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Reimagining usages of international trade in the era of artificial intelligence (AI)†

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Abstract

Trade usages are a pivotal building block in international commercial law. Besides serving as a useful tool to aid interpretation of commercial contracts, trade usages, depending on the applicable laws and rules, are frequently deemed binding on the parties, even in the absence of the parties' knowledge or awareness. The normative value that tends to be assigned to trade usages is justified on various grounds, including that the community of traders, and not the legislator(s), is in the best position to formulate the most efficient rules to govern the traders' transactions. Nevertheless, trade usages have been exposed to various forms of criticism, including that, in practice, their existence is difficult to prove and that courts and arbitral tribunals have been willing to accept the existence of trade usages based on flimsy evidence. This article first explores the very concept of trade usages, focusing on the following questions: (i) how are trade usages defined, if at all; (ii) what is the theoretical foundation of trade usages; (iii) what justifies assigning normative value to trade usages; and (iv) what are the critiques directed towards trade usages? Second, the article explores the possibility of relying on artificial intelligence technology in order to maximize the efficiency of usages of international trade.

I. Introduction

Trade usages have come to play a significant role in international commerce. One of their prominent functions has been to act as a tool for interpreting and supplementing contracts.[1] In some legal regimes, trade usages have even attained a legally binding effect on the parties irrespective of the parties' actual knowledge.[2] Moreover, one can encounter arguments, both in case law and in literature, that unification and harmonization efforts embodied in instruments such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts 2016 (PICC 2016) reflect usages of international trade.[3]

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1 Edgardo Muñoz, 'Soft Law Instruments as Usages of Trade in CISG Contracts and International Commercial Arbitration' (2021) 50 *UCC Law Journal* 1. The author notes that 'usages of trade have traditionally played a contract's supplementation role'.

2 This approach is reflective of the objective theory of trade usages, and is discussed in detail in section II.2.B together with the examples of legal instruments enshrining this theory.

3 Muñoz (n 1) 1. Muñoz observes that '[c]ase law and academic contributions exist in which the PICC have been qualified as trade usages in their entirety'. CISG as Reflection of Trade Usages Case (Final Award), 1989

In terms of how trade usages are generally viewed in the literature, one can observe three camps. The first camp includes authors who bestow praise upon trade usages. They argue that trade usages have shaped the modern-day commercial law and that traders rely on them for seamless contracting. Leonardo Graffi's remarks on trade usages perfectly capture the stance of this scholarly camp:

> Usages and practices tend to be dignified by the business community with a status equivalent to that of actual law. As a matter of fact, many business persons often tend to regard trade usages and business practices as very powerful tools to ensure the stability of their bargain and, at times, transact business solely based on such usages and practices, without any written contract.[4]

The second camp acknowledges the usefulness and significance of trade usages but expresses concern in terms of how usages are proven. This camp argues that courts and arbitral tribunals have been willing to find usages to exist when the evidence for this was flimsy at best.[5] Consequently, this camp of scholars favours stricter scrutiny by decision-makers when deciding on the existence of trade usages. The third camp is populated by sceptics who go as far as opining that trade usages are simply a fiction and that traders actually prefer to contract on express contract terms rather than to rely on supposedly non-existent trade usages.[6]

The aim of this article is twofold. First, the article seeks to unpack the very concept of trade usages. How are trade usages defined, if at all? How do they become binding on the parties, and more specifically, how do they attain normative value? What categories of trade usages exist? What is their significance, and what criticism is generally directed at them? All of these questions will be addressed in section II of the article, with the focus being on the international context. Second, the article explores how artificial intelligence (AI) could be used to make usages of international trade more efficient, while in the process also addressing any reasonable criticisms discussed in section II. Section III of the article outlines a proposed AI model specifically designed for this purpose. This model would assist traders not only by providing reliable evidence on the existence and nature of trade usages but also by simplifying and expediating the way in which traders themselves create new, and (re)shape the existing, usages of international trade.

II. Unpacking the concept of 'trade usage'

1. Definition

There does not exist a universally accepted definition of the term 'trade usage'.[7] As a result, many legal instruments, including the CISG,[8] avoid putting forth a definition, allowing

(5713). In this award, the tribunal 'finds that there is no better source to determine the prevailing trade usages than the terms of the [CISG]'.

[4] Leonardo Graffi, 'Remarks on Trade Usages and Business Practices in International Sales Law' (2011) 59 *Анали Правног факултета у Београду* 102.

[5] Djakhongir Saidov, 'Trade Usages in International Sales Law', *Research Handbook on International and Comparative Sale of Goods Law* (Edward Elgar Publishing 2019) 96.

[6] Lisa Bernstein, 'The Myth of Trade Usages: A Talk' (2017) 23 Barry L. Rev. 119. Lisa Bernstein, 'Custom in the Courts' (2015) 110 *Nw. UL Rev.* 63.

[7] Juana Coetzee, 'The Role and Function of Trade Usage in Modern International Sales Law' (2015) 20 *Uniform Law Review* 249. Coetzee notes as follows: 'Comparative analysis shows that it is no easy task to define trade custom and usage. Custom is a vague concept that, on the one hand, is used as a synonym for trade usage or practice, while, on the other, they are used in different contexts and meanings.'

