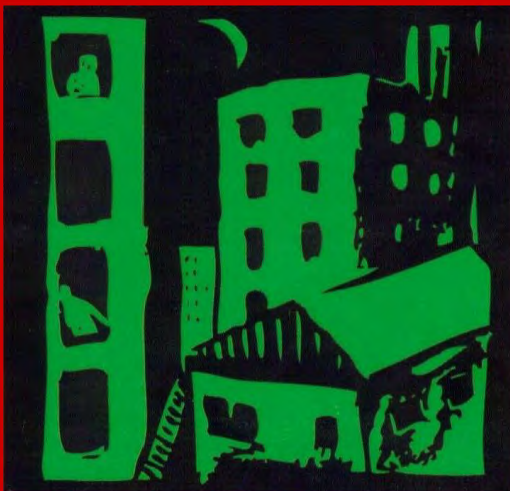


LAW
DEMOCRACY
& DEVELOPMENT



VOLUME 24 (2020)

DOI: <http://dx.doi.org/10.17159/2077-4907/2020/idd.v24.2>

ISSN: 2077-4907
CC-BY 4.0

Private regulation in the context of international sales contracts

JUANA COETZEE

*Associate Professor, Department of
Mercantile Law, Faculty of Law,
Stellenbosch University, South Africa*

<https://orcid.org/0000-0003-1388-4792>

ABSTRACT

*This article argues that modern international sales law has a hybrid character as it increasingly makes provision for interfaces between public and private, State and non-State, hard and soft, law. Although private forms of regulation are often associated with the *lex mercatoria*, this article shows that they rarely reflect or constitute mercantile custom or trade usage. However, they often address issues that State law does not. As a result, these forms of regulation have become an effective tool in supply chains, especially in the context of sustainable development. Whether private forms of regulation constitute law is a matter for debate, though. This article concludes that in the context of international sales, private forms of regulation mostly obtain*

their legitimacy through contract, which “hardens” them into law.

Keywords: Private regulation; international sales; sustainable development

1. BACKGROUND

Despite differing opinions, the preponderant view is that international trade can support economic growth and consequently serves as a tool for social and economic development and the alleviation of poverty. However, to be sustainable, development needs to take place within the framework of the law.¹ Unfortunately, the international nature of trans-border transactions creates challenges for legal regulation. As law is territorial in nature, State based law is often incapable of addressing the needs of international trade in full;² in some instances even inhibiting international trade.³ Differences in national laws lead to uncertainty and complications in establishing the law of the contract.⁴ As uniform law does not always provide a complete or ideal solution, there is a need for other forms of regulation. Globalisation, therefore, has been a major catalyst for privately generated rules and norms.⁵ In an effort to address the problems and shortcomings connected to national law, contractual parties often resort to framework, master, standard form and model contracts, or to mercantile custom and trade usage.

The notion of private law-making⁶ is nothing new as already in the Middle Ages merchants regulated their own transactions according to the practices, usages and customs of their trades. The ancient *lex mercatoria* functioned as an autonomous system of law based on transnational mercantile customs, general principles and procedural procedures, and was enforced through social sanction within the networks of

¹ See the 2030 United Nations (UN) Agenda for Sustainable Development, UN Doc A/Res/70/1, Sustainable Development Goal (SDG) No 16.3.

² Eiselen S “Globalization and harmonization of international trade law” in M Faure & A Van der Walt (eds) *Globalization and private law: the way forward* (2010) 97 at 97-8. See also Smits J “The future of contract law in Europe” (2015) *Maastricht European Private Law Institute Working Paper No 2125/2 1* at 12-13 available at <https://ssrn.com/abstract=2566149> (accessed 9 April 2019) .

³ For example, increases in import tariffs or attempts to retreat from globalised regulation, such as, international trade agreements or economic unions. The conduct of the USA President and Brexit are typical examples here. See also Quinn PS “Regulation in the shadows of private law” (2018) 28 *Duke Journal of Comparative & International Law* 327 at 330.

⁴ Eiselen (2010) at 99; Cafaggi F “New foundations of transnational private regulation” (2011) 38(1) *Journal of Law and Society* 20 at 25.

⁵ Maurer A “The creation of transnational law – participatory legitimacy of privately created norms” (2012) *Center for Transnational Studies (ZenTra) of the Universities of Bremen and Oldenburg Working Papers in Transnational Law No 03/2012 1* at 13 available at <https://ssrn.com/abstract=2179584> (accessed 9 April 2019) . See also Schiek D “Private rule-making and European governance – issues of legitimacy” (2007) *European Law Review* 443 at 445.

⁶ Not to be confused with private law, a branch of State law that deals with the private relationships between natural and juristic persons.

merchants or by specialised merchant courts.⁷ Supporters of a new law merchant seek to revive the notion of a separate legal order regulating transnational commerce that is functionally equivalent to State law.⁸ However, proponents of the new *lex mercatoria* hold different opinions on its content, and its ability to function autonomously outside the State. Some of them are of the view that the new law merchant is not fully autonomous from State law but acts within its boundaries, often in supplementation of State law. According to this view, the law merchant is no longer a mere spontaneous but also haphazard body of merchant customs and usages, but is formulated and expressed in authoritative texts formulated by international organisations and agencies and then incorporated into national law by State action, alternatively into contracts through party agreement.⁹ When it comes to the regulation of international sales, the United Nations Convention on Contracts for the International Sale of Goods (CISG) is one of its main sources. Mercantile custom and general principles of law when codified by international organisations, such as, the International Chamber of Commerce's (ICC) Incoterms® rules or the International Institute for the Unification of Private Law's (UNIDROIT) Principles of International Commercial Contracts, are other sources.

Internationally, there has been a steady rise in autonomous private regulatory bodies, so much so that private authority is now operating alongside public authority. Moreover, a substantial body of scholarship has developed on private regulation, not only in the context of international commercial transactions and related fields, but also in other areas of the law.¹⁰ In addressing the inadequacies of State law, private forms of transnational regulation encompass much more than mere uncodified and spontaneous custom. Nevertheless, they are often discussed and analysed against the background of the *lex mercatoria*¹¹ or global legal pluralism.¹² In EU private law, privately generated

⁷ Cuniberti G "Three theories of *lex mercatoria*" (2014) 52 *Columbia Journal of Transnational Law* 369 at 374. See also DiMatteo LA "Soft law and the principle of fair and equitable decision making in international contract arbitration" 2013 *Chinese Journal of Comparative Law* 221 at 226; Yuan B "A law and economics approach to norms in transnational commercial transactions: incorporation and internalisation" (August 2016) 1 *Erasmus Law Review* 5 at 10.

⁸ Michaels R "The true *lex mercatoria*: law beyond the state" (2007) 14 *Indiana Journal of Global Legal Studies* 447 at 454-455.

⁹ Schmitthoff CM "The unification of the law of international trade" in Cheng J (ed) *CM Schmitthoff's select essays on international trade law* (1988) 170 at 171-172. See also Maniruzzaman AFM "The *lex mercatoria* and international contracts: a challenge for international commercial arbitration" (1999) 14 *American University International Law Review* 657 at 671-672.

¹⁰ Such as : canon or church law; rules that regulate sports and games; conduct rules of homeowner associations; standards or technical rules set by various standard-setting organisations; regulations of the professions set by their own professional bodies; rules that regulate the use of credit cards; rules of the stock exchange, and collective labour agreements, to name but a few. See in general, Schiek (2007); Cafaggi F "The many features of transnational private rule-making: unexplored relationships between custom, *jura mercatorum* and global private regulation" (2015) 36 *University of Pennsylvania Journal of International Law* 875.

¹¹ See generally Cafaggi (2015); DiMatteo (2013); Cuniberti (2014).

law fulfils a central role.¹³ Lately, much of the scholarship on private regulation focuses on the voluntary acceptance of privately formulated standards pertaining to health, safety, labour and the environment, which includes aspects of social corporate responsibility and sustainable development.¹⁴ Research on private regulation also extends to fields other than the law.¹⁵ However, many of the issues discussed there are universal in nature and cross-cutting, and, therefore, can apply to the legal context too.

