international commercial law. To some degree, the Uniform Law on the International Sale of Goods[65] and the related Uniform Law on the Formation of Contracts[66] failed because the United States did not seriously consider ratifying either convention.[67] Conversely, the United States delegation relied on the UCC's approach to trade usage in negotiating the CISG.[68]

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61. *See, e.g.*, U.C.C. § 1-205; HANDELSGESETZBUCH [HGB] § 346 (F.R.G.); *see also* U.C.C. § 1-103 (incorporating the law merchant as an authoritative source of law).

62. Harold J. Berman & Felix J. Dasser, *The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy*, *in* LEX MERCATORIA AND ARBITRATION, *supra* note 57, at 21, 25.

63. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 8-15 (1972); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 80 (Supp. 1989); *cf.* Unterweser Reederei G.m.b.H. v. Zapata Off-Shore Co. [The Chaparral], [1968] 2 Lloyd's Rep. 158, 163 (C.A.) (adopting a similar rule in England). For an extension of the choice-of-forum clause to a non-commercial context, see Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522, 1527-28 (1991).

64. *See* 9 U.S.C. § 2 (1988); Mitsubishi Motors, Inc. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691, 704 (2d Cir. 1978).

65. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 106.

66. Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169.

67. *See* Peter Winship, *New Rules for International Sales*, 68 A.B.A. J. 1231, 1232 (1982).

68. *See* Stephen Bainbridge, Note, *Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions*, 24 VA. J. INT'L L. 619, 638-40 (1984).

2. The UCC and Incoterms

Thanks to the American role in codifying international commercial law,[69] the UCC shares similarities with two of the most important international commercial law agreements: Incoterms and the CISG. The UCC defines such standard trade terms as f.o.b., f.a.s., c.i.f., c. & f., and ex-ship.[70] Incoterms defines these terms and several more.[71] Both the UCC and Incoterms can fill the need for defined trade terms under the CISG.[72] As an international agreement, Incoterms has found acceptance outside the United States.[73] Because the UCC supports its definitions with a comprehensive sales law, whereas Incoterms' definitions depend on the law applicable to the overall contract,[74] the UCC provides a beneficial alternative to Incoterms in international transactions. Currently, parties desiring to incorporate the UCC definitions may either stipulate an American jurisdiction for choice-of-law purposes[75] or incorporate, verbatim, the UCC's definition of the desired trade term without stalling contract negotiations over choice of law.

3. The UCC and the CISG

Since the CISG's many similarities to the UCC have drawn exhaustive attention,[76] a brief comparison of the trade usage provisions will suf-

69. *See generally* Peter H. Pfund, *United States Participation in Transnational Lawmaking*, *in* LEX MERCATORIA AND ARBITRATION, *supra* note 57, at 167.

70. *See* U.C.C. §§ 2-319 to 2-324.

71. *See* INCOTERMS, *supra* note 4 (defining ex-works, f.o.r./f.o.t., f.a.s., f.o.b., c. & f., c.i.f., ex-ship, ex-quay, delivered at frontier, delivered duty paid, f.o.b. airport, free carrier, freight/carriage paid to, and freight/carriage and insurance paid to).

72. The CISG omits such definitions. *See* Harold J. Berman & Monica Ladd, *Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods*, 21 CORNELL INT'L L.J. 423, 433 (1988).

73. For example, the German Supreme Court applied Incoterms in [1975] Recht der Internationalen Wirtschaft 578-79. For an extended discussion of this issue, see Felix J. Dasser, Incoterms and Lex Mercatoria: Applicability of Incoterms in the Absence of Express Party Consent? (1990) (unpublished LL.M. thesis, Harvard Law School).

74. *See* Berman & Ladd, *supra* note 72, at 434.

75. *See* U.C.C. § 1-105(1).

76. *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 120, at 147-48 (1982) (noting that the CISG's trade usage provision resembles U.C.C. § 1-205); Michael J. Bonell, *Article 9—Usages and Practices*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 103, 106 (Cesare M. Bianca & Michael J. Bonell eds., 1987); Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United States Sales Convention*, 37 LOY. L. REV. 43 (1991); *see also* sources cited *supra* note 6. A comprehensive, practical comparison of the CISG and the UCC

fice. Both the UCC and the CISG focus on usage rather than custom. For instance, unlike the Uniform Law of International Sales (ULIS), which binds parties to "usages which reasonable persons in the same situation . . . usually *consider* to be applicable to their contract,"[77] the CISG negates the need to show legal obligation in proof of trade usage:

> 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.[78]

This provision resembles the UCC's trade usage clause[79] in three ways. First, the definition of usage as regular observation rejects the requirement that custom be "obligatory." Second, both the UCC and the CISG presume that parties know all regularly observed usages. Third, applicable usages are limited to a specific type of trade.[80] Both the UCC and the CISG radically depart from the treatment of usage (as opposed to obligatory custom) in public international law, which denies usage the force of law.[81]

The CISG's definition of trade usage has drawn sharp criticism. In adopting a descriptive paradigm of trade usage, the CISG drafters left two key issues unresolved: (1) whether to recognize local as well as

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appears in ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1989).

77. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, art. 9, para. 2, 834 U.N.T.S. 106, 127 (emphasis added); *see also* Berman, *Lex Mercatoria, supra* note 1, at 296-97 (contrasting the ULIS and CISG provisions on trade custom); Bainbridge, *supra* note 66, at 629-45 (same).

78. CISG, *supra* note 3, art. 9, para. 2, S. TREATY DOC. NO. 9 at 24, 19 I.L.M. at 674. Article 9(1) binds parties to "any usage to which they have agreed and by any practices which they have established themselves." This uncontroversial provision merely gives force to the parties' freedom under article 6 to opt out of the CISG or to modify its provisions. *See* Bonell, *supra* note 76, at 107.

79. *See* U.C.C. § 1-205.

80. *See* Dore & DeFranco, *supra* note 6, at 57; *cf.* J.H. Rayner & Co. v. Hambro's Bank, 1943 K.B. 37, 41 (C.A. 1942) (declaring that a banker is not "affected with knowledge of the customs . . . of every one of the thousands of trades for whose dealings he may issue letters of credit").

81. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 38, art. 38, ¶ 1(b) (permitting the application of only those customs generally accepted by the international community as binding law).

general usages and (2) whether to permit contemporary as well as traditional usages.[82] Additionally, unlike the UCC, the CISG does not command that express contractual terms control contrary course of performance, course of dealing, and trade usages.[83] Incoterms supplies no gap-filling guidance to resolve these issues; it merely advises sellers and buyers "to keep [both] general and particular customs in mind when negotiating their contract."[84] Requiring stringent proof of a custom's normative element is one possible cure for a CISG that is "descriptive of many commercial practices and thus prescriptive of none."[85] However, English cases have demonstrated that such an evidentiary barrier would obstruct commercially valuable usages that happen to be local or contemporary.[86] Indeed, to the extent that recognizing only "widely known" and "regularly observed" usages effectively eliminates all but global usages, the CISG may exclude sensible and useful local usages.[87]

These gaps in the CISG may have resulted from deep divisions between capitalist and socialist camps in the United Nations Commission on International Trade Law.[88] In particular, socialist delegates urged that the CISG give binding force to only international, and not domestic, usages.[89] Because usages emerge in free-market economies, socialist and developing countries both feared that international recognition of usages

82. Note, *supra* note 6, at 1989-91. These distinctions are not merely aesthetic. The CISG's lack of guidance maroons parties if, for example, the seller observes general usage and the buyer observes local usage. *Id.* at 1990 n.39.

83. *See* Dore & DeFranco, *supra* note 6, at 59; *cf.* U.C.C. § 1-205(4) ("when [consistent] construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade"); U.C.C. § 2-208(2) ("when [consistent] construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade").

84. INCOTERMS, *supra* note 4, at Introduction, para. 4.

85. Note, *supra* note 6, at 1991.

86. The English requirements that custom be proven universal and "ancient or immemorial" impairs judicial acceptance of local and contemporary usages. *See, e.g.*, Comptoir d'Achat et de Vente du Boerenbond Belge, S.A. v. Luis de Ridder, Ltda. [The Julia] 1949 App. Cas. 293 (rejecting the local definition of a French "delivery order"). The classic common law case illustrating the advantages of local custom is Ghen v. Rich, 8 F. 159 (D. Mass. 1881). Under local custom, the first person to lance a fin-back whale won title to it, contrary to the untenable common law rule that awarded ownership to the first person to take possession of a wild animal.

87. *See* Berman, *Lex Mercatoria, supra* note 1, at 297; Dore & DeFranco, *supra* note 6, at 58.

88. *See* Bainbridge, *supra* note 68, at 633-45.

89. *See id.* at 641.

would tighten dominant traders' grip on the market.[90] According to this "legislative history" of the CISG, the "widely known" requirement should preclude application of almost all domestic usages, no matter how popular or efficient, in transactions with foreign merchants.[91] Further, the CISG failed to reach even a superficial compromise on unreasonable usages. Rather, it abdicates to national law the power to determine "the validity . . . of any usage."[92] Like so many other negotiated legislative solutions, the CISG threatens more to spawn than to resolve disputes over the applicability of local, contemporary, and unreasonable usages.

Consequently, despite the CISG's attempt to codify international sales law, national legal systems retain a substantial role. Though conferring the force of law on descriptive trade usages, the CISG has by no means preempted elaboration of key issues at the national level. Unless CISG amendments settle the status of local and contemporary usages (at best a politically optimistic contingency), national law will resolve these disputes. With the usage paradigm firmly in place, the UCC supplements the CISG and other sources of international commercial law.

III. THE UCC AS LAW MERCHANT: MYTH AND REALITY

The UCC declares as one of its purposes "the continued expansion of commercial practices through custom, usage and agreement of the parties."[93] It also adopts the "principles of law and equity, including the law merchant" as a supplementary source of law.[94] Not surprisingly, a myth of the UCC as the twentieth-century version of the law merchant has arisen. Some early commentators urged enactment of the UCC as a reconstruction of the law merchant.[95] More recently, another commentator unwittingly summarized the UCC's law merchant myth:

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90. *See* KRITZER, *supra* note 76, at 132-33; E. Allan Farnsworth, *Developing International Trade Law*, 9 CAL. W. INT'L L.J. 461, 465-66 (1979); *cf.* Developments in the Law—International Environmental Law, 104 Harv. L. Rev. 1484, 1505 (1991) (making a similar observation about developing nations' attitude toward customary international law as a source of liability standards governing transnational pollution).