One of the main concerns is the normative quality of privately generated rules, and whether they constitute “law” as traditionally understood. Is it enough that their users feel bound to these rules, and that as a result they have the same effect as law although they are not law *per se*? Alternatively, do they function as a separate and autonomous system of law, or in the context of commercial transactions as part of the *lex mercatoria*? Moreover, can law exist independently of the State? If so, does privately made law function in parallel with, or perhaps in competition with, State law? Fears have been expressed that privately made law might signify a movement away from the State in an effort to claim autonomy from it. This could mean a move away from the public interest in favour of private interests. However, private regulatory frameworks do not exclusively exist outside the State. The State often delegates legislative power to private authorities or outsources certain functions to private bodies.¹⁶ Private actors, furthermore, participate in the formulation of national and international legislation as advisors or observers.¹⁷ In the creation of international uniform sales law instruments, the Hague Conference on Private International Law and the United Nations Commission on Trade Law (UNCITRAL) are probably the most known intergovernmental bodies to formulate international conventions or model laws that ultimately will function as State law. International organisations of non-State actors, such as UNIDROIT, on the other

¹² Berman PS “Global legal pluralism” (2007) 80 *Southern California Law Review* 1155 at 1155; Berman PS “The evolution of global legal pluralism” in Cotterel R & Del Mar (eds) *Authority in transnational legal theory: theorizing across disciplines* Cheltenham: Edward Elgar (2016) 151 at 154.

¹³ See Schiek (2007); Mak V “Private actors as norm-setters. On new legal pluralism in European regulatory private law and how to manage it” 2015 *Tilburg Law School Legal Studies Research Paper Series No. 02/2015* available at <https://ssrn.com/abstract=2566672> (accessed 9 April 2019); Mak V “Who does what in European private law – and how is it done? An experimentalist perspective” 2017 *Tilburg Private Law Working Paper Series No 05/2017* available at <https://ssrn.com/abstract=2958146> (accessed 9 April 2019).

¹⁴ Quinn (2018); Scheltema M “Balancing public and private regulation (2016) 12(1) *Utrecht Law Review* 16; McAllister LK “Harnessing private regulation” (2014) 3 *Michigan Journal of Environmental and Administrative Law* 291. See also Beckers A “Regulating corporate regulators through contract law? The case of corporate social responsibility” 2016 *EUI Working Papers Max Weber Programme (MWP) 2016/12* available at <https://ssrn.com/abstract=2789360> (accessed 9 April 2019).

¹⁵ Such as, philosophy, theology, anthropology, social norms theory, political theory, or the interfaces between law and other norms, such as, ethnic, tribal, institutional or religious norms. See Berman (2016) at 152-154.

¹⁶ Schiek (2007) at 453.

¹⁷ Such as, international business organisations, trade associations, transnational corporations, lawyers and academics. See Schiek (2007) at 453. In the context of the USA, see Snyder DV “Private lawmaking” (2003) 64 *Ohio State Law Journal* 371 at 377-384.

hand, are better known for the creation of general principles of law that function on a voluntary basis through party agreement or as an interpretative tool. Contract is the main vehicle through which instruments formulated by non-State actors operate. As most legal systems recognise party autonomy and freedom of contract, once incorporated by contract these rules and standards operate as contract terms. This generates a complementary relationship between State and non-State law. However, would a pluralist global framework that combines State and non-State law undermine the stability and predictability of the rule of law or the democratic principles on which it is built? These issues unavoidably raise the questions of what is law, and, more specifically, what the sources of transnational commercial law are, especially in the context of sustainable development.

Although scholarship on private forms of regulation is on the increase, the indiscriminate use of terms, such as, private regulation, private ordering, self-regulation, private governance, self-governance, private rule-making, private law-making, non-State law, transnational commercial norms, or soft law, often makes it difficult to distinguish whether these rules and norms function as law or merely as an informal means of regulation. One scholar suggests that a distinction must be made. In his view, “self-ordering” and “self-regulation” refer to rules or norms that are formulated and followed by the members of a closed group for their sole use but which have no legal force for parties outside of the group.¹⁸ “Privately-made law”, “non-State law”, “transnational norms” and “soft law”, on the other hand, refer to privately made rules, norms and standards that have general application.¹⁹ These rules find their legitimacy through competition with other rules, whether privately made or State made,²⁰ or in processes and procedures that resemble those followed by the State when making law and, therefore, they are treated as such. In these cases, their legitimacy would depend on consent by all concerned, both on a substantial and a procedural level.²¹ However, whether these rules amount to law in the traditional sense is still a matter for debate.²²

This article refers to “private regulation” as a generic term to include all forms of rules, norms and standards formulated by non-State or quasi-State organisations, whether they are considered to be law or not. “Regulation”, furthermore, refers to three elements, namely, the setting, implementation and enforcement of private forms of standards, norms or rules.²³

Despite uncertainty about their legal status, it is clear that private forms of regulation are closing the traditional divide between private and public law. They are no longer restricted to matters of private law but increasingly regulate matters of social

¹⁸ Snyder (2003) at 401-403. See also Scheltema (2016) at 16.

¹⁹ Snyder (2003) at 404-406.

²⁰ Snyder (2003) at 424.

²¹ Schiek (2007) at 450.

²² See Schiek (2007) at 444. This aspect is discussed in more detail in the course of this article.

²³ See McAllister (2014) at 298-301.

interest traditionally left to the domain of the State, such as, human rights and environmental concerns. Consequently, the new law merchant contains elements from private as well as public law.²⁴ As private forms of regulation mostly apply voluntarily through contractual incorporation, it has furthermore caused a shift in the traditional role of contract, namely to maximise wealth. Contract has now also become a regulatory instrument based on good faith, fair dealing and public policy in order to promote sustainable development and distributive justice.

This article will show that, in the transnational context, there is a need to conceptualise law differently from the traditional notion of being State law, to include also private forms of regulation. This discussion will focus specifically on the role of private regulation in the context of international sales transactions. These contracts often form part of an extended global supply chain where suppliers or places of production are located in developing countries. The article commences with an examination of the rationale for privately made law, followed by a discussion of the main forms of private regulation as applied in the context of international sales contracts. The aim of this article is not to present an in-depth analysis of the role of contract as an instrument of private governance; therefore, only brief reference will be made to the shortcomings of contract law doctrine in the context of global supply chains as that warrants an article of its own. What it does wish to accomplish is to show that there is a need to re-conceptualise the notion of international sales law so that it recognises its inherent hybrid character and the various interfaces between public and private, State and non-State, as well as hard and soft, law.

2. THE RATIONALE FOR PRIVATE REGULATION

As neo-liberal theory envisages less involvement of governments in economic activity, it largely facilitated the notion of private regulation.²⁵ In addition, the diminished power of the State, but also the costliness of State power, encouraged private forms of regulation.²⁶ Supply and demand models can further explain why certain aspects are left to private regulators whilst others remain within the realm of the State.²⁷

In the context of international commercial transactions, the challenges that economic globalisation pose to the link between law and State are often the drivers of initiatives for private regulation.²⁸ Not only can it be difficult to determine the governing law of an international contract of sale,²⁹ laws can also be divergent on a particular aspect, which can create legal uncertainty.³⁰ Moreover, the national character

²⁴ DiMatteo (2013) at 7. See also Kjaer PF “From the private to the public to the private? Historicizing the evolution of public and private authority” (2018) 25(1) *Indiana Journal of Global Legal Studies* at 13-36.

²⁵ Büthe T “Private regulation in the global economy: A (p)review” (2010) 12 *Business and Politics* 1 at 6.

²⁶ Snyder (2003) at 423.

²⁷ Büthe (2010) at 6. See also in general Cafaggi F “The regulatory functions of transnational commercial contracts new architectures” (2013) 36 *Fordham International Law Journal* 1557 at 1557.

²⁸ Maurer (2012) at 1; Büthe (2010) at 4.

²⁹ The fact that the rules of private international law are not unified exacerbates the problem.

³⁰ See Eiselen (2010) at 99; Cafaggi (2011) at 25.

of law can become an obstacle to international trade if not geared to the needs of cross-border sales,³¹ especially where the laws are antiquated.³² Uniform sales laws do not always provide a complete or ideal solution to these problems. The compromise and static natures of uniform law can place further limitations on their scope for regulation.³³ Furthermore, the need for uniform law to be interpreted uniformly in order to be effective can be an additional challenge.³⁴

Non-State actors can act as political-economic actors when producing rules that the market requires but which the State fails to provide.³⁵ As law is slow and reactive in nature, national law often finds it difficult to keep up with developments in international trade.³⁶ Electronic commerce and the effects of technology, as well as new forms in which business is conducted, such as, supply chains, value-added products and inter-organisational trade, together with an increasing demand for sustainable and socially responsible trade practices, necessitate special forms of regulation. That is especially so where State law fails to regulate or does so inadequately. Even when regulated by the State, such regulation will be restricted to the territorial boundaries of that State. Moreover, when it comes to supply chains, State regulation in the country of the buyer or manufacturer could be different from that in the country of the seller or producer. International conventions or other forms of cooperation among State regulators take long to negotiate and sometimes even longer to adopt, and, therefore, are not always effective options.