91. *See* Bonell, *supra* note 73, at 109.

92. CISG, *supra* note 3, art. 4(a), S. TREATY DOC. No. 9 at 23, 19 I.L.M. at 673.

93. U.C.C. § 1-102(2)(b).

94. U.C.C. § 1-103; *cf.* CISG, *supra* note 3, art. 7, para. 2, S. TREATY DOC. No. 9 at 23-24, 19 I.L.M. at 673 (settling questions falling outside the CISG and its general principles "in conformity with . . . private international law").

95. *See, e.g.*, Arthur L. Corbin, *The Uniform Commercial Code—Sales: Should It Be Enacted?*, 59 YALE L.J. 821, 824 (1950); Norman D. Lattin, *The Law of Sales in the Uniform Commercial Code*, 15 OHIO ST. L.J. 12, 14 (1954).

> Like the post-medieval codes of continental Europe, the UCC distinguished between commercial and non-commercial contracts. It differentiated between "merchants" and "nonmerchants," between secured and unsecured transactions, and between sales and other types of contracts. In so doing, the Code recognized a commercial regime which, like the Law Merchant, operated separately and apart from the non-commercial law of the realm.[96]

In reality, the UCC has not created special rules and procedures for a separate merchant community. The UCC's provisions on documentary sales[97] do codify the law merchant in the sense that these provisions emerged from a long history of mercantile practice, but few provisions of the UCC address themselves specifically to merchants. The UCC's few merchant provisions have had little impact, and Karl Llewellyn's proposal to resurrect Lord Mansfield's merchant juries has faded into obscurity. To the extent that a commercial code must acknowledge and accommodate a distinct mercantile community, the UCC has failed.

A. *The Merchant Rules*

Article 2 of the UCC defines a "merchant" as:

> a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent . . . or other intermediary who by his occupation holds himself out as having such knowledge or skill.[98]

Article 2 includes only three kinds of merchant rules.[99] First, under provisions for the exchange of sales documents,[100] "almost every person in business would . . . be deemed to be a 'merchant' . . . since the practices involved in the transaction are non-specialized business practices such as answering mail."[101] Second, the UCC implies a warranty of mer-

96. TRAKMAN, *supra* note 46, at 35.

97. U.C.C. §§ 2-319 to 2-324.

98. U.C.C. § 2-104(1).

99. *See generally* Wiseman, *supra* note 25, at 542-45 (listing proposed merchant rules and their disposition).

100. *See* U.C.C. § 2-201(2) (statute of frauds); U.C.C. § 2-205 (firm offers); U.C.C. § 2-207 (confirmatory memoranda); U.C.C. § 2-209 (modifications).

101. U.C.C. § 2-104 cmt. 2.

chantability only "if the seller is a merchant with respect to goods of that kind."[102] Third, the UCC applies the mercantile community's standards of commercial reasonableness to such duties as good faith and adequate assurance of performance.[103]

Ideally, merchant provisions would incorporate mercantile practices, understandings, and needs.[104] Although these provisions were intended to generate separate case law for merchants,[105] the open definition of merchant and the UCC's broad applicability drown efforts to identify a distinct merchant class. Courts have scrambled to exclude the "casual or inexperienced seller or buyer"[106] from the merchant rules, especially section 2-201(2)'s merchant statute of frauds and section 2-314(1)'s warranty of merchantability.[107]

B. The Failed Merchant Jury Proposal

The failure of Llewellyn's merchant jury proposal has also hampered the UCC's attempt to reflect commercial understandings. Under his proposal, an expert merchant panel would decide the substantiality of any breach, trade usages, commercial reasonableness, and any other issue requiring a merchant's special knowledge. The panel would then deliver a written opinion as virtually unassailable expert evidence to the lay jury.[108] While naturally evocative of Lord Mansfield's merchant juries, Llewellyn's proposal did not lack an American precedent; merchant juries prevailed in the late eighteenth century.[109] Had it been implemented, the proposal would have overcome longstanding distrust of lay juries to comprehend trade usages.[110] Nevertheless, the 1942 NCC killed

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102. U.C.C. § 2-314(1).

103. *See* U.C.C. § 2-103(1)(b) (good faith); U.C.C. § 2-327(1)(c) (merchant buyer's duty to follow instructions when returning goods sold on approval); U.C.C. § 2-603 (merchant buyer's duties as to rightfully rejected goods); U.C.C. § 2-605 (waiver of buyer's objections by failure to particularize); U.C.C. § 2-609(2) (right to adequate assurance of performance).

104. *See* Wiseman, *supra* note 25, at 504.

105. *Id.*

106. U.C.C. § 2-104 cmt. 1.

107. *See, e.g.*, Rock Creek Ginger Ale Co. v. Thermice Corp., 352 F. Supp. 522, 528 (D.D.C. 1971) (merchantability); Donald v. City Nat'l Bank, 329 So. 2d 92, 95 (Ala. 1965) (frauds). *See generally* Hillinger, *supra* note 14, at 1144-46 (discussing the rampant judicial confusion over the merchant rules).

108. *See* Wiseman, *supra* note 25, at 512-13.

109. *See* HORWITZ, *supra* note 20, at 155-59.

110. *See* Kirst, *supra* note 44, at 835.

the proposal, primarily because the commissioners were reluctant to trust lay experts to formulate legal rules.[111]

From the international perspective, the jury proposal's collapse has had minimal impact. American use of merchant juries would merely separate domestic practice from an international commercial law that involves no juries. In any event, arbitration has replaced the merchant jury in modern practice. Nevertheless, the ultimate rejection of merchant juries reflects the awkwardness of the UCC's efforts to incorporate traditional commercial law. To restore the law merchant, the UCC must adopt special merchant rules or otherwise accommodate international trade customs and usages. Consequently, the UCC's failure to develop such merchant rules focuses attention on its trade usage provision.

IV. TRADE USAGE AS THE ENGINE OF THE UCC'S MERCANTILE LAW

Founded on trade usage, the UCC sheds new light on the three C's of the law merchant: custom, community, and contractual autonomy. Increasing recognition of commercial custom as a source of law by national legal systems has mooted objections against the law merchant as a body of stateless contracts. Commercial custom and "its continuous use as a starting point for judicial interpretation and for national and international legislation" distinguish a special international law of trade.[112] This custom arises from the practices of a cohesive mercantile community, whose consensus is to seek "fair and balanced rules as between merchant sellers and buyers."[113] In turn, the community and its customs rest on the underlying principle of contractual autonomy.[114] The links between custom, community, and freedom of contract came full circle in the traditional

111. *See* Wiseman, *supra* note 25, at 527-29; *cf.* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986) (exploring difficulties and benefits of adopting lay research in social science as legal authority).

112. Berman, *Lex Mercatoria, supra* note 1, at 304.

113. Wiseman, *supra* note 25, at 539-40; *see also* TWINING, *supra* note 12, at 307 (noting that Llewellyn "had no political or ideological hobby-horses to ride" in drafting the UCC). *But cf.* Hal S. Scott, *The Risk Fixers*, 91 HARV. L. REV. 737, 737 (1978) ("There is no real jurisprudence of commercial law. We are presently prisoners of the conception that commercial law embodies the law merchant. . . ."). Hal Scott confines his analysis of the impact of interest-group politics to the law of bank collections under Article 4 of the UCC. *See* Berman, *Lex Mercatoria, supra* note 1, at 304 n.205.

114. *See* Clive M. Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions*, *in* THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS, *supra* note 9, at 19, 21; *see also* Backus & Harfield, *supra* note 42, at 589 (condemning judicial invasions of freedom of contract).

requirement of *opinio necessitatis*: only those customs that evoked subjective feelings of legal obligation could bind commercial parties. The triumph of trade usage over custom in the UCC effectively overthrows the old law merchant. Careful inspection of the UCC reveals a new, pragmatic vision of trade usage for international commercial codes.

A. *Trade Usage and Section 1-205*

1. All Roads Lead to Section 1-205

Section 1-102 of the UCC seeks the "continued expansion of commercial practices through custom," and section 1-103 acknowledges the law merchant as a supplementary source of law. These provisions superficially imply that the UCC codified merchants' customary law. In practice, however, neither section has revived custom's tests. Courts occasionally invoke section 1-103 to justify a common law restriction on a code provision[115] or to enable an equitable remedy.[116] More often, courts merely compare UCC provisions to their historical analogs.[117] At best, this method helps place commercial decisions in their historical context.[118] One commentator concedes that section 1-103 bears virtually no relation to the law merchant.[119]

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115. *See, e.g.*, Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 342 (Iowa 1979) (applying an exception under the RESTATEMENT (SECOND) OF CONTRACTS § 217A to the statute of frauds, U.C.C. § 2-201, because the UCC "does not purport to eliminate equitable and legal principles traditionally applicable in contract actions").

116. *See, e.g.*, Producers Cotton Oil Co. v. Amstar Corp., 242 Cal. Rptr. 914, 927 (Ct. App. 1988) (holding that Article 9 does not displace or prohibit the equitable remedy of quantum meruit).

117. *See, e.g.*, Western State Bank v. First Union Bank & Trust Co., 360 N.E.2d 254 (Ind. Ct. App. 1977) (comparing the UCC's definition of holder in due course, U.C.C. § 3-302, with pre-UCC conceptions); First Nat'l Bank v. Rosebud Housing Auth., 291 N.W.2d 41 (Iowa 1980) (reviewing the historical backdrop of Article 5's provisions on letters of credit).

118. *See, e.g.*, Pribus v. Bush, 173 Cal. Rptr. 747 (Ct. App. 1981) (using historical evidence to decide whether a check endorser could attach an "allonge" once the original space for endorsements had been exhausted).