Therefore, from a cost and organisational perspective, private regulatory efforts have definite advantages as they standardise business transactions and reduce transaction costs.³⁷ Compared to State law, or to conventions that are products of diplomatic compromise, privately generated rules produced by industry players and experts can be more efficient.³⁸ They are often better suited to the needs of a particular trade, whilst State law and international conventions have to regulate a wide range of trades and as a result are often vague and broadly worded. Privately made rules can produce more efficient rules as it is much easier to reach agreement when the drafters represent similar interests, whilst in the case of international conventions, the focus is often on reconciling differences through compromise. The flexible nature of private regulation is another advantage.³⁹ As they are mostly voluntary, contractual parties can choose whether they want to adopt these rules. They can furthermore deviate from

³¹ Smits (2015) at 12-13.

³² Revisions made in the main legal system are often not transposed into the law of the colonised country after independence, resulting in its laws becoming static.

³³ For example, in the case of the CISG, diplomatic compromises left several external gaps that need to be filled with reference to the national applicable law. See Art 7(2) CISG.

³⁴ See Cafaggi (2011) at 26.

³⁵ Büthe (2010) at 1.

³⁶ Eiselen (2010) at 97.

³⁷ Cafaggi (2015) at 879.

³⁸ Mak (2015) at 2.

³⁹ See Snyder (2003) at 421; Mak (2015) at 2.

them by agreement or even opt for another set of rules if available. It is also easier to reform privately made rules when there is a need to adapt them to changes in international commercial practices.⁴⁰ Where different sets of private regulation are available, market competition will ensure that ineffective rules are replaced, or at least that the most effective rules will reign.⁴¹ Moreover, publicly made law often follows the example of a private rule-maker when adapting national law to new developments, which reaffirms the efficiency of privately made rules.⁴²

State institutions may find it difficult to enforce transnational rules or to monitor compliance with international standards, especially in supply chains.⁴³ Informal or private measures of enforcement by means of market prices, reputational damage or exclusion from a group can be more effective and, therefore, often preferred by those who transact in groups and chains where reputation carries much weight.⁴⁴ The Internet is a very effective tool as it provides instant access to information around the globe and, as a result, it is ideal for enforcing reputational sanctions.⁴⁵ Furthermore, transnational private rules can contain their own innovative implementation and enforcement procedures and techniques that are better geared to the international context.⁴⁶

Despite the many advantages of private regulation, there are a number of concerns. Where private rules address the weaknesses in conventional international public or private law, they operate in conjunction with State law in a hybrid relationship. Where State and non-S law exist in the same area, a proliferation of lawmakers might induce fragmented law, which in turn creates competition and legal uncertainty.⁴⁷ However, the same would happen where there are competitive transnational private rules in place.⁴⁸ Therefore, there is a need to manage pluralist systems, for example, by providing clear conflict of laws rules for the interaction between different forms of private regulation or between private regulation and State law.⁴⁹ Party agreement can also serve to manage fragmentism.

Even if the advantages of private regulation were to outweigh the disadvantages, privately generated rules would only be effective if they enjoy a form of normativity or

⁴⁰ Snyder (2003) at 436.

⁴¹ Snyder (2003) at 421 & 424.

⁴² Snyder (2003) at 421. For example, the 1996 UNCITRAL Model Law on Electronic Commerce forms the basis of most countries' national laws on electronic commerce.

⁴³ Cafaggi (2011) at 26-27.

⁴⁴ Snyder (2003) at 430; Smits (2015) at 15.

⁴⁵ Smits (2015) at 15; Mak (2017) at 6.

⁴⁶ Cafaggi (2011) at 27.

⁴⁷ Mak (2015) at 2.

⁴⁸ Cafaggi (2011) at 25.

⁴⁹ Mak (2015) at 3; Scheltema (2016) at 23.

are respected and legitimised as law.⁵⁰ This brings us to the question: what is law? The answer might differ depending on whether you consider it from the perspective of the State or that of commerce. According to the classic theory of law, which originated in Western legal systems of the civil and common law, only the State can confer legal authority on private actors for purposes of making law.⁵¹ Privately made rules would therefore only obtain the force of law once incorporated into national law,⁵² through use by the courts,⁵³ as contract terms,⁵⁴ or as custom or trade usage when meeting stringent requirements.⁵⁵ On the other hand, from a commercial perspective, the focus is often placed on the functionality and efficiency of a rule or norm.⁵⁶

Therefore, in international commerce, the dividing lines primarily lie in different trades and industries and not so much along State lines.⁵⁷ Rules, norms and standards that a particular trade or industry perceive as binding internationally would constitute the normative framework for international transactions in that trade or industry. However, the question is whether they would bind anyone from outside? Moreover, are these rules fair? Some scholars argue that it is not enough that rules merely have the effect of law. For them, the legitimacy and accountability of these rules are a point of concern.⁵⁸ Unlike State law and international conventions, which are products of democratic law-making processes, the processes that give rise to private forms of regulation might not be open to public scrutiny. Therefore, they may run the risk of becoming paternalistic and exclusive.⁵⁹ However, often there are processes at work in the creation of privately generated rules that can confer legitimacy on them. That would enable a distinction between rules that purely function as a form of self-regulation or private ordering and rules that would constitute privately made law. Moreover, in the context of international contracts of sale, contractual agreement on private forms of regulation, or their incorporation through trade usage, can also confer legitimacy on these forms of regulation so that they become binding. The next part will focus in more detail on contract as a vehicle for providing private forms of regulation.

⁵⁰ Smits (2015) at 13 refers to Jansen N *The making of legal authority* (2010) who places the emphasis on the users that regard them as binding and therefore as legitimate.

⁵¹ See Maurer (2012) at 9.

⁵² Privately created rules and standards that are acceptable to everyone in the community, industry or group can be transferred into national law by way of a bottom-up approach. See generally Levit JK "A bottom-up approach to international lawmaking: the tale of three trade finance instruments" (2005) 30 *Yale Journal of International Law* at 125-209. See also Michaels (2007) at 461.

⁵³ Yuan (2016) at 8 refers to social norms turned into judicial precedent or common law doctrine.

⁵⁴ Mak (2015) at 7.

⁵⁵ Goode R "Usage and its reception in transnational commercial law" (1997) 46 *International and Comparative Law Quarterly* 1 at 7-8. See also Mak (2015) at 7.

⁵⁶ See Michaels (2007) at 463-4; Schwartz A & Scott RE "Contract theory and the limits of contract law" (2003) 113 *The Yale Law Journal* 541 at 545.

⁵⁷ Michaels (2007) at 465.

⁵⁸ Maurer (2012) at 9; Mak (2015) at 2.

⁵⁹ Snyder (2003) at 431.

3. PRIVATE REGULATION IN THE CONTEXT OF INTERNATIONAL SALES: LEGAL NATURE AND STATUS

3.1. Negotiated contracts and contract clauses

Contract is the most basic form of private regulation.⁶⁰ Most national laws allow private parties to design their own contracts by virtue of party autonomy and the principle of freedom of contract. South African law underlines this freedom as part of the fundamental rights protected by Chapter 2 of the Constitution.⁶¹

However, as it is time-consuming to negotiate every term of the contract and it increases the costs of the transaction,⁶² gaps are often left, which are to be filled by the default law of the contract.⁶³ A choice of law that is best suited for the gap-filling task together with a choice of forum are the simplest forms of private regulation.⁶⁴ This is also an easy way of substituting State law that would otherwise be ill-suited to the needs of international trade in general or the transaction in particular. Furthermore, a significant number of international commercial contracts choose to have disputes heard by arbitral tribunals instead of State courts as they can address the parties' concerns related to unfamiliar, inefficient or corrupt court systems more effectively. Although most contracts contain a choice-of-law clause that incorporates national law, arbitrators can also use rules of law or so-called a-national law to adjudicate commercial disputes.⁶⁵ General principles of international trade or the *lex mercatoria* are examples of such non-State rules.⁶⁶

Does that suggest that contracts which provide for dispute resolution by means of international commercial arbitration are a source of autonomous privately made law? Although State courts generally recognise and enforce arbitral awards, that does not mean they endorse their findings as privately made law.⁶⁷ The notion of an autonomous contract regards contract as an institution that functions as an autonomous system of

⁶⁰ Cuniberti (2014) at 475.

⁶¹ The right to individual freedom, equality and dignity and economic freedom (ss 9-12 & 22 of the Constitution 1996) are examples of fundamental values echoed in the general principles underlying the law of SA contract, such as, freedom to contract, private autonomy, public policy, good faith, *boni mores*, reasonableness, fairness etc. See Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Contract: general principles* 5th ed (2016) 11.

⁶² Snyder (2003) at 423.

⁶³ Eiselen (2010) at 98.

⁶⁴ Smits (2015) at 12. However, this could give rise to legal tourism or forum shopping.

⁶⁵ Goode (1997) at 6-7. According to Michaels (2007) at 456, that happens rarely.

⁶⁶ Smits (2015) at 13. Whether State courts would be prepared to recognise a-national law as the governing law of a contract is doubtful. It is also unlikely that non-State law could regulate a contract in full without being supplemented by State law.

⁶⁷ Flanagan PM "Demythologising the law merchant: the impropriety of the *lex mercatoria* as a choice of law" 2004 *International Company and Commercial Law Review* 297 at 300.

law based on the will of the parties.⁶⁸ The autonomous contract, furthermore, derives its legitimacy from the fact that contractual disputes are adjudicated by an independent institutionalised system of arbitrators. Critics of this approach rightly point out that this might explain why an individual contract would be binding on the parties thereto – in other words, a form of self-regulation - but it would not explain why it would function as an autonomous system of law.⁶⁹ Law must have general application and should not merely regulate the behaviour of parties to a particular contract as that would only amount to a form of self-regulation.⁷⁰ Contracts generally obtain their legitimacy from State law through that law's recognition of the principles of party autonomy and freedom of contract. Contract, therefore, cannot function as an autonomous source of law, but only as an institution supplementing State law.⁷¹ At the same time, national law would always supplement contracts, either as default law or as a choice of law. What makes contract efficient as a private form of regulation is that the parties thereto can order their contractual relationship without State intervention by means of private or informal enforcement mechanisms, for example by withholding payment of a final instalment to ensure full performance by the other party, or requiring a deposit before making delivery.⁷² Moreover, a properly drafted contract that is clear on the obligations of the parties can easily and effectively deter disputes and avoid the need for State mechanisms to intervene.

3.2 Standard form contracts

The main aim of standard form contracts is to reduce transaction costs by providing greater legal certainty, and to cater for specific needs.⁷³ For that reason, multinational business corporations regularly make use of standard contracts, together with framework or master contracts, especially in the context of global supply chains. Mostly, standard terms are formulated unilaterally where after they are imposed on the other party to the contract. Consequently, standard form contracts are often criticised for being one-sided, coercive, unfair, or against public policy.⁷⁴ Problems can also arise where both parties to the contract have their own sets of standard terms, especially if those terms are conflicting.⁷⁵ However, if they reflect fair terms of business, these contracts can save time and money and provide a *de facto* legal framework within which the parties can operate.

⁶⁸ Michaels (2007) at 449-450 with reference to Teubner G “Global bukowina’: legal pluralism in the world society” in Teubner G (ed) *Global law without a state* Brookfield: Dartmouth (1997) at 3-28.

⁶⁹ Michaels (2007) at 450. See also Snyder (2003) at 403 & 404-405; Goode R “Rule, practice, and pragmatism in transnational commercial law” (2005) 3 *International and Comparative Law Quarterly* 539 at 547.

⁷⁰ See the distinction made by Snyder (2003) at 401-405.

⁷¹ Goode (2005) at 547-548; Cuniberti (2014) at 375.

⁷² Smits (2015) at 14-15.

⁷³ Snyder (2003) at 423; Maurer (2012) at 5.

⁷⁴ Maurer (2012) at 5.

⁷⁵ This dilemma is commonly referred to as the battle of the forms.

Trade and merchant associations often make use of standard form contracts to codify or standardise the practices, usages and customs of their trades. These contracts are industry driven and restricted to members of that trade or industry.⁷⁶ Unlike standard contracts of private entities, their terms are not formulated by one of the parties to the contract and then imposed on the other, but are made by representatives of the trade or industry for the use of all parties to the contract.⁷⁷ They, furthermore, often provide their own enforcement mechanisms. These create self-regulatory normative frameworks that can operate without intervention of State institutions.⁷⁸ However, despite their elaborate self-regulatory nature, the standard form contracts of major international trade associations in the commodity trade, such as, the Grain and Feed Trade Association (GAFTA) and the Federation of Oils, Seeds & Fats Association (FOSFA), do so within the framework of national law.⁷⁹ Although these standard contracts could be regarded as a source of the *lex mercatoria*,⁸⁰ it is not the intention of major trade associations to move entirely outside State law and create an autonomous normative order of their own.⁸¹

The rules contained in such contracts still operate as contractual terms within the framework of the applicable law of the contract. Although these rules may have the effect of law for the parties to the contract, they merely constitute a form of self-regulation or ordering and do not operate as an autonomous source of law. Unlike these contracts, legal rules are not exclusive to a particular trade but have to be available to everyone.⁸² Furthermore, rules or norms will normally only be dignified as law if they are created through a democratic participatory process in which all stakeholders with competing interests, as well as those who could potentially be affected by the rule, take part in the bargaining process.⁸³ Therefore, where a governing trade association produces the terms of a standard contract unilaterally, it would not qualify as law *per se*. However, for the parties to that contract it provides the legal framework within which they operate.

It is often said that standard form contracts reflect, or even create, international mercantile custom.⁸⁴ However, research conducted in different trades regulated by trade associations found that it is very difficult to identify consistent customs in the

⁷⁶ Cafaggi (2011) at 32.

⁷⁷ Snyder (2003) 405.

⁷⁸ Bernstein L “Merchant law in a merchant court: rethinking the Code’s search for immanent business norms” (1996) 144 *University of Pennsylvania Law Review* 1765 at 1771-1777 & 1818-1820.

⁷⁹ In the case of the GAFTA and FOSFA standard contracts, they exclude the CISG in favour of English law.

⁸⁰ Goode (2005) at 546.

⁸¹ Cuniberti (2014) at 375 & 428. The ICC Model Sales Contract, for example, uses the CISG as the default law of the contract.

⁸² Snyder (2003) at 404-405.

⁸³ That would be closest to the democratic process that affords State law legitimacy. See Schiek (2007) at 452; Maurer (2012) at 5, 7 & 9-11; Snyder (2003) at 432-433.

⁸⁴ Basedow J “The state’s private law and the economy – commercial law as an amalgam of public and private rule-making” (2008) 56 *American Journal of Comparative Law* 703 at 708-709.

trades where they operate.⁸⁵ Furthermore, it was found that their rules rarely reflect customs of the trade but that the trade association formulated such rules for purposes of efficiency. When found to be inadequate, the association will make a point of amending them for future use.⁸⁶ Regular revision makes it difficult for these rules to develop into mercantile custom as such amendments prevent the creation of regularly observed and consistent practices. Furthermore, special tribunals instituted by trade associations seldom rely on unwritten custom to resolve disputes but, instead, make use of the detailed provisions contained in the association's standard form contract.

On the other hand, an independent third party formulates standard contracts of international business organisations, such as those of the ICC. The ICC is an international business organisation that promotes the interests of international business in general. Unlike international trade associations, it does not have an affiliation with a particular trade or industry. Therefore, its contracts neither constitute terms imposed by one contract party on the other, nor are they restricted to certain trades, but they are the result of a participatory process that involves interested parties from different trades and connected sectors. Notwithstanding, views still differ on whether the ICC's standards and guidelines constitute privately made law. The Uniform Customs and Practice for Documentary Credits (UCP), a set of ICC rules that banks consistently contract into, often serves as an example in this regard. One view holds that, as they are wellknown and regularly observed as a method of payment by the majority of traders making use of international documentary credits, they have obtained the status of international commercial custom or trade usage.⁸⁷ Whether that is true for the set of terms as a whole is uncertain, though.⁸⁸ Another view is to regard them as privately made law.⁸⁹ Although some scholars support the latter view,⁹⁰ others have questioned the democratic nature of the ICC's processes. They argue that, in the making of the rules, the organisation does not involve all stakeholders who might potentially be affected by them.

The process is often technical in nature, and often it is merely practitioners in the field and members of the ICC who are responsible for formulating the rules and

⁸⁵ Bernstein L "Merchant law in a modern economy" (2013) *University of Chicago Coase-Sandor Institute for Law and Economics Working Paper No 639 (2nd series)* available at <https://ssrn.com/abstract=2242490> (accessed 9 April 2019) at 2-3.

⁸⁶ Bernstein (1996) at 1775-1779 with reference to the position of the National Grain and Feed Association (NGFA).

⁸⁷ Dalhuisen JH "Custom and its revival in transnational private Law" (2008) 18 *Duke Journal of Comparative and International Law* 339 at 356.

⁸⁸ Goode (2005) at 550. See also Snyder (2003) at 393-394.