119. Peter Winship, *Contemporary Commercial Law Literature in the United States*, 43 OHIO ST. L.J. 643, 645 n.8 (1982) (noting that the UCC's reference to law merchant "has become increasingly cryptic, is relied upon infrequently, and is usually only a minor factor in a decision when it is referred to"); *see also* Morgan Guar. Trust Co. v. American Sav. & Loan Ass'n, 804 F.2d 1487 (9th Cir. 1986), *cert. denied*, 482 U.S. 929 (1987); *In re* Staveco Elec. Constr., 40 U.C.C. Rep. Serv. (Callaghan) 1308, 1316 (Bankr. D.N.J. 1985); Prince v. LeVan, 486 P.2d 959, 962 (Alaska 1971). Most academic attention has focused on section 1-103's impact on statutory interpretation. *See* Robert A. Hillman, *Construction of the Uniform Commercial Code: UCC Section 1-103 and "Code*

2. Section 1-205

Like the CISG, the UCC adopts regularly observed trade usage as the statutory incarnation of commercial custom:

> (2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
>
> (3) . . . [A]ny usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
>
> (4) The express terms of an agreement and an applicable . . . usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.
>
> (5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.
>
> (6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.[120]

Additionally, the UCC abandons the common law tests of custom, replacing or loosening most of the traditional requirements.[121] For example, the UCC renders the universality requirement immaterial, particularly when

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Methodology," 18 B.C. INDUS. & COM. L. REV. 655 (1977); Nickles, *supra* note 13; Robert S. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. U. L. REV. 906 (1978). Whether U.C.C. § 1-102 or U.C.C. § 1-103 is the greater font of equitable principles is a popular topic. *See* Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330 (1951); Steve H. Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code—Part II: The English Approach and a Solution to the Methodological Problem*, 31 ARK. L. REV. 171, 225-30 (1977).

120. U.C.C. § 1-205.

121. U.C.C. § 1-205 cmt. 4; *cf.* U.C.C. § 1-205 cmt. 7 (replacing custom's requirement of universality with "regularity of observance"). For a detailed test-by-test comparison of the UCC with common law, see Levie, *supra* note 37, at 1105-06.

the parties involved had followed a local usage in prior dealings.[122] Most notably, however, section 1-205 eliminates the need to prove *opinio necessitatis*.[123] Although the UCC explicitly retains the traditional requirement of reasonableness, "the very fact of commercial acceptance makes out a prima facie case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable."[124] The liberalization of custom's strict requirements enables "full recognition . . . or new usages and for usages currently observed by the great majority of decent dealers."[125]

3. Applications of Trade Usage

Trade usage serves as a tool in interpreting both the UCC and private agreements. As a guide to construing the UCC, usage either establishes the standard of conduct or modifies statutory provisions. Scattered provisions define commercial reasonableness according to trade usage.[126] Usage can both create an implied warranty of merchantability[127] and exclude a warranty that the UCC would otherwise imply.[128] Contradicting the UCC's more liberal definition of "bill of lading,"[129] one

122. *See* Ebasco Servs. v. Pennsylvania Power & Light Co., 460 F. Supp. 163, 210 (E.D. Pa. 1978).

123. The UCC's drafters vigorously opposed the word "custom," despite its passing mention in U.C.C. § 1-102(2)(b). *See, e.g.*, Karl N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355, 1359 n.1 (1940) ("The word 'custom' is nowhere used; it is too blunt and confused to serve in careful analysis.").

124. U.C.C. § 1-205 cmt. 6; *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 222 cmt. b (1981) ("Unless agreed to in fact, [a usage] must be reasonable, but commercial acceptance by regular observance makes out a prima facie case that a usage of trade is reasonable.").

125. U.C.C. § 1-205 cmt. 5.

126. *See, e.g.*, U.C.C. § 2-504(b) (requiring a seller to provide shipping documents required "by usage of trade"); U.C.C. § 3-503(2) (directing the court to determine "reasonable time" in part by "any usage of banking or trade"); *cf.* Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364, 373 (E.D. Mich. 1977) (determining whether a breach was material in light of trade usage). Of the reasonableness tests, the UCC's provisions on good faith, U.C.C. § 2-103(1)(b), and unconscionability, U.C.C. § 2-302, are most important because they limit the use of trade usage.

127. U.C.C. § 2-314(3); *see, e.g.*, T.J. Stevenson & Co. v. 81,193 Bags of Flour, 629 F.2d 338 (5th Cir. 1980); Gindy Mfg. Corp. v. Cardinale Trucking Corp., 268 A.2d 345, 349 (N.J. Super. Ct. 1970). That merchants' usage can create such an implied warranty should be no surprise. U.C.C. § 2-314 is one of the UCC's few merchant rules.

128. U.C.C. § 2-316(3)(c); *see, e.g.*, Spurgeon v. Jamieson Motors, 521 P.2d 924 (Mont. 1974).

129. U.C.C. § 1-201(6) (defining "bill of lading" as "a document evidencing the receipt of goods for shipment," including an air, rail, or marine bill).

court allowed the admission of trade usage to limit the term "bill of lading" to an ocean bill.[130] Relying solely on trade usage, commercial parties can "expressly agree[]" to an exclusive remedy.[131] Only rarely does an express UCC provision, such as the provision on transfers of title,[132] displace trade usage.[133] These blends of trade usage and statutory law reject the common law view that customary law "represent[s] an effort to displace or negate 'established rules of law.'"[134]

Moreover, the UCC considers trade usage an integral part of commercial agreements.[135] Not only does the UCC recognize "the reasonable practices and standards of the commercial community . . . [as] an appropriate source of legal obligation," but it also gives legal effect to the expectations that trade practices create.[136] By binding parties to usages of which they "are or should be aware,"[137] the UCC provides that agreements implicitly incorporate usages of which the parties should be aware. Interpreting merchants' contracts in light of trade usage invariably triggers the old problem of reconciling usage with contractual language.[138]

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130. *See* Board of Trade v. Swiss Credit Bank, 597 F.2d 146, 148-49 (9th Cir. 1979); *cf.* Brunswick Box Co. v. Coutinho, Caro & Co., 617 F.2d 355, 360-61 (4th Cir. 1980) (permitting the parties' course of dealing and performance to define "F.A.S." as allowing the seller to unload on the dock area rather than along ship, *contra* U.C.C. § 2-319(2)).

131. *See* Western Indus., Inc. v. Newcor Canada Ltd., 739 F.2d 1198, 1201-04 (7th Cir. 1984) (Posner, J.) (applying U.C.C. § 2-719(1)(b)); Posttape Assocs. v. Eastman Kodak Co., 537 F.2d 751, 756 (3d Cir. 1976) (applying U.C.C. § 2-719(1)(b)). *But see* Mark S. Kloster, *Trade Usage, Exclusive Remedies, and UCC Section 2-719(1)(b)*, 25 HOUS. L. REV. 363, 379 (1988) (criticizing the exclusion of remedies by trade usage alone as contrary to the UCC's policy of permitting liberal remedies).

132. U.C.C. § 2-401.

133. *See* First Nat'l Bank v. Smoker, 287 N.E.2d 788 (Ind. Ct. App. 1972); Credit Alliance Corp. v. Adams Constr. Corp., 570 S.W.2d 283 (Ky. 1978).

134. U.C.C. § 1-205 cmt. 4.

135. *See* U.C.C. § 1-201(3) (defining "agreement" as "the bargain of the parties in fact as found in their language or by implication from other circumstances including . . . usage of trade"); American Mach. & Tool Co. v. Strite-Anderson Mfg., 353 N.W.2d 592, 597 (Minn. Ct. App. 1984).

136. Amy H. Kastely, *Stock Equipment for the Bargain in Fact: Trade Usage "Express Terms," and Consistency Under Section 1-205 of the Uniform Commercial Code*, 64 N.C. L. REV. 777, 780 (1986).

137. U.C.C. § 1-205(3).

138. *See, e.g.*, Kunglig Jarnvägsstyrelsen v. Dexter & Carpenter, 299 F. 991, 994-95 (S.D.N.Y. 1924) (Hand, J.). Requiring strict performance is but one variation of the view that contractual language should generally take precedence over usage. *See, e.g.*, Backus & Harfield, *supra* note 42, at 589; *cf.* Harold J. Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963) (favoring strict enforcement of impracticability clauses in certain types of cases where usage so favors).

B. Trade Usage Versus Contractual Language

1. The Original Vision

By sanctifying contractual language through the plain meaning and parol evidence rules, textualism[139] can prevent a court from reading commercial customs and usages into a contract.[140] Before the UCC, American and English courts split deeply on whether to admit a usage that seemingly contradicted express contractual language.[141] Consistent with the pre-UCC application of trade usage to fill gaps in agreements,[142] section 1-205 directs that usage should govern "plain meaning:"

> This Act rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.[143]

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139. For a definition of "textualism" and its philosophical counterpart, "contextualism," see Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 306-07 (1985).

140. Consider, for example, the eventually reversed opinions in Biddell Bros. v. E. Clemens Horst Co., [1911] 1 K.B. 214, *rev'd*, [1911] 1 K.B. 934 (C.A.), *rev'd* 1912 App. Cas. 18.

141. *Compare, e.g.*, Ermolieff v. R.K.O. Radio Pictures, 122 P.2d 3 (Cal. 1942) (allowing the term "United Kingdom" to include the Irish Free State); Hurst v. W.J. Lake & Co., 16 P.2d 627 (Or. 1932) (construing the words "minimum 50% protein" to mean as little as 49.5%); *and* Smith v. Wilson, 3 B. & Ad. 728, 732, 110 Eng. Rep. 266, 267 (K.B. 1832) (defining "thousand" as 1,200); *with* Goode v. Riley, 28 N.E. 228 (Mass. 1891) (Holmes, J.) (opposing the notion that parties can show by usage "that when they wrote 500 feet they agreed it should mean 100 inches, or that Bunker Hill Monument should signify the Old South Church"); *and* Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1899).

142. Allowing trade usage to fill gaps in agreements prevailed well before the UCC, see, e.g., California Lettuce Growers, Inc. v. Union Sugar Co., 289 P.2d 785, 790 (Cal. 1955) (en banc), and stirred little controversy, even among advocates of strict performance. *See* Backus & Harfield, *supra* note 42, at 602 ("It is the function of custom to fill in the interstices of an agreement . . . .").

143. U.C.C. § 1-205 cmt. 1; *see also id.* § 2-202 cmt. 1 (rejecting the "premise that the [contractual] language used has the meaning attributable to [it] by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used").

Likewise, by incorporating section 1-205, the UCC's parol evidence rule provides expressly that contractual language be interpreted in light of trade usage: "Terms . . . set forth in a writing intended by the parties as a final expression of their agreement . . . may be explained or supplemented by . . . usage of trade. . . ."[144] Under the UCC's parol evidence rule, a merger clause, or other evidence of the parties' intent to have a fully integrated writing, cannot exclude evidence of trade usage.[145] Nor does the UCC's parol evidence rule confine usage to the interstitial function of resolving ambiguous language.[146]

In expanding trade usage's interpretive role, the drafters of section 1-205 intended "a Code responsive to business reality."[147] Terms such as "full set bills of lading" have no "ordinary" or "plain" meaning outside their commercial context.[148] In short, modern business could no longer afford the plain meaning rule.[149] The earliest cases under section 1-205 considered proven trade usage an integral part of the agreement, binding unless the parties explicitly bargained otherwise.[150] In one case, local banks' practice of informing guarantors that insurance had lapsed or been canceled rose to a binding usage, though the guarantor had waived "all notices whatsoever in respect to this agreement."[151] Such

144. U.C.C. § 2-202; *cf.* RESTATEMENT (SECOND) OF CONTRACTS §§ 212-214 (1981) (admitting certain extrinsic evidence even if a contract's express terms appear integrated).

145. *See, e.g.*, Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 805 (9th Cir. 1981); Peoples Bank & Trust v. Reiff, 256 N.W.2d 336, 341 (N.D. 1977); Raney v. Uvalde Producers Wool & Mohair Co., 571 S.W.2d 199, 200 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.). *But see* Morgan v. Stokely-Van Camp, Inc., 663 P.2d 1384, 1388-89 (Wash. Ct. App. 1983).

146. *See* U.C.C. § 2-202 cmt. 1 (rejecting the "requirement that a condition precedent to the admissibility of [trade usage evidence] is an original determination by the court that the language used is ambiguous").

147. Kirst, *supra* note 44, at 813; *see also* Committee on the Proposed Commercial Code, Section on Corporate Banking & Business Law, American Bar Association, *Report*, 6 BUS. LAW. 119, 126 (1951) (describing the UCC's business-oriented outlook).

148. *See* Honnold, *supra* note 43, at 509.

149. *Cf.* Note, *supra* note 39, at 1198 (observing that modern commerce "is not conducive to the expenditure of considerable time by merchants in attending to contract details").

150. *See, e.g.*, Michael Schiavone & Sons, Inc. v. Securalloy Co., 312 F. Supp. 801, 804 (D. Conn. 1970); Gindy Mfg. Corp. v. Cardinale Trucking Corp., 268 A.2d 345 (N.J. Super. Ct. 1970).

151. Provident Tradesmens Bank & Trust Co. v. Pemberton, 24 Pa. D. & C.2d 720 (Philadelphia County Ct.), *aff'd*, 173 A.2d 780 (Pa. Super. Ct. 1961) (quoting U.C.C. § 2-202 cmt. 2: writings "are to be read on the assumption that . . . usages of trade were taken for granted when the document was phrased. Unless *carefully negated* they have become an element of the meaning of the words used.") (emphasis added).

application of section 1-205 enables a usage too weak to qualify as custom to override contrary language.[152] This twist in interpretation recognizes usage as a bridge between text and context, which sometimes are meant to coincide.

Trade usage assumes three roles in contractual interpretation: (1) to define jargon, clarify ambiguities, and explain technical terms; (2) to add terms to the agreement; and (3) to allow commercial meanings to control contrary lay definitions.[153] In a realist world that scorns the "judicial belief in the possibility of perfect verbal expression" as "a remnant of a primitive faith in the inherent potency and inherent potency of words,"[154] these roles differ by degree, not in kind. Besides being a guide to the parties' intent, trade usage provides one interpretive norm that guides judicial policymaking. Any particular interpretation can serve all three roles. To take a pre-UCC example,[155] interpreting "United Kingdom" to include all of Ireland can be seen as: (1) defining jargon for "United Kingdom," (2) adding Ireland to an otherwise complete list, or (3) ensuring that others in the trade could continue using "United Kingdom" as they understood it.

2. The Quasi-Parol Evidence Rule

Despite the UCC's endorsement of trade usage, textualism still thrives.[156] To be sure, the UCC does cripple the quest for plain meaning. In addition to discarding the restrictive tests of custom, the UCC expressly permits evidence of trade usage under its parol evidence rule.[157] To counter the real parol evidence rule's deference to usage, the textua-

152. When the UCC was originally enacted, most lawyers assumed that custom could not contradict express contractual terms. *See* Levie, *supra* note 37, at 1112. Even Dixon, Irmaos & Cia. v. Chase Nat'l Bank, 144 F.2d 759 (2d Cir.), *cert. denied*, 324 U.S. 850 (1944), acknowledged that "evidence of a custom is not admissible to contradict the unambiguous terms of a written contract." *Id.* at 762.

153. *Cf.* Levie, *supra* note 37, at 1110 (identifying three "parol evidence rules" that correspond to these interpretive uses); Note, *supra* note 39, at 1195-98 (separating pre-UCC applications of usage into "translational" and "additive" categories).

154. Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 643-44 (Cal. 1968) (en banc) (Traynor, C.J.).

155. Ermolieff v. R.K.O. Radio Pictures, 122 P.2d 3 (Cal. 1942).

156. *See* Division of Triple T Serv. v. Mobil Oil Corp., 304 N.Y.S.2d 191, 204 (Sup. Ct. 1969) ("It has been the sacredness of contractual obligations which has prevented courts of equity from imposing justice in many circumstances"); Goetz & Scott, *supra* note 139, at 307 n.124 (citing supporting cases).

157. U.C.C. § 2-202.

list impulse has transformed section 1-205(4) into a quasi-parol evidence rule that renders some usages "extrinsic" to commercial agreements. Instead of helping juries reconcile conflicting evidence,[158] section 1-205(4) has permitted exclusion of trade usage in the name of "consistency."[159]

No other split in the application of section 1-205 threatens so much the UCC's goal of "[u]niformity throughout American jurisdictions," which "cannot be obtained without substantial uniformity of construction," as this realist/textualist division.[160] Although the UCC does not require that contractual language be ambiguous before trade usage can be admitted,[161] some courts ask whether express terms and trade usages are "consistent."[162] The consequential exclusion of evidence of commercial practice reduces the dispute to one of interpreting written words, an issue of law.[163] In this fashion, the consistency test nullifies the fact-finding function.[164]

Two divergent approaches to "consistency" have emerged.[165] Some cases define "consistency" expansively: trade usage is consistent so long as it does not "totally negate" a written term.[166] Perhaps fearful of permitting too many jury questions,[167] other courts grant presumptive control

158. Several authorities interpret § 1-205(4) as a statutory jury instruction. The judge would admit the evidence if relevant and instruct the jury to favor express terms over trade usage in case of conflict. *See* American Mach. & Tool Co. v. Strite-Anderson Mfg., 353 N.W.2d 592, 597 (Minn. Ct. App. 1984); Urbana Farmers Union Elevator Co. v. Schock, 351 N.W.2d 88 (N.D. 1984); Modine Mfg. Co. v. North East Indep. School Dist., 503 S.W.2d 833, 837-41 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.).

159. *See* Lipschutz v. Gordon Jewelry Corp., 373 F. Supp. 375, 387 (S.D. Tex. 1974); Division of Triple T Serv. v. Mobil Oil Corp., 304 N.Y.S.2d 191, 203 (Sup. Ct. 1969).

160. U.C.C. gen. cmt.

161. U.C.C. § 2-202 cmt. 1(c).

162. *See, e.g.*, Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 9 (4th Cir. 1971) ("evidence of usage of trade . . . should be excluded whenever it cannot be reasonably construed as *consistent* with the terms of the contract") (emphasis added); *Division of Triple T Serv.*, 304 N.Y.S.2d at 203 ("evidence of custom or usage in the trade is not admissible where *inconsistent* with the express terms of the contract") (emphasis added); *see also* Brunswick Box Co. v. Coutinho, Caro & Co., 617 F.2d 355, 359 (4th Cir. 1980); Carter Baron Drilling v. Badger Oil Corp., 581 F. Supp. 592, 595 (D. Colo. 1984); Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc., 131 Cal. Rptr. 183 (Ct. App. 1976).

163. *See* Kirst, *supra* note 44, at 817.

164. *Id.* at 835.

165. *See* Kastely, *supra* note 136, at 788-95.

166. *See, e.g.*, Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 805 (9th Cir. 1981); *Columbia Nitrogen*, 451 F.2d at 9; *Carter Baron Drilling*, 581 F. Supp. at 592.

167. *See* Kirst, *supra* note 44, at 850.

to express terms.[168] Rooted in a belief in documentary integrity,[169] this approach upholds the textualist view that allowing trade usage to vary written terms violates freedom of contract.[170] If this version of the quasi-parol evidence rule prevails, it menaces far more than the uniformity of UCC construction. Little more than the plain meaning rule in statutory clothing, this doctrine threatens one fundamental premise of allowing trade usage, the premise that "established practices and usages within a particular trade" can more reliably reveal the parties' intent "than the sometimes imperfect and often incomplete language of the written contract."[171] Furthermore, a harsh consistency requirement inhibits judicial application of trade usage as public policy. In either form, the quasi-parol evidence rule perverts the proper function of section 1-205(4) as an axiom that express terms control trade usages in case of irreconcilable conflict.[172]

Despite judicial confusion over the relationship between usage and language, the UCC deliberately departs from the traditional conception of customary commercial law. Indeed, in many respects the UCC bears scant resemblance to the law merchant. Through its sheer scope, Article 2 touches disputes that are commercial only in their invocation of trade usage. The merchant rules failed to distinguish an adequate merchant class, and Llewellyn's merchant jury proposal now seems as ancient as Lord Mansfield himself. As national law, the UCC decides international disputes only to the extent that the non-American party agrees to be bound by American law, choice-of-law rules apply American law, or the parties adopt the UCC's trade term definitions. Nevertheless, the UCC's treatment of trade usage leads the growing codification movement in international commercial law. The remainder of this Article will discuss the UCC's new trade usage paradigm and the special problem of unreasonable or fraudulent trade usages.