⁸⁹ Snyder (2003) at 393. See also Calliess G-P and Jarass IS "Private uniform law and global legal pluralism: the case of ICC's Incoterms and UCP" (2018) *The Dickson Poon School of Law, King's College London, Transnational Law Institute Think! Paper 12/2018* at 21, available at <https://ssrn.com/abstract=3184731> (accessed 9 April 2019).

⁹⁰ Snyder (2003) at 405; Calliess & Jarass (2018) at 14 & 21.

standards.⁹¹ Another opinion holds that there is no need for transnational law to be subjected to the same level of democratic processes required of national law. According to this argument, the normativity of a rule is determined by whether a range of interested parties participated in its creation; that these stakeholders found the rule generally acceptable and agreed on its content; and that there is always an opportunity of revising such rule or norm at a later stage when needed.⁹² Measured by this standard, most instruments formulated by the ICC would qualify as law. However, as the ICC does not have any statutory authority, all of their standard contracts, rules, norms and standards are voluntary in nature and incorporated by agreement. Once agreed to, they are binding on the parties.⁹³ That would mean that, in practice, the ICC's standard forms of contract obtain their legal force through party agreement, unless it can be proven that they constitute mercantile custom or trade usage. Even then, most legal systems will treat them as implied terms of the contract. This can be explained by reference to the ICC's Incoterms® rules.

The prevailing opinion is that the Incoterms® rules operate as standard contract terms.⁹⁴ However, in connection with earlier editions of the rules, scholarly opinion held that the FOB, CIF and CFR Incoterms® rules might constitute international mercantile custom.⁹⁵ Arbitral tribunals also regularly applied them as such.⁹⁶ Courts in the USA almost routinely incorporate the Incoterms® rules as an Article 9(2) international trade

⁹¹ Cafaggi (2011) at 33-34; Cafaggi (2015) at 924.

⁹² See Maurer (2012) at 7 & 10-11 with reference to Ochoa C "The relationship of participatory democracy to participatory law formation" (2008) 15 *Indiana Journal of Global Legal Studies* 5 at 16 and Calliess G-P & Zumbansen P *Rough consensus and running code. A theory of transnational private law* (2010).

⁹³ Cafaggi (2015) at 879.

⁹⁴ Rowe MC "The contribution of the ICC to the development of international trade law" in Horn N & Schmitthoff CM (eds) *The transnational law of international commercial transactions II* (1992) 51 at 51 & 52. See also Eiselen S "Scope of CISG" in LA DiMatteo et al (eds) *International sales law: contract principles & practice* (2016) at 91 at para 15.

⁹⁵ Basedow (2008) at 710; Dalhuisen (2008) at 356; Rowe (1992) at 53; Ramberg J "Incoterms® 2010" (2011) 29 *Penn State International Law Review* 415 at 423.

⁹⁶ China International Economic and Trade Arbitration Commission (CIETAC) Case No CISG/1997/09 of 24 April 1997 available at <http://iicl.law.pace.edu/cisg/case/china-international-economic-trade-arbitration-association-cietac-prc-60> (accessed 14 September 2017); China International Economic and Trade Arbitration Commission (CIETAC) Case No CISG/1997/16 of 25 June 1997 available at <http://iicl.law.pace.edu/cisg/case/china-june-25-1997-translation-available> (accessed 28 July 2017); China International Economic & Trade Arbitration Commission (CIETAC) (PRC) Case No CISG/1999/20 of 7 April 1999 available at <http://iicl.law.pace.edu/cisg/case/china-april-7-1999-translation-available> (accessed 10 November 2017); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce Case No 406/1998 of 6 June 2000 available at <http://iicl.law.pace.edu/cisg/case/russian-federation-june-6-2000-translation-available> (accessed 24 May 2017); The International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry Case No 105/2005 of 13 April 2006 available at <http://iicl.law.pace.edu/cisg/case/russian-federation-april-13-2006-translation-available> (accessed 24 August 2017).

usage where the contract of sale was based on one of the traditional trade terms but the parties failed to indicate its definition.⁹⁷ However, in none of these cases the courts endeavoured to establish whether the Incoterms® rules are widely recognised and applied as international trade usage in order to meet the requirements of Article 9(2) CISG.⁹⁸ As the Incoterms® rules do not simply codify existing mercantile custom but also contain improvements formulated by the ICC due to periodic revisions of the compilation, it is highly improbable that the rules would qualify as international trade custom.⁹⁹ Judges, furthermore, could only apply them as custom if the majority of industries in that particular trade follow such a practice. To establish that would require empirical studies, which do not exist to date. Moreover, whether the mercantile community at large has legitimised the Incoterms® rules as custom, and therefore as law across all trades, would depend on how frequently they are used internationally. In turn, that would be difficult to measure beyond mere anecdotal evidence as surveys on the use of Incoterms® rules are inconclusive on this aspect.¹⁰⁰

One might argue that decisions such as those of the US courts referred to above¹⁰¹ are to be construed as an application of the *lex mercatoria* and therefore as a form of privately made autonomous law. Scholars have also observed that English and German courts tend to apply the Incoterms® rules in a manner similar to the application of statutory law. In their opinion, the rules should be regarded as privately made law of general application.¹⁰² As their content is set out in the ICC's publication, a judge can simply take judicial notice of the Incoterms® rules without any need for proof and therefore imply them by law. In coming to their conclusion, these scholars note the efficiency and effectiveness of the Incoterms® rules. Moreover, unlike customary practices, which are dependent on regular observance in the majority of trades, courts

⁹⁷ *BP Oil International v Empresa Estatal Petroleos De Ecuador*, 332 F.3d 333 (5th Cir 2003), 200 ALR Fed 771, 2003 US App LEXIS 12013; *St Paul Guardian Insurance v Neuromed Medical Systems and Support GmbH*, 2002 WL 465312 (SDNY), No 00 Civ 9344 (SHS), 2002 US Dist LEXIS 5096; *China North Chemical Industries Corporation v Beston Chemical Corporation* Civ A H-04-0912; 200 US Dist LEXIS 35464. See also Switzerland 28 January 2009 Tribunal Cantonal [Appellate Court] available at <http://iicl.law.pace.edu/cisg/case/switzerland-tribunal-cantonal-appellate-court-du-jura-18> (accessed 9 March 2017).

⁹⁸ Johnson WP "Analysis of Incoterms as usage under article 9 of the CISG" (2013) 35 *University of Pennsylvania Journal of International Law* 379 at 409-410 & 414-415.

⁹⁹ Schmidt-Kessel M "Article 9" in Schwenger I (ed) *Schlechtriem & Schwenger Commentary on the UN Convention on the International Sales of Goods (CISG)* 4th ed Oxford: Oxford University Press (2016) at para 27; Ferrari F "Trade usage and practice established between the parties under the CISG" (2003) 5 *International Business Law Journal* 571 at 575-576; Ramberg (2011) at 423.

¹⁰⁰ School of International Arbitration at Queen Mary, University of London "2010 International Arbitration Survey: choices on international arbitration" available at www.arbitration.qmul.ac.uk/media/arbitration/docs/2010InternationalArbitrationSurveyReport.pdf (accessed 9 April 2019), at 15 indicated that on an international scale across various trades, the Incoterms® rules are only used "sometimes". Surveys such as these are limited insofar as it is impossible to include all countries and trades.

¹⁰¹ See fn 97 above.

¹⁰² Calliess & Jarass (2018) at 18-21.

may have a greater discretion to apply international forms of soft law.¹⁰³ As worldwide the Incoterms® rules are the definitions most often used to interpret trade terms,¹⁰⁴ courts can use them as an interpretative tool to establish or supplement the intention of the parties where they contracted on a trade term but failed to incorporate the Incoterms® rules explicitly.

In summary, standard contracts can provide an adequate *de facto* legal framework in contexts where there is little harmonisation or modernisation of the law. Moreover, because they are based on party agreement, they can easily be adapted to changed circumstances.

3.3. Mercantile custom and trade usage

Mercantile custom and trade usage obtain their legitimacy from the fact that they are well-known homogenous practices that exist in a particular trade or geographic location and that those engaged in that trade or region regularly observe them as binding on them. In the context of international sales generic custom is exceptional. If it were to exist as a source of law, stringent requirements must be met. Although these requirements differ from one legal system to the next, the factual existence of a custom or well-established practice (*usus*) and the belief that such practice is binding on its users (*opinio iuris*) are generally required.¹⁰⁵

Most legal systems treat trade usage as implied contract terms. As for the CISG, trade custom or usage prevails over all its provisions. Unless the parties have contracted out, a trade usage which the parties knew or ought to have known and which is regularly observed in international trade will regulate the parties' agreement.¹⁰⁶ Whether that means incorporation by law or through implied agreement is not always that clear. However, it seems that implied agreement would prevail.¹⁰⁷ Other international instruments of unification and harmonisation, such as, the UNIDROIT Principles for International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL), have done away with the requirement of implied knowledge, but they still require that the usage must be regularly applied in that particular trade when doing business internationally.¹⁰⁸ This burden of proof is not always easy to discharge, especially in modern international trade where evolving technology strongly influences mercantile practices.