168. *E.g.*, General Plumbing & Heating, Inc. v. American Air Filter Co., 696 F.2d 375 (5th Cir. 1983); Kologel Co. v. Down in the Village, Inc., 539 F. Supp. 727 (S.D.N.Y. 1982); Southern Concrete Servs. v. Mableton Contractors, Inc., 407 F. Supp. 581, 584 (N.D. Ga. 1975), *aff'd mem.*, 569 F.2d 1154 (5th Cir. 1978); State *ex rel.* Conley Lott Nichols Mach. Co. v. Safeco Ins. Co., 671 P.2d 1151, 1155 (N.M. Ct. App.), *appeal denied*, 670 P.2d 581 (N.M. 1983).

169. *See Southern Concrete*, 407 F. Supp. at 584.

170. *See* Backus & Harfield, *supra* note 42, at 601-02.

171. Urbana Farmers Union Elevator Co. v. Schock, 351 N.W.2d 88, 92 (N.D. 1984).

172. *See supra* note 158.

V. THE UCC'S TRADE USAGE PARADIGM AND THE NEW LAW MERCHANT

A. *The New Trade Usage Paradigm*

The UCC has fixed trade usage in commercial law's firmament and engendered a new paradigm of customary commercial law. Under the traditional requirement of *opinio necessitatis*, no custom would be binding absent proof that the parties thought themselves legally bound. Strictly speaking, both custom and usage carry normative meaning, but the UCC's usage paradigm eliminates custom's evidentiary barrier, facilitating the application of trade usage as a tool of public policy. Like the subjective theory of contract, faith in *opinio necessitatis* has fallen victim to the law's shift in emphasis from states of mind to empirically verifiable observations.[173] As a comprehensive expression of the new trade usage paradigm, the UCC occupies a central niche in twentieth-century commercial law. In addition to clarifying the CISG's trade usage provision, the UCC rearranges the roles of individual parties, the mercantile community, and national courts in resolving commercial disputes.

Notably, as an expression of domestic law, the UCC anticipates that commercial adjudication will involve judges.[174] By contrast, in most international disputes, the arbitrator assumes the judicial role.[175] In the trade usage context, the difference between adjudication and arbitration may be primarily academic. When deciding both law and fact, arbitrators differ from a standard judge and jury in only two important respects. First, an arbitrator has a greater understanding of the commercial community; in this respect, an arbitrator resembles Llewellyn's advisory merchant panel. Second, an arbitrator lacks a judge's lawmaking power. Thus an arbitrator's legal immobility offsets his special fact-finding expertise. In most trade usage issues, an arbitrator should suffer no disability, as "[t]he existence and scope of . . . a usage are to be proved as facts."[176] Finally, just as the CISG and national commercial statutes require courts to apply trade usage,[177] national arbitration statutes and private arbitration rules require arbitrators to recognize usage.[178] Al-

173. *See* GILMORE, *supra* note 18, at 41-45.

174. *See* U.C.C. § 1-205(2) (leaving the interpretation of written evidence of trade usage to the *court*).

175. *See* RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE 16 (1985).

176. U.C.C. § 1-205(2).

177. *See* CISG, *supra* note 3, art. 9, S. TREATY DOC. NO. 9 at 24, 19 I.L.M. at 674; *see also* sources cited *supra* note 61.

178. *See, e.g.*, Federal Commercial Arbitration Act, ch. 22, 1986 S.C. 819, 831 (Can.); Rules of the Court of Arbitration of the International Chamber of Commerce, art. 13(5),

though arbitrators are theoretically free from any state's domestic law,[179] arbitrators and judges share the common task of discovering and enforcing trade usage. In any event, because secrecy renders reliance on arbitral decisions virtually impossible,[180] trade usages and general principles of international commercial law are superior sources of substantive law merchant rules.

1. The UCC's Treatment of Local and Contemporary Trade Usages

The UCC fills gaps in the CISG's recognition and application of usages. The CISG's uncertain distinction between domestic and international usages[181] suggests even greater confusion over the broader categories of local and contemporary usages. By contrast, the UCC recognizes all usages whose "regularity of observance . . . justif[ies] an expectation that [they] will be observed with respect to the transaction in question."[182] Also unlike the CISG, the UCC does not require that usage be "widely known."[183] This difference may be political. Whereas harsh debate over local and contemporary usages paralyzed the adoption of the CISG,[184] the NCC debated the UCC's trade usage provisions with little discord. Consequently, the UCC's ability to accommodate usage "in a given locality or a given vocation or trade"[185] allows courts to consider peculiar circumstances that affect the parties' understanding.[186] Now that the CISG has lessened international reliance on obligatory custom, the UCC broadens the usage paradigm by extending judicial discretion to admit local and contemporary usages. This elasticity coun-

reprinted in 3 WORLD ARB. REP. 3652 (1991); Berman & Dasser, *supra* note 62, at 33 & n.33 (citing other sources).

179. *See* Stoecher, *supra* note 58, at 109.

180. Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317, 336-38 (1984); Stoecher, *supra* note 58, at 121.

181. *See* Bainbridge, *supra* note 68, at 658.

182. U.C.C. § 1-205(2).

183. CISG, *supra* note 3, art. 9, para. 2, S. TREATY DOC. NO. 9 at 24, 19 I.L.M. at 674.

184. *See supra* text accompanying notes 88-92.

185. U.C.C. § 1-205 cmt. 4.

186. *See, e.g.*, Nanakuli Paving & Rock Co. v. Shell Oil Co., Inc., 664 F.2d 772, 779 (9th Cir. 1981). Courts are apt to be somewhat more careful with new usages, which may not have developed widespread acceptance within a trade. *See* Goetz & Scott, *supra* note 137, at 278; *cf.* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960) (illustrating the confusion over the terms "broiler," "roaster," "fryer," and "stewer" in the chicken trade).

teracts English law's apparent unwillingness to accommodate the trade community's own innovations.[187]

To the extent that the words "widely known" permit, courts interpreting the CISG should enforce local and contemporary usages to the extent that the UCC would recognize such usages. The CISG's trade usage provision allows an otherwise rigid document to incorporate new legal rules more readily than national commercial codes and Incoterms[188] —the CISG's prime competitors in the business of supplying positive law for international commercial transactions. Adopting the UCC's approach would infuse greater flexibility into a convention whose "opt-out" and trade usage provisions[189] already recognize the importance of merchants' freedom of contract.

2. New Conceptions of Contract, Custom, and Code

The UCC's vision of usage fundamentally alters the relationship between contractual autonomy, merchants' customary law, and arbiters of commercial law. To the extent that the CISG shares the UCC's trade usage vision, the CISG portends a similar change at the transnational level. In the past, the filter of *opinio necessitatis* allowed merchants themselves to determine which customs would be binding. Such private lawmaking rested on the freedom of contract of:

> [A] subcommunity . . . whose members occupy a status position distinct from society at large, whose disputes are often resolved by informal negotiation or in private forums, whose relationships tend to continue over time rather than ending with the culmination of single transactions, and whose primary rules derive from a sense of fairness widespread—if imprecisely defined—within the commercial community.[190]

Thus, a customary law based on perceptions of legal obligation grew from a great deference for merchants' freedom of contract. Under this view, a court merely "fill[s] in the interstices of an agreement, . . . reduce[s] the burdens of making written memoranda of agreement, and

187. *See supra* note 86.

188. *See* KRITZER, *supra* note 76, at 132.

189. *See* CISG, *supra* note 3, arts. 6 & 9, S. TREATY DOC. NO. 9 at 23-24, 19 I.L.M. at 673-74.

190. Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 622-23 (1975).

. . . substitute[s] for agreement with respect to matters overlooked or not expressly foreseen."[191]

The UCC rejects *opinio necessitatis* in favor of a more objective standard. Intended as an instrument of social engineering,[192] the UCC revolted against *opinio necessitatis* and unfettered freedom of contract. The UCC could not tolerate the mercantile community as a competing source of legal authority.[193] Though criticized as contrary to social welfare,[194] the UCC's reliance on trade usage actually promotes general social utility. Parallelling the reform of tort law according to tests of general social utility[195] and the resulting tort theories' influence on contract law,[196] the UCC sought to eliminate such inefficient rules as custom's proof requirements. *Opinio necessitatis* empowered merchants to consider some trade practices binding and others discretionary. Conversely, by "uncovering and implementing [the] immanent law" of regularly observed usages, judges incorporate objectively perceived practices into every commercial agreement and into the UCC itself.[197] Judicial discretion to admit local and contemporary usages[198] manifests but one result of the UCC's new commercial law order: mercantile conventions will continue to evolve independently, but judges will decide their legal ramifications.

Of course the UCC does not dispatch lay judges on unsupervised quests for commercial standards. Rather, the UCC recognizes "that perception is conditioned by environment: unless a judge considers a contract in the proper commercial setting, his view is apt to be distorted or myopic, increasing the probability of error."[199] To force judges to search for indications of widespread commercial acceptance, the UCC adopts a "regularity of observance" standard.[200] Furthermore, the UCC's presump-

191. Backus & Harfield, *supra* note 42, at 602.

192. *See* TWINING, *supra* note 12, at 321.

193. Such a maneuver to tighten judicial hegemony over commercial law occurred during the late eighteenth century. To secure the profitable cooperation of marine insurers with the bar, early American courts attacked, in succession, three sources of competing commercial law authority: lay juries, arbitrators, and merchant juries. *See* HORWITZ, *supra* note 20, at 140-59.

194. Danzig, *supra* note 190, at 629-31.

195. *See* George P. Fletcher, *Fairness and Utility in Tort Law*, 85 HARV. L. REV. 537, 556-64 (1972) (outlining "the paradigm of reasonableness" in tort thinking).

196. *See* GILMORE, *supra* note 18, at 87-103.

197. KARL N. LLEWELLYN, THE COMMON LAW TRADITION 122 (1960).

198. *See supra* text accompanying notes 185-86.

199. Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1046 (5th Cir. 1971).

200. *See* U.C.C. § 1-205(2).

tion that proven trade usage is, prima facie, reasonable[201] protects the party asserting the usage. These provisions ensure greater fidelity to mercantile expectations by reducing judicial error.