Developing countries are often sceptical regarding the application of trade usages and customs, especially when that involves the practices of developed countries. The

¹⁰³ Cafaggi F "New foundations of transnational private regulation" (2010) *European University Institute, Robert Schuman Centre for Advanced Studies (RSCAS) Private Regulation Series-04 EUI Working Paper RSCAS 2010/5* at 27.

¹⁰⁴ Johnson (2013) at 386.

¹⁰⁵ Goode (1997) at 4 & 9.

¹⁰⁶ Article 9(2) CISG.

¹⁰⁷ Schmidt-Kessel (2016) at para 13.

¹⁰⁸ Articles 1.9 PICC and 1:105 PECL.

drafting history of Article 9 CISG is testimony to such fears, which resulted in the current compromise provision.¹⁰⁹ It is concluded that, in a developmental context, trade usage would not always be the most efficient instrument due to these negative connotations. Courts, therefore, must be very careful when incorporating a trade usage, and make sure that the usage is indeed well-known and regularly observed to ensure its legitimacy.

3.4 Codes of conduct, international standards, recommendations, guidelines and other private regulatory regimes

Primarily, this category of privately formulated rules is used to address the absence of public regulation or to increase the standard of existing State regulation.¹¹⁰ These rules cover a wide range of topics. However, for purposes of this article the discussion focuses on privately generated rules, norms and standards pertaining to technical, health, safety, labour, environmental and other sustainability matters as they appear in the context of supply chain contracts, especially where one of the parties is situated in a developing country.

To speak to their social responsibilities, multinational corporations often formulate standards and codes of conduct to regulate their own behaviour and that of their employees, suppliers and subcontractors. Very often, these companies adopt the code of conduct as a unilateral declaration in order to meet institutionalised expectations, moral obligations, or to obtain a competitive advantage in attracting customers and employees, but they have no intention that the code will have any legal implications.¹¹¹

However, market pressure from consumers, non-governmental societies and other groups can provide an additional incentive for companies to adopt responsible business practices, and to require the same of their suppliers and other contract parties.¹¹² These standards are then included in framework contracts, or incorporated as sustainability clauses into the terms or conditions of contracts they conclude with suppliers or buyers.¹¹³ Companies can also make use of private international or regional standards and codes, which they then incorporate into their contracts by reference.

It remains debatable whether unilateral personal commitments and undertakings set out in a code of conduct are enforceable, even if contractually incorporated, as it would depend on the intention with which the unilateral obligation was made before it can bind the promisor. National laws hold different views on the unilateral creation of contractual obligations due to different doctrinal concepts regulating this aspect.

¹⁰⁹ See Goldstajn A “Usages of trade and other autonomous rules of international trade according to the UN (1980) Sales Convention” in Sarcevic P & Volken P (eds) *International sale of goods: Dubrovnik lectures* New York: Oceana Publications (1986) 55 at 77-85.

¹¹⁰ McAllister (2014) at 293.

¹¹¹ Beckers (2016) at 10.

¹¹² According to McAllister (2014) at 305, with reference to Vogel D “The private regulation of global corporate conduct: achievement and limitations” (2010) 49 *Business and Society* 68 at 71-72, there are voluntary codes for every global industry and internationally traded commodity.

¹¹³ Beckers (2016) at 17.

However, in the context of international trade law, courts might be prepared to respect legitimate expectations by virtue of promissory estoppel.¹¹⁴ International case law fails to provide a uniform position. It sometimes bends over backwards to pronounce these obligations as binding if addressed to parties who need special legal protection, such as, a company's own employees¹¹⁵ or consumers,¹¹⁶ but the same does not apply to the employees of suppliers, local communities or others affected by non-compliance with a company's undertakings.¹¹⁷

Over time, practices may develop into trade usage. However, where privately produced rules are periodically reviewed they are less likely to ever reach the status of trade usage, and their application would be confined to contract terms. Where these rules are self-regulatory in nature, compliance would largely depend on how transparent a company is about its operations or whether it is assessed externally by another entity, for example, through certification procedures conducted by an independent third party such as a compliance authority, or through peer review.

Corporate codes of conduct may rely on a mixture of national law, international soft law and the specification of autonomous standards, which means they are based on both public and private methods of regulation.¹¹⁸ However, contract remains the main mechanism whereby companies can harden soft law rules contained in codes of conduct and international standardisation codes¹¹⁹ in order to ensure that their employees and suppliers fulfil their duties in accordance with such codes. Presently, the most effective remedy for non-compliance by a supplier lies in informal measures based on reputational sanctions and market pressures, or in private enforcement mechanisms provided in the contract, code of conduct or other formulated standard. Measures focused on compliance and prevention are often far better remedies than traditional breach of contract remedies, such as cancellation and specific performance that provide *ex post facto* relief but do not ensure compliance.¹²⁰ These methods are also better suited for international transactions where the enforcement of judgements in foreign jurisdictions cannot be guaranteed.

¹¹⁴ Beckers (2016) at 14.

¹¹⁵ Beckers (2016) at 15. In ArbG Wuppertal, NZA-RR 2005, 476; LAG Düsseldorf NZA-RR 2006, 81 the German courts argued that Walmart's unilateral code of conduct constituted rights and obligations for its German employees in order to reconcile their legal position with their constitutional rights.

¹¹⁶ Beckers (2016) at 15-16. See also Case C-96/00 *Rudolf Gabriel* [2002] ECR I-06367; Case C-27/02 *Petra Engler v Janus Versand GmbH* [2005] ECR I-00481; Case C-180/06 *Renate Ilsinger v Martin Dreschers* [2009] ECR I-3961. In these cases, the European Court of Justice held that unilateral promises made for marketing purposes can be understood as being of a contractual nature.

¹¹⁷ Beckers (2016) at 16. Note however a positive turn in the recent landmark decision of the UK Supreme Court in *Vedanta Resources PLC v Lungowe* [2019] UKSC 20, based on the duty of care of a parent company towards its subsidiary.

¹¹⁸ Beckers (2016) at 12-13.

¹¹⁹ Beckers (2016) at 12; Cafaggi (2011) at 47.

¹²⁰ Beckers (2016) at 19.

State law should therefore not only recognise the regulatory role of corporations and other private regulators but also the regulatory character of contract.¹²¹ However, in this context, how does one reconcile contract law with the social aims of sustainable development as envisaged by corporate codes of conduct? Traditionally, the role of contract law has been to regulate the intentions of contract parties, whilst the aim of corporate conduct rules is to regulate the public interest.¹²² Furthermore, doctrines of contract law do not account for procedural legitimacy while that is a prerequisite when protecting matters of public interest.¹²³ Where a company unilaterally formulates its code of conduct and thereafter imposes it contractually on its suppliers and other contract parties, the rules might not qualify as procedurally legitimate and could be challenged on that ground.¹²⁴ Moreover, where a company does not comply with its own code of conduct and as a result its own employees, or those of its suppliers, suffer detriment because of human rights abuses or safety compromises, contractual remedies might be to no avail.¹²⁵

The same applies where societies, or the environment, are harmed by the operations of a company or its subsidiaries. In these circumstances, there is no direct contractual relationship between the company and the aggrieved person due to the principle of privity of contract. Consequently, there might be no legal relief based on contract, unless the corporate code explicitly provides remedies therefor.¹²⁶ In general, this would require a re-think of contract law doctrine on third party rights, some innovation, and a willingness on the part of courts to interpret contractual terms with reference to their context and not merely formalistically.¹²⁷ Although external compliance mechanisms are useful to ensure objectivity and impartiality, those that are potentially interested in compliance with the rules, including third parties, must have access to such dispute resolution mechanisms in case of non-compliance, for them to have any effect.¹²⁸

¹²¹ Beckers (2016) at 24-26.

¹²² Beckers (2016) at 20.

¹²³ Beckers (2016) at 21.

¹²⁴ Beckers (2016) at 22. Arguments could, however, be made that requirements of transparency, participation and accountability contradict the principles of party autonomy and privity of contract, and that the former considerations should not play a role once these terms are contractually incorporated.

¹²⁵ See *Doe v Walmart Stores Inc* 527F 3d 677 (9th Cir 2009) where the claim of a supplier's employees was dismissed.