Under trade usage, contractual autonomy is no longer the prime legal norm. Instead, recognizing that freedom of contract protects judicial legitimacy, a court must try to divine what the parties agreed to do. By assuming that parties contract with tacit consent to prevailing practices,[202] a court can rationalize the imposition of trade usages on every contract it interprets.[203] In instances when a party actually contracted with reference to usage, admitting trade usage shields "reasonable expectations."[204] Consider the pre-UCC example of *Dixon*.[205] In that case, if the beneficiary tended a prime bank's offer of indemnity in lieu of a full set of bills of lading, the bank would honor the tender despite feeling no legal obligation. Arguably, the New York banks' routine acceptance made this expectation reasonable.[206] By contrast, Chase Bank believed it could refuse an indemnity offer. Short of reading minds (as *opinio necessitatis* demands), the court could choose between two relatively tangible standards: (1) "plain language" (read in a commercial vacuum) or (2) the banks' actual practice of accepting prime banks' indemnity offers. Like *Dixon*, the UCC chose usage, usually the superior measure of the parties' understanding.

Admittedly, banks responded to *Dixon* by expressly disclaiming the obligation to indemnify. Such a result does not undermine the usage paradigm. Courts could interpret the practice of accepting prime banks' indemnity offers as an implied contract term. Express disclaimer merely demonstrates the flexibility of freedom of contract, and it helps inform

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201. *See* U.C.C. § 1-205 cmt. 6.

202. *See* U.C.C. § 2-202 cmt. 2 (directing courts to read writings "on the assumption that . . . usages of trade were taken for granted when the document was phrased").

203. *Cf.* Kastely, *supra* note 135, at 807 (arguing that members of a trade community will form voluntary agreements and understandings based on their communal experiences).

204. *See* Note, *supra* note 39, at 1209.

205. Dixon, Irmaos & Cia. v. Chase Nat'l Bank, 144 F.2d 759 (2d Cir.), *cert. denied*, 324 U.S. 850 (1944).

206. *See* Honnold, *supra* note 43, at 512 (arguing that the bankers' perceived discretion to refuse indemnities "can hardly be given legal effect in the face of reliance by the commercial community on the [banks'] objective conduct"). Honnold's emphasis on reliance strikes the key chords of the promissory estoppel provision in *Restatement (Second) of Contracts* § 90(1) (1981), notorious for its tort-based rejection of individual volition and mutual exchange as exclusive bases for contractual obligation.

bank customers that they should not rely on the otherwise usual practice of idemnification.

Beyond private-law reliance, a public-law view of self-imposed duties independently supports *Dixon's* result. Though Chase Bank perceived that it accepted offers of indemnity only as a matter of grace and convenience, its practice of routine acceptance demonstrates that it can avoid and spread losses better than beneficiaries. Like tort law's paradigmatic "good Samaritan," the merchant who performs favors owes his counterparts a duty not to depart from this practice; "that the knowledge or lack of knowledge" of a beneficiary "concerning such custom cannot affect the nature or extent of the duty owed" by the merchant.[207]

To displace obligatory custom, trade usage must demonstrate not only legitimacy but also functional advantages over the traditional model. The UCC attempts simultaneously to ensure exclusive judicial power to decide cases and to safeguard the mercantile community's freedom to develop customary standards. Despite these aims' intrinsic conflict, the UCC equips courts to exploit privately developed commercial practices. By converting "prevalent contractual patterns in a trade environment" into the implied term of trade usage,[208] the UCC preserves the commercial core of merchants' contracts. Trade usage reduces nonexpert judges' errors, especially those that arise from the plain meaning and parol evidence rules.[209]

3. The Usage Paradigm's Economic Advantages

Discarding *opinio necessitatis* and custom's other restrictions more efficiently enforces prevalent trade practices. The international sales community displays the classic characteristics of a highly competitive market: nearly perfect information, a great number of competitors, low barriers to entry, deconcentration of power to set prices. In such a competitive market, courts may usually assume that any surviving usage increases net social wealth. According to the Coase theorem,[210] parties will bargain their way to an efficient outcome regardless of arbitrary legal entitlements. Onerous burdens of proof boost transaction costs and

207. Erie R.R. v. Stewart, 40 F.2d 855, 858 (6th Cir. 1930) (Tuttle, J., concurring).

208. Goetz & Scott, *supra* note 139, at 274.

209. "Indeed, the least happy side of commercial law has been the instances in which conveyancers' and laymen's understandings have been imposed on commercial dealings." Honnold, *supra* note 43, at 508.

210. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

obstruct socially desirable bargains. By alleviating the burden of proof, the UCC's presumption that trade usage is reasonable[211] rescues some beneficial usages from custom's ax and thereby increases efficiency.[212]

Indeed, the economic perspective renders feelings of obligation (and legal tests for such feelings) wholly irrelevant. Though parties do not feel morally bound when they do each other favors, economically motivated actors simply do not perform gratuitous acts. "Favors" are no more than services more cheaply performed by one party; either the purchase price reflects the cost of such services, or the performer absorbs the cost as in investment in his reputation within the market. Courts should enforce "favors" that have become common usages as part of the performance each contracting party expects. Because favors arise out of the course of private transactions, they merit inclusion in contracts at least to the extent legally implied terms do. Efficient breach theory teaches that a party will renege on an expected favor when the costs of compliance outweigh the sanctions for breach.[213] Consequently, merely inquiring into *opinio necessitatis* risks overcompensating a party that has already efficiently breached and refused to perform a favor.

The usage paradigm also proves efficient before commercial relations develop into disputes. Legal recognition of usages reduces contracting costs. By providing easy access to implied contract terms that reflect the mercantile community's "collective wisdom and experience," the UCC generates "an expanding supply of mature, customary formulations" that are "not only *cheaper*, but . . . also *better* than do-it-yourself terms."[214] As courts harmonize their applications of trade usage, the resulting stock of standardized contractual terms enhances social wealth by reducing negotiation costs.[215] Those who dislike prevailing usages

211. *See* U.C.C. § 1-205 cmt. 6.

212. *See supra* note 86 (citing examples of beneficial trade practices that were excluded because English courts misinterpreted custom's requirements).

213. *See, e.g.*, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 25-36, 57-63 (1983).

214. Goetz & Scott, *supra* note 139, at 277-78; *cf.* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) ("You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy . . . .").

215. *See* Elizabeth Warren, *Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule*, 42 U. PITT. L. REV. 515, 518 (1981); Bainbridge, *supra* note 68, at 648, 650.

may stipulate out of them (as did prime banks after *Dixon*),[216] subject to a few restrictions.[217]

To be sure, the UCC may increase contracting costs under certain conditions. Although such UCC-defined terms as f.o.b., f.a.s., and c.i.f., allow parties to be reasonably certain of their obligations,[218] strict enforcement of trade usages raises the cost of self-tailored contracts. Ritual incantations may not "carefully negate[]" trade usage.[219] To be sure of escaping undesired local or newer usages, parties must unequivocally state their objections. This extra step can prove beneficial. A requirement of "careful negation" alerts both parties to a deviation from routine practice and facilitates adjudication should a dispute arise.[220] Despite its initial cost, therefore, a provision expressly excluding undesired usages serves the same cautionary, channeling, and evidentiary functions that contractual formality does.[221]

Moreover, when courts bind a party to usages he does not know,[222] newcomers must expend more to learn existing practices. A per se rule binding all parties to prevailing usages, however, ultimately benefits society by "inducing newcomers to master the language of the trade promptly."[223] An initial investment in learning the trade reduces the newcomer's future negotiating costs. The opposing rule, that of excusing neophytes from prevailing usages,[224] ultimately obstructs entry into

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216. This fundamental premise of contractual autonomy applies equally to the UCC and the CISG. *See* KRITZER, *supra* note 76, at 133-34.

217. No party may disclaim duties of good faith, diligence, reasonableness, and care. *See* U.C.C. § 1-102(3)-(4) & cmts. 2-3; *cf.* Goetz & Scott, *supra* note 139, at 266, 280 (observing that state-sanctioned implied terms ordinarily impose no restrictions on parties who wish to agree otherwise).

218. *See* Goetz & Scott, *supra* note 139, at 282. *But cf.* Brunswick Box Co. v. Coutinho, Caro & Co., 617 F.2d 355 (4th Cir. 1980) (defining f.a.s. according to the parties' course of dealing rather than the UCC or port practice).

219. U.C.C. § 2-202 cmt. 2; *see, e.g.*, Provident Tradesmens Bank & Trust Co. v. Pemberton, 24 Pa. D. & C.2d 720 (Philadelphia County Ct.), *aff'd*, 173 A.2d 780 (Pa. Super. Ct. 1961).

220. *See* Bainbridge, *supra* note 68, at 662.

221. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941).

222. *See, e.g.*, Foxco Indus. v. Fabric World, 595 F.2d 976 (5th Cir. 1979).

223. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 4.1, at 84 (3d ed. 1986); *see also* Warren, *supra* note 215, at 518.

224. *See* Flower City Painting Contractors, Inc. v. Gumina Constr. Co., 591 F.2d 162, 165 (2d Cir. 1979); United States *ex rel.* Union Bldg. Materials Corp. v. Haas & Haynie Corp., 577 F.2d 568 (9th Cir. 1978); *cf.* J.H. Rayner & Co. v. Hambro's Bank, [1943] 1 K.B. 37, 41 (C.A. 1942) (excusing a banker from having "knowledge of the customs . . . of every one of the thousands of trades for whose dealings he may issue letters of credit").

the international sales market. Existing merchants would deal with each other rather than risk litigation and potential liability to newcomers who have no incentive to learn the rules of the trade. Paternalistic motives, such as those underlying the implied warranty of fitness for a particular purpose,[225] may justify refusal to enforce a trade usage of disclaiming all warranties against a buyer who relies on the seller's expertise.[226] In most other circumstances, however, charging a buyer with knowledge of the seller's trade provides the appropriate incentive to learn usages as a cost-minimizing source of standardized contract terms.[227] In the international context, merchants from socialist and developing nations are relative newcomers who must learn capitalist trade usages. According to this analysis, socialist and Third World objections to the CISG's recognition of usages[228] are largely groundless, and enforcement of usages will help integrate less advanced economies into the world market.

In the end, enforcing usage without further inquiry into whether the parties feel some sense of obligation is no more than allowing Adam Smith's "invisible hand" to perform its magic. Strictly speaking, legal pragmatism's view that "[c]ustom is what men *do*, not what they *think*"[229] fails to acknowledge that each act carries some intent. Nevertheless, the traditional search for obligatory custom has proved as futile as Sir Lancelot's quest for the Holy Grail. Guided by the CISG's and the UCC's adoption of the usage paradigm, the international law merchant should purge all vestiges of obligatory custom. As Alfred North Whitehead has observed:

> It is a profoundly erroneous truism, repeated by all copy-books and by eminent people when they are making speeches, that we should cultivate the habit of thinking what we are doing. The precise opposite is the case. Civilization advances by extending the number of important operations which we can perform without thinking about them.[230]

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225. *See* U.C.C. § 2-315.