¹²⁶ Beckers (2016) at 19; Cafaggi (2013) at 1568-1569 & 1591-1595. Remedies might be available in tort, or on a construction of agency where the seller acts as agent of the interested party. Other possibilities would be warranties, doctrines for the benefit of third parties, or the principles of unjust enrichment. See also references in fn 114 above where German courts were prepared to assist employees on the basis of constitutional rights.

¹²⁷ Beckers (2016) at 22-23.

¹²⁸ Cafaggi (2015) at 904-8, 931 & 933-934.

Although there are a number of similarities between modern forms of private regulation and custom, there are also distinct differences. Whilst custom develops spontaneously, private regulatory regimes do not arise organically but are formulated in standard contracts, codes of conduct, regulatory contracts, rule books, and other agreements to implement standards. They, therefore, are rules based.¹²⁹ Furthermore, as these forms of private regulation are regularly revised, they will not easily reach the status of custom as that would require homogeneity in practice.¹³⁰ Furthermore, custom harmonises existing business practices, whilst privately generated standards are often “forward-thinking” insofar as they regulate matters that the state has failed to address or addressed inadequately.¹³¹

An inclusive and democratic participatory process could facilitate the legitimacy of rules and standards formulated by industry associations, international agencies or standard setting organisations. However, it does not suffice that the rules alone are the product of democratic processes. In addition, there must be clear procedural rules that apply to compliance and enforcements mechanisms, especially if they are internal processes. Equally problematic are instances where the creation of the enforcement mechanism lacks procedural legitimacy.¹³² However, where the necessary processes were followed in conferring legitimacy on these rules, one can argue that these forms of private regulation are privately made law with the same legal effect and force as State-based law. Even though they would primarily function as soft law, or as implied terms, there might also be room for their application as terms implied by law.

4. CONCLUSION

Non-State actors increasingly generate international rules, norms and standards by which they regulate themselves and which have the effect of law. This article has focused on the role of contract as a vehicle through which private forms of regulation find application in the context of international trade. As they mainly find application as contract terms, and not as autonomous law, private forms of regulation are subject to the applicable law of the contract. This means that they continue to function within the framework of State law, but in supplementation thereof. Private forms of regulation, such as, standard form contracts formulated by trade associations and the private regulatory frameworks set by international standard-setting organisations, often make provision for their own adjudication bodies and enforcement mechanisms to address disputes and ensure compliance outside the traditional structure of the courts through arbitration or other forms of dispute resolution. Once parties have agreed to comply with the rules and standards set by private organisations, they have also agreed to the procedures and processes put in place to ensure compliance. As a result, these contracts become a form of self-regulation or self-ordering. Most legal systems will allow that by

¹²⁹ Cafaggi (2015) at 899-900, 926 & 928; Maurer (2012) at 9.

¹³⁰ Cafaggi (2015) at 899 & 901.

¹³¹ Cafaggi (2015) at 925-927. Transnational private regulation is also capable of fulfilling a harmonisation function where there are different local forms of private regulation in place.

¹³² Beckers (2016) at 22.

virtue of the notions of party autonomy and freedom of contract as long as those contracts do not conflict with applicable mandatory law or public policy.

Private forms of international regulation, however, can only assume the label of privately made law if they are of general application so that they apply to a variety of trades and are capable of also regulating the legal position of parties outside a particular trade. To ensure the legitimacy of privately generated standards, independent standard-setting authorities must follow an inclusionary participatory process that includes all interested parties. Dispute resolution mechanisms must also provide clearly formulated and legitimate procedures. Being soft law, they can only “harden” into law through party agreement, unless a case can be made that the particular example of private regulation reflects or constitutes a custom or trade usage. However, to prove that would not be an easy task, and in most instances it would not meet the requirements for trade usage and custom.

How do private forms of regulation find application in the absence of express contractual incorporation? Contract interpretation could play an important role here. Courts can interpret the contract so that an intention to incorporate these instruments would be implied. In the process, privately generated rules and standards formulated by highly respected and wellknown international trade organisations could be used to establish an “international” interpretation of the terms of the contract.¹³³ However, once incorporated, they would only address the rights and obligations of the parties to the contract and not the rights and obligations of outsiders who are affected by the conduct of those party to the contract. To overcome the limitations brought about by the principle of privity of contract would necessitate a pragmatic and contextual interpretation of sustainability clauses, which supports fundamental human rights, good faith and fair dealing. However, where private forms of regulation obtain their legitimacy in procedures similar to those through which State law is produced, it is suggested that courts should apply them as law, albeit privately made law.

This article has not only identified the importance of contract as a vehicle for private regulation but has also touched on the dual role of contract in modern international commercial practice and sales law. On the one hand, contract law still fulfils its traditional role of regulating the exchange of goods for money. By ordering the parties’ rights and obligations in a manner that addresses the needs of the parties at a private level it can facilitate economic wealth. On the other hand, contract has become a regulatory instrument that seeks to govern in areas which traditionally belonged to public law. In the context of sustainability and social responsibility, contracts function as a regulatory instrument that incorporates private norms, standards and adjudication procedures formulated by international standard setting organisations. In this manner, private forms of regulation govern areas that the default law of contract and State law in general do not address. With some innovation, the legal effect of the privately formulated regimes can be extended to third parties so that these rules and standards

¹³³ See Dalhuisen JH “Globalization and the transnationalization of commercial and financial law” (2015) 67 *Rutgers University Law Review* 40 at 41.

can have the effect of law. As the traditional divide between State and non-State law, as well as between private and public law, is becoming smaller, it necessitates a paradigm shift towards a pluralist legal framework for international sales and commercial law.

BIBLIOGRAPHY

Books

Calliess G-P & Zumbansen P *Rough consensus and running code. A theory of transnational private law* Oxford: Hart Publishing (2010).

Jansen N *The making of legal authority* Oxford: Oxford University Press (2010).

<https://doi.org/10.1093/acprof:oso/9780199588763.001.0001>

Van der Merwe S, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Contract: general principles* 5th ed Cape Town: Juta (2016).

Chapters in books

Berman PS “The evolution of global legal pluralism” in Cotterell R & Del Mar M (eds) *Authority in transnational legal theory: theorizing across disciplines* Cheltenham: Edward Elgar (2016).

Eiselen S “Globalization and harmonization of international trade law” in Faure M & Van der Walt A (eds) *Globalization and private law: the way forward* Cheltenham: Edward Elgar (2010).

Eiselen S “Scope of CISG” in DiMatteo LA et al (eds) *International sales law: contract principles & practice* Baden-Baden: Nomos (2016).

Goldstajn A “Usages of trade and other autonomous rules of international trade according to the UN (1980) Sales Convention” in Sarcevic P & Volken P (eds) *International sale of goods: Dubrovnik lectures* New York: Oceana Publications (1986).

Rowe MC “The contribution of the ICC to the development of international trade law” in Horn N & Schmitthoff CM (eds) *The transnational law of international commercial transactions II* Deventer: Kluwer (1992).

Schmidt-Kessel M “Article 9” in Schwenzler I (ed) *Schlechtriem & Schwenzler Commentary on the UN Convention on the International Sales of Goods (CISG)* 4th ed Oxford: Oxford University Press (2016).

Schmitthoff CM “The unification of the law of international trade” in Cheng J (ed) *CM Schmitthoff’s select essays on international trade law* Dordrecht: Marthinus Nijhoff (1988).

Teubner G “‘Global bukowina’: legal pluralism in the world society” in Teubner G (ed) *Global law without a state* Brookfield: Dartmouth (1997).

Journal Articles

Basedow J "The state's private law and the economy - commercial law as an amalgam of public and private rule-making" (2008) 56 American Journal of Comparative Law 703.
<https://doi.org/10.5131/ajcl.2007.0024>

Berman PS "Global legal pluralism" (2007) 80 Southern California Law Review 1155.

Bernstein L "Merchant law in a merchant court: rethinking the Code's search for immanent business norms" (1996) 144 University of Pennsylvania Law Review 1765.
<https://doi.org/10.2307/3312639>

Büthe T "Private regulation in the global economy: A (p)review" (2010) 12 Business and Politics 1.
<https://doi.org/10.2202/1469-3569.1328>

Cafaggi F "The many features of transnational private rule-making: unexplored relationships between custom, *jura mercatorum* and global private regulation" (2015) 36 University of Pennsylvania Journal of International Law 875.
<https://doi.org/10.2139/ssrn.2636359>

Cafaggi F "The regulatory functions of transnational commercial contracts new architectures" (2013) 36 Fordham International Law Journal 1557.
<https://doi.org/10.2139/ssrn.2153096>

Cafaggi F "New foundations of transnational private regulation" (2011) 38(1) Journal of Law and Society 20.
<https://doi.org/10.1111/j.1467-6478.2011.00533.x>

Cuniberti G "Three theories of *lex mercatoria*" (2014) 52 Columbia Journal of Transnational Law 369.