226. *See* Wilson v. Marquette Elecs., Inc., 630 F.2d 575, 582 (8th Cir. 1980).

227. *See* Clark v. General Foods Corp., 400 N.E.2d 1027, 1031 (Ill. App. Ct. 1980); Bremerton Concrete Prods. Co. v. Miller, 745 P.2d 1338, 1341 (Wash. App. Ct. 1987).

228. *See supra* text accompanying notes 88-92.

229. JOHN C. GRAY, THE NATURE AND SOURCES OF THE LAW 285 (2d ed. 1921). Nevertheless, de-emphasis of intent conserves judicial effort and promotes accurate adjudication by reducing burdensome proof requirements.

230. Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 528 (1945) (quoting Alfred North Whitehead).

4. Trade Usage Supreme

Economic analysis demonstrates the usage paradigm's substantial advantages over the traditional view of custom. A bundle of cumbersome, needless tests, obligatory custom obstructs the utilitarian objectives of modern commercial law. Neither the traditional formula nor any modern variation[231] offers functional advantages over the usage paradigm.

Trade usage secures its advantages at slight cost to contractual autonomy. Indeed, judicially administered trade usage sometimes enables merchants to rely on common practices and the reasonable expectations they create.[232] Furthermore, the UCC's adoption of trade usage as the core of commercial agreements defeats mischievous abuse of the plain meaning and parol evidence rules.[233] At the very least, trade usage directs a court toward interpreting within commercial context and deters crusades for universality, immemoriality, *opinio necessitatis*, and their ilk.

Through trade usage, the UCC benefits from privately initiated standard-setting without conceding actual legal authority to merchants. Far better than custom's seven-part sieve, the single usage test of "regularity of observance" promises advantages to the marketplace and the judicial system, with only a marginal increase in negotiation costs. Merchants familiar with prevailing practices in the trade can apply trade usages to any dispute without incurring the substantial costs of educating a court (or even a relatively expert arbitration panel).[234] When disputes do reach the courts, the UCC brings commercial law under the umbrella of social engineering. No longer will subjective perceptions of legal obligation deny effect to trade practices that enhance collective wealth.

Merchants must now expand "commercial practices through custom, usage, and agreement of the parties" without the shield of *opinio necessitatis*.[235] In theory, courts now determine commercial practices' legal effect according to a broader social plan. On balance, the mercantile

231. For a proposed "custom" amendment to U.C.C. § 1-205, see Levie, *supra* note 37, at 1116-17.

232. *See supra* text accompanying notes 202-07.

233. If American courts overcome the quasi-parol evidence rule, the usage paradigm will be crippled to the extent that judges impose any "consistency" requirement.

234. *See* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 404 (1990).

235. U.C.C. § 1-102(2)(b).

community benefits. Commercial acceptance of the usage paradigm is no more than swallowing the bitter with the sweet. Though merchants have surrendered the right to filter out nonobligatory usages, they have gained enforcing courts' greater accommodation of commercial understandings. In effect, the mercantile community continues to "legislate" new trade practices, but courts assume plenary power to "adjudicate" usage without delegating to merchants the task of assaying the practices' normative content.

Under the UCC, law merchant remains "an autonomous body of law, binding upon national courts."[236] Nevertheless, binding merchants to mere patterns of behavior without regard to norms changes the character of law merchant. As national and transnational commercial codes adopt the usage paradigm, they remove proof of *opinio necessitatis* from the core of customary commercial law. Ironically, though premised upon contractual autonomy, the traditional regime of *opinio necessitatis* derogates private lawmaking by demanding that merchants feel at least as obligated to custom as to positive law. The usage paradigm flexibly grants equal legal force to the UCC and to most private variations of statutory provisions. Among individuals, variation occurs through contract; within a trade community, variation occurs through the development of usages. To replace subjective custom, trade usage erects a new law merchant that splits the power to create custom from the power to enforce it. Over time, this division actually strengthens custom as a source of commercial law. Rather than segregate customary law from positive law through onerous proof burdens, the UCC's paradigm integrates usage as a privately generated law underlying every commercial contract.[237]

B. Unreasonable Usages and Marketplace Morality

The triumph of usage over custom may not be complete. Custom's express requirement of reasonableness is arguably superior to a usage provision that describes all practices but prescribes none.[238] Still, trade usages are rarely fraudulent. In one case, a carrier issued a clean bill of lading for orange juice in rotting barrels, receiving in exchange the

236. Berman, *Lex Mercatoria, supra* note 1, at 298.

237. Custom's battery of requirements implies that privately created norms should be confined as contrary to positive law. Characteristically, some pre-UCC courts demanded that custom be strictly proved, based on a misreading of the Latin phrase "*stricti juris.*" *See* Levie, *supra* note 37, at 1117 & n.61.

238. *Cf.* Note, *supra* note 6, at 1989-91 (criticizing the CISG's trade usage test).

shipper's letter of indemnity.[239] In another, a used car dealer pleaded a common practice of turning back a reconditioned car's odometer to reflect repairs and improvements.[240] Both usages were rejected as unreasonable. Though rare, such usages challenge the wisdom of presuming the reasonableness of all mercantile practices.[241]

1. The UCC's Solution

The UCC wields total power over the issue of whether to enforce unreasonable trade usages. Few other issues in international commercial law rely so squarely on national law. The CISG disclaims any effect on "the validity of the contract or of any of its provisions or of any usage."[242] As a result, national law determines the validity of an allegedly unreasonable usage.[243]

Section 1-205's text does not require that trade usage be reasonable, but its comments imply a reasonableness test. The drafters remarked that the "regularity of observance" standard gives "full recognition" to "usages currently observed by the great majority of *decent* dealers."[244] This is scant evidence that section 1-205 intrinsically bans unreasonable usages. Indeed, the drafters referred to the extrinsic tests of good faith[245] and unconscionability[246] as provisions that "carr[y] forward the policy underlying the ancient requirement that a custom or usage must be 'reasonable.'"[247] The drafters also imply a third external check: "the

239. Brown Jenkinson & Co. v. Percy Dalton (London) Ltd., [1957] 1 Q.B. 621 (C.A.).

240. Jones v. West Side Buick Co., 93 S.W.2d 1083 (Tex. 1936).

241. *See* Berman, *Lex Mercatoria*, *supra* note 1, at 289; *cf.* Kastely, *supra* note 135, at 795 & n.116 (advocating stricter proof requirements for usage to counteract the UCC's presumption that usages are reasonable).

242. CISG, *supra* note 3, art. 4(a), S. TREATY DOC. NO. 9 at 23, 19 I.L.M. at 673. *See generally* KRITZER, *supra* note 76, at 79-93 (discussing Article 4). The CISG also does not govern a seller's liability for death or personal injury caused by his goods. CISG, *supra* note 3, art. 5, S. TREATY DOC. NO. 9 at 23, 19 I.L.M. at 673; *see also id.* art. 2(a), S. TREATY DOC. NO. 9 at 23, 19 I.L.M. at 672 (excluding "goods bought for personal, family or household use" from the CISG). For a discussion of this issue, see KRITZER, *supra* note 76, at 95-98; Audit, *supra* note 57, at 158-59.

243. *See* HONNOLD, *supra* note 76, § 122, at 149; Bonell, *supra* note 76, at 112.

244. U.C.C. § 1-205 cmt. 5 (emphasis added).

245. U.C.C. §§ 1-203, 2-103(1)(b). Significantly, good faith under Article 2 of the Code requires not only "honesty in fact," *id.* § 1-201(19), but also "the observance of reasonable commercial standards of fair dealing in the trade." *Id.* § 2-103(1)(b); § 1-203 cmt.

246. U.C.C. § 2-302.

247. U.C.C. § 1-205 cmt. 6.

anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard."[248] Perhaps a court could invoke general equitable principles through section 1-103[249] and proclaim (as did Hand in *The T.J. Hooper*)[250] the judiciary's discretion to disregard unreasonable customs.

Whether the UCC invokes an internal or external reasonableness test, it definitely creates a presumption that commercially accepted usage is reasonable: "The very fact of commercial acceptance makes out a prima facie case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable."[251] Remarkably, however, section 1-205's text and comments specify no remedies for unreasonable usages. As with the definition of unreasonableness, the UCC must imply a remedy from sources outside section 1-205. The unconscionability provision suggests three ways that a court can nullify unreasonable usage. The court may: (1) void a contract wholly premised on an unreasonable usage, (2) enforce the contract without the usage, or (3) limit the application of the usage so as to avoid injustice.[252]

That the UCC neither defines unreasonableness nor dictates remedies hardly inspires confidence in its ability to deflect fraudulent trade practices. Even if section 1-205 explicitly rejected bad practices, the presumption of reasonableness may prove decisive. Victims of market-wide frauds must affirmatively prove lack of good faith, unconscionability, or fraud. Each of these external tests is laden with defects.

Good faith not only eludes easy definition[253] but also exposes a party to seemingly arbitrary judicial perceptions of honesty.[254] Under Article 2, courts may ask whether a merchant observes "reasonable commercial standards of fair dealing in the trade."[255] Elsewhere, the standard of "honesty in fact" controls.[256] This scienter test forces courts to probe

248. *Id.*
249. *See* Summers, *supra* note 119, at 912.
250. 60 F.2d 737 (2d Cir. 1932).
251. U.C.C. § 1-205 cmt. 6.
252. *Cf.* U.C.C. § 2-302(1) (outlining unconscionability remedies).
253. For example, courts struggle to define good faith when deciding whether a letter of credit's beneficiary may be enjoined under U.C.C. § 5-114. *See* Edward L. Symons, Jr., *Letters of Credit: Fraud, Good Faith and the Basis for Injunctive Relief*, 54 TUL. L. REV. 338, 349-52 (1980).
254. *See* Marc Snyderman, Note, *What's So Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending*, 55 U. CHI. L. REV. 1335 (1988).
255. U.C.C. § 2-103(1)(b).
256. U.C.C. § 1-201(19).

minds for the absence of intentional fraud,[257] partly defeating the goals of the usage paradigm.

Other approaches seem even less effective. The UCC's unconscionability provision is notoriously vague. It "tells a court almost nothing save that unconscionability is bad and that it exists."[258] Whatever its actual meaning, unconscionability connotes an evil far exceeding mere absence of good faith. Perhaps it corresponds to "egregious fraud" as lack of good faith corresponds to "intentional fraud."[259] In any event, proving unconscionability offers no greater protection against bad usages than proving lack of good faith. Invoking general equitable principles would fare even worse. This option depends on the doubtful vitality of section 1-103.[260] As a drastic request for a remedy outside the UCC, it is almost certain to fail.

In the end, this tale of sound and fury signifies nothing. The fraudulent trade usage exists now only in nightmares. Apparently, no UCC decision has ever struck down a trade usage as unreasonable. There are two possible explanations. First, a test of usage can easily subsume the question of reasonableness under the broader inquiry into whether a usage has won sufficiently wide acceptance.[261] In other words, unreasonable usages never qualify as evidence. Second, and more important, destructive usages can scarcely survive in a competitive trade market.

Merchants who wish to remain solvent would avoid bad usages. Because they routinely oscillate between the roles of buyer and seller, merchants have little incentive to commit fraud that will inevitably haunt its originators. National legal systems can safely allow antitrust laws and international trade accords to police collusive and predatory behavior. Under the UCC, a reasonable usage is one that emerges from the practices of competing merchants, not the predilections of uninformed judges.[262] The survival of the law merchant as a largely nonpositivistic

257. *See* Symons, *supra* note 253, at 350.

258. Danzig, *supra* note 190, at 627. *See generally* Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

259. *Compare* Henry Harfield, *Enjoining Letter of Credit Transactions*, 95 BANKING L.J. 596, 614-15 (1978) (defining "egregious fraud") *with* Symons, *supra* note 253, at 350 (defining "intentional fraud").

260. *See supra* notes 115-19 (discussing § 1-103's minimal ability to import outside legal and equitable standards).

261. *See* Note, *supra* note 39, at 1199 & n.30.

262. *Cf.* United States v. Trenton Potteries Co., 273 U.S. 392, 396-98 (1927) (defining a reasonable price for purposes of the antitrust law as the price that emerges from competition and recognizing that "[t]he reasonable price of today may . . . become the unreasonable price of tomorrow").

body of rules for a self-regulating commercial community supports this presumption. Historically, enforcement of the law merchant depended on reputational sanctions, especially exclusion from commercial fairs.[263] Modern law merchant operates similarly. Arbitration, the favored dispute resolution method of international merchants, is nothing more than third-party decisionmaking enforced by reputational sanctions against those who fail to comply.[264] Blacklisting by a trade association or a general, economically debilitating loss of reputation induces compliance with arbitral awards and the market's behavioral norms.[265] If international commercial communities can monitor compliance with arbitration, they can also punish and suppress unreasonable practices.

The UCC presumes that proven trade usage is reasonable. The remote contingency of a renegade usage simply cannot justify extraordinary proof requirements. Furthermore, presuming reasonableness lessens the risk that efficient practices will fail to attain legal recognition because judges wrongly assess the practices' commercial wisdom. Perhaps a mandatory test of reasonableness is metaphysically sounder, but the UCC's presumption makes more realistic sense than such stern moralism.[266]

2. Does Trade Usage Merely Perpetuate Marketplace Morality?

Even if market forces retard the proliferation of destructive usages, the UCC's clumsy approach to unreasonableness suggests that subtler forms of fraud flourish. One suspects that a UCC with virtually no normative judgments of its own may unwittingly sanction marketplace morality.[267] This perceived abdication of moral initiative recalls Roscoe Pound's charge that the legal realists conceived of law "as a body of devices for the purposes of business instead of as a body of means toward general social ends."[268] Such criticism strikes the UCC at its weakest point: its difficulty in generating new commercial norms.

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263. *See* Cremades & Plehn, *supra* note 180, at 319.

264. *See* Charny, *supra* note 235, at 409-12.

265. *See* Cremades & Plehn, *supra* note 180, at 325 & n.39. *But see* Stoecher, *supra* note 58, at 105 ("Unlike in the medieval merchant community, today's business community is hardly able to apply pressure within the group to ensure that rules and judgements are complied with.").

266. *Cf.* GILMORE, *supra* note 18, at 81.

267. *See* Danzig, *supra* note 190.

268. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 708 (1931).

Besides deviating from the Continental model of a commercial code,[269] the UCC "is an idiosyncratic piece of legislation because in critical provisions it neither pretends to the substance nor adopts the form of the usual legislative enactment."[270] Instead of codifying legislatively determined norms, the UCC defaults to commercial standards of "reasonableness" in crucial provisions in Articles 1 and 2.[271] Even the good faith duty underlying all sales contracts depends in part on "the observance of *reasonable* commercial standards."[272] One commentator laments, "The word *reasonable*, effective in small doses, has been administered by the bucket, leaving the corpus of the Code reeling in dizzy confusion."[273]

"Reasonableness" running riot and the trade usage paradigm produce an undesirable synergy. In crafting commercial rules, the UCC seems to lack normative impetus. It implies that "'good law' cannot be described for courts, but they will know it when they see it."[274] Doubtless, the UCC's drafters intended some ambivalence. In the wake of legal formalism, Llewellyn advocated the "*[t]emporary* divorce of Is and Ought for purposes of study."[275] Together, the UCC's addiction to "reasonableness" and its usage paradigm may separate Is and Ought for good. Perhaps Llewellyn never imagined that normative lawmaking differed from descriptive law—stating:

> Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus not eternal

269. *See supra* text accompanying notes 12-16.

270. Danzig, *supra* note 190, at 622.

271. For two of the more extreme examples of reliance on "reasonableness," see U.C.C. §§ 1-204(2) ("What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.") and 2-706 (relying upon "commercially reasonable" method, manner, time, place, and terms of sale, as well as "reasonable" notification, notice, and inspection, in defining seller's right to resell rejected or undelivered goods). For further examples, see Danzig, *supra* note 190, at 634; David Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 209-13 (1967).

272. U.C.C. § 2-103(1)(b) (emphasis added).

273. Mellinkoff, *supra* note 271, at 185-86.

274. Danzig, *supra* note 190, at 629.

275. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

> nor changeless nor everywhere the same, but is indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law.[276]

Some fear that heavy reliance on discovering trade practices portends "a vision of merchant reality devoid of any normative component—or at least devoid of any normative component other than speed and efficiency in the marketplace."[277] The UCC's prescriptive Sahara can undermine the usage paradigm's attempt to transform commercial law into a weapon of social reform. First, the descriptive approach reduces the law to reaffirming preexisting marketplace morals, hardly a realist objective. Second, the UCC at its worst resuscitates the formalist technique; it allows the judge to project his own definitions of reasonableness and to "discover" those definitions in a purportedly objective manner. Third, the emphasis on discovering "immanent law" diverts courts from pursuing larger social concerns as they interpret commercial contracts.[278]

In all fairness, the UCC's drafters intended to incorporate marketplace realities, not to abdicate legal control to merchants.[279] The UCC's overthrow of *opinio necessitatis* signaled an effort to unify commercial law with other forms of law under the rubric of general social reform. Nevertheless, the mercantile community enjoys greater involvement in fashioning legal standards under the UCC than under the traditional law merchant. Perhaps the UCC's extraordinary faith in "reasonable" trade usage's ability to describe market conditions does delegate a legislative function to the judiciary.[280] The chain of delegation, however, does not stop in the courts. A judiciary instructed to rely on commercial reasonableness must transfer some legislative power to merchants. Through the course of their many contracts, individual buyers and sellers devise the practices that embody the trade community's norms. In turn, as section 1-205 recognizes, the community's collective sense of obligation shapes each merchant's individual volition.[281]

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276. LLEWELLYN, *supra* note 197, at 122 (quoting Levin Goldschmidt, a nineteenth century commercial lawyer of the Germanist school). For the argument that Llewellyn's obsession with "immanent law" stemmed from Goldschmidt, see Whitman, *supra* note 51.

277. Wiseman, *supra* note 25, at 505.

278. *See* Danzig, *supra* note 190, at 629-30.

279. *See* Wiseman, *supra* note 25, at 494-95.

280. *See* Danzig, *supra* note 190, at 635.

281. *See* Kastely, *supra* note 136, at 814-15.

In many circumstances, the UCC does enforce the market's prevailing practices. Usually, marketplace morality is no evil. Like Lord Mansfield's merchant juries, the UCC's merchant legislature upholds profit-creating practices in a competitive market. By command of the UCC, courts enforce these practices as incorporated into commercial contracts. An occasional fraud may slip through a natural or deliberate information gap and elude the UCC's latent defenses, but the market's own reputational sanctions should retard the fraud's proliferation. As with custom's tests of obligation and reasonableness, the cure is worse than the disease. The UCC and the commercial community may be better off suffering the very rare fraud rather than expending the extraordinary effort needed to define, detect, and proscribe specific instances of unreasonable trade usage.[282]

VI. CONCLUSION

Though primarily an effort to advance and unify American commercial law, the Uniform Commercial Code may have achieved greater success in influencing international commercial law. Through its links to Incoterms and the CISG, the UCC has forged a new standard for enforcing customary commercial law: the trade usage paradigm. Whether American courts can exploit this powerful interpretive tool depends on the domestic debate over the quasi-parol evidence rule. International transactions continue to fall within a usage paradigm as the CISG gains greater acceptance. The UCC's supple usage provision empowers a court to give the needed legal effect to desirable local or contemporary usages, an ordeal under the traditional demands that custom be universal and ancient. Likewise, the UCC's presumption of usages' normative element and commercial reasonableness removes the clumsy tautologies of *opinio necessitatis* and *stricti juris*. Despite fears of fraud and the subtle perpetuation of marketplace morality, the UCC has effectively policed usage. In this efficiency lies the UCC's greatest strength: freeing merchants to develop their own practices and ensuring legal enforcement of the reasonable expectations that arise from them.

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282. That the burden of preventing harm can exceed the losses to be prevented is a legal instinct predating Learned Hand by many generations. *Cf.* CHARLES DICKENS, BLEAK HOUSE 19 (Signet Classic, Penguin Books 1964) (1853):

> This is the Court of Chancery . . . which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who would not give—who does not often give—the warning, "Suffer any wrong that can be done you, rather than come here!"