Dalhuisen JH "Custom and its revival in transnational private law" (2008) 18 Duke Journal of Comparative and International Law 339.

DiMatteo LA "Soft law and the principle of fair and equitable decision making in international contract arbitration" 2013 Chinese Journal of Comparative Law 221.
<https://doi.org/10.1093/cjcl/cxt013>

Ferrari F "Trade usage and practice established between the parties under the CISG" (2003) 5 International Business Law Journal 571.

Flanagan PM "Demythologising the law merchant: the impropriety of the *lex mercatoria* as a choice of law" 2004 International Company and Commercial Law Review 297.

Goode R "Rule, practice, and pragmatism in transnational commercial law" (2005) 54(3) *International and Comparative Law Quarterly* 539.

<https://doi.org/10.1093/iclq/lei017>

Goode R "Usage and its reception in transnational commercial law" (1997) 46(1) *International and Comparative Law Quarterly* 1.

<https://doi.org/10.1017/S0020589300060097>

Johnson WP "Analysis of Incoterms as usage under article 9 of the CISG" (2013) 35 *University of Pennsylvania Journal of International Law* 379.

Kjaer PF "From the private to the public to the private? Historicizing the evolution of public and private authority" (2018) 25(1) *Indiana Journal of Global Legal Studies* 13.

<https://doi.org/10.2979/indjglolegstu.25.1.0013>

Levit JK "A bottom-up approach to international lawmaking: the tale of three trade finance instruments" (2005) 30 *Yale Journal of International Law* 125.

Maniruzzaman AFM "The lex mercatoria and international contracts: a challenge for international commercial arbitration" (1999) 14 *American University International Law Review* 657.

McAllister LK "Harnessing private regulation" (2014) 3 *Michigan Journal of Environmental and Administrative Law* 291.

<https://doi.org/10.2139/ssrn.2315253>

Michaels R "The true lex mercatoria: law beyond the state" (2007) 14 *Indiana Journal of Global Legal Studies* 447.

<https://doi.org/10.2979/gls.2007.14.2.447>

Ochoa C "The relationship of participatory democracy to participatory law formation" (2008) 15 *Indiana Journal of Global Legal Studies* 5.

<https://doi.org/10.2979/gls.2008.15.1.5>

Quinn PS "Regulation in the shadows of private law" (2018) 28 *Duke Journal of Comparative & International Law* 327.

Ramberg J "Incoterms® 2010" (2011) 29 *Penn State International Law Review* 415.

Scheltema M "Balancing public and private regulation" (2016) 12(1) *Utrecht Law Review* 16.

<https://doi.org/10.18352/ulr.323>

Schiek D "Private rule-making and European governance - issues of legitimacy" (2007) European Law Review 443.

Schwartz A & Scott RE "Contract theory and the limits of contract law" (2003) 113 The Yale Law Journal 541.

<https://doi.org/10.2307/3657531>

Snyder DV "Private lawmaking" (2003) 64 Ohio State Law Journal 371.

<https://doi.org/10.2139/ssrn.397301>

Vogel D "The private regulation of global corporate conduct: achievement and limitations" (2010) 49 Business and Society 68.

<https://doi.org/10.1177/0007650309343407>

Yuan B "A law and economics approach to norms in transnational commercial transactions: incorporation and internalisation" (August 2016) 1 Erasmus Law Review 5.

<https://doi.org/10.5553/ELR.000064>

Treaties and Conventions and other International Documents

2030 United Nations Agenda for Sustainable Development UN Doc A/Res/70/1.

Principles of European Contract Law (PECL).

UNCITRAL Model Law on Electronic Commerce (1996).

UNIDROIT Principles of International Commercial Contracts (PICC).

United Nations Convention on Contracts for the International Sale of Goods (1980).

Case law

ArbG Wuppertal, NZA-RR 2005, 476.

BP Oil International v Empresa Estatal Petroleos De Ecuador 332 F 3d 333 (5th Cir 2003), 200 ALR Fed 771, 2003 US App LEXIS 12013.

Case C-180/06 *Renate Ilsinger v Martin Dreschers* [2009] ECR I-3961.

Case C-27/02 *Petra Engler v Janus Versand GmbH* [2005] ECR I-00481.

Case C-96/00 *Rudolf Gabriel* [2002] ECR I-06367.

China International Economic and Trade Arbitration Commission (CIETAC) Case No CISG/1997/09 of 24 April 1997 available at <http://iicl.law.pace.edu/cisg/case/china-international-economic-trade-arbitration-association-cietac-prc-60> (accessed 14 September 2017).

China International Economic and Trade Arbitration Commission (CIETAC) Case No CISG/1997/16 of 25 June 1997 available at <http://iicl.law.pace.edu/cisg/case/china-june-25-1997-translation-available> (accessed 28 July 2017).

China International Economic & Trade Arbitration Commission (CIETAC) (PRC) Case No CISG/1999/20 of 7 April 1999 available at <http://iicl.law.pace.edu/cisg/case/china-april-7-1999-translation-available> (accessed 10 November 2017).

China North Chemical Industries Corporation v Beston Chemical Corporation Civ A H-04-0912; 200 US Dist LEXIS 35464.

Doe v Walmart Stores Inc 527F 3d 677 (9th Cir 2009).

LAG Düsseldorf NZA-RR 2006, 81.

Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce Case No 406/1998 of 6 June 2000 available at <http://iicl.law.pace.edu/cisg/case/russian-federation-june-6-2000-translation-available> (accessed 24 May 2017).

The International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry Case No 105/2005 of 13 April 2006 available at <http://iicl.law.pace.edu/cisg/case/russian-federation-april-13-2006-translation-available> (accessed 24 August 2017).

St Paul Guardian Insurance v Neuromed Medical Systems and Support GmbH, 2002 WL 465312 (SDNY), No 00 Civ 9344 (SHS), 2002 US Dist LEXIS 5096.

Switzerland 28 January 2009 Tribunal Cantonal [Appellate Court] available at <http://iicl.law.pace.edu/cisg/case/switzerland-tribunal-cantonal-appellate-court-du-jura-18> (accessed 9 March 2017).

Vedanta Resources PLC v Lungowe [2019] UKSC 20.

Internet and other sources (Working papers)

Beckers A “Regulating corporate regulators through contract law? The case of corporate social responsibility” 2016 *EUI Working Papers Max Weber Programme (MWP) 2016/12* available at <https://ssrn.com/abstract=2789360> (accessed 9 April 2019).

Bernstein L “Merchant law in a modern economy” (2013) *University of Chicago Coase-Sandor Institute for Law and Economics Working Paper No 639 (2nd series)* available at <https://ssrn.com/abstract=2242490> (accessed 9 April 2019).

Cafaggi F “New foundations of transnational private regulation” (2010) *European University Institute, Robert Schuman Centre for Advanced Studies (RSCAS) Private Regulation Series-04 EUI Working Paper RSCAS 2010/53*.

Calliess G-P and Jarass IS “Private uniform law and global legal pluralism: the case of ICC’s Incoterms and UCP” (2018) *The Dickson Poon School of Law, King’s College London, Transnational Law Institute Think! Paper 12/2018* available at <https://ssrn.com/abstract=3184731> (accessed 9 April 2019).

Mak V “Private actors as norm-setters. On new legal pluralism in European regulatory private law and how to manage it” 2015 *Tilburg Law School Legal Studies Research Paper Series No. 02/2015* available at <https://ssrn.com/abstract=2566672> (accessed 9 April 2019).

Mak V “Who does what in European private law – and how is it done? An experimentalist perspective” 2017 *Tilburg Private Law Working Paper Series No 05/2017* available at <https://ssrn.com/abstract=2958146> (accessed 9 April 2019).

Maurer A “The creation of transnational law – participatory legitimacy of privately created norms” (2012) *Center for Transnational Studies (ZenTra) of the Universities of Bremen and Oldenburg Working Papers in Transnational Law No 03/2012* available at <https://ssrn.com/abstract=2179584> (accessed 9 April 2019).

School of International Arbitration at Queen Mary, University of London “2010 International Arbitration Survey: choices on international arbitration” available at www.arbitration.qmul.ac.uk/media/arbitration/docs/2010InternationalArbitrationSurveyReport.pdf (accessed 9 April 2019).

Smits J “The future of contract law in Europe” (2015) *Maastricht European Private Law Institute Working Paper No 2125/2* available at <https://ssrn.com/abstract=2566149> (accessed 9 April 2019).