[8] Article 9 of the CISG deals with usages, and it provides as follows: '(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.'

instead the courts and arbitral tribunals to set the boundaries of its meaning and scope. Besides the CISG, this approach is followed, for instance, in the PICC 2016, the Principles of European Contract Law (PECL), and the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on International Commercial Arbitration (Model Law on ICA).[9] Examples of this approach are widespread at the national level as well. For instance, the German Commercial Code (*Handelsgesetzbuch* (*HGB*)), in section 346, simply provides that '[m]erchants are to give consideration, in light of the significance and effect of actions and omissions, to prevailing commercial customs and usages'.[10]

In contrast, some legal instruments do attempt to provide a precise definition of the term. The Unform Commercial Code (UCC) in the United States is an illustration of this approach. The term 'usage of trade' is used in section 1-303(c), which provides as follows:

> 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 must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.[11]

Scholars have been more than willing to offer at least some definition of the term. Thus, Martin Schmidt-Kessel, in the now seminal *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, simply observes that '[t]rade usages are accordingly rules of commerce which are regularly observed by those involved in a particular industry or marketplace'.[12] Juana Coetzee offers a more elaborate definition, noting as follows:

> Despite a lack of clear definition, it can be concluded that trade usage constitutes unwritten practices or patterns of behaviour that have originated in a particular trade or industry, have been in existence for a long time, are well known and are widely and regularly observed by merchants who engage in that trade or industry.[13]

In *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* by Stefan Kröll, Loukas A. Mistelis, and Maria del Pilar Perales Viscasillas, a

[9] PICC 2016 in its Article 1.9, in the same vein as the CISG, states what the role of usages shall be, but it does not provide a definition: '(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.' The same approach is followed in PECL (Article 1:105: Usages and Practices): '(1) The parties are bound by any usage to which they have agreed and by any practice they have established between themselves. (2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable.' UNCITRAL Model Law on International Commercial Arbitration (United Nations documents A/40/17, Annex I and A/61/17, Annex I). Article 28 (4) provides as follows: 'In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.'

[10] Commercial Code (*Handelsgesetzbuch—HGB*) in the revised version published in the *Bundesgesetzblatt* (*BGBl.*, Federal Law Gazette), Part III, Section 4100-1, Book 1, as amended by Article 11 of the Act of 18 July 2017 (Federal Law Gazette Part I p. 2745), Book 2, as amended by Article 14 of the Act of 22 December 2020 (Federal Law Gazette Part I p. 3256), Book 3, as amended by Article 5 of the Act of 7 August 2021 (Federal Law Gazette Part I p. 3311), Book 4, as amended by Article 184 of the Act of 19 June 2020 (Federal Law Gazette Part I p. 1328) and Book 5, as amended by Article 184 of the Act of 19 June 2020 (Federal Law Gazette Part I p. 1328).

[11] Uniform Commercial Code (UCC), Article 1, General Provisions (2001), Part 3, § 1-303.

[12] Martin Schmidt-Kessel, 'Article 9', *Commentary on the UN Convention on the International Sale of Goods* (4th edition, Oxford University Press 2015) 183.

[13] Coetzee (n 7) 249.

suggestion is made to draw on the definitions from the corresponding concepts found in national laws.[14] While noting that the interpretation of the term 'usage' must be carried out in the spirit of Article 7(1) of the CISG—that is, internationally and autonomously—the author also observes that 'there are domestic definitions and conditions for usages that might be considered to embody the same concepts as the term ["]usage["] within the Convention'.[15]

2. Normative value of trade usages

Trade usages are generally bestowed upon with normative value. In other words, they are meant to guide the behaviour of the contracting parties, and, what is more, they are deemed to acquire a binding effect. In terms of how trade usages become binding on the parties, different theories are advanced in the literature. The ensuing subsections discuss these theories on trade usages in greater detail.

A. Subjective versus objective theory of trade usages

On the most general level, one can observe two theories of trade usages: subjective theory and objective theory. Subjective theory holds that trade usages are only binding on the parties if they agree that the usages shall be applicable to their transaction.[16] Thus, the ultimate power to grant normative value to usages as per the subjective theory lies with the parties themselves. A rather significant implication of this approach is that those trade usages with which the parties are unfamiliar can never become binding on them.[17] The subjective theory of trade usages was generally preferred by the socialist countries, with some keeping their adherence to the subjective theory of usages even after transition to democracy and market economy—examples being Serbia and Bosnia and Herzegovina.[18] The Law on Obligations of Serbia provides as follows in Article 1107(3):

> If general or special usage or other trade practices and customs are contrary to the dispositional norms of the present Law, the provisions of the present Law shall apply, unless the parties have expressly stipulated the application of usage, or other trade practices and customs.[19]

The polar opposite of subjective theory—the objective theory—advances the position that trade usages are binding on the parties if they are deemed to constitute a legal norm, and consequently, even usages unknown to the parties would be of relevance for their

[14] Pilar Perales Viscasillas, 'Article 9', *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* (2nd edition, Beck 2018) 169.

[15] Ibid.

[16] Ch. Pamboukis, 'The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods' (2005) 25 *JL & Com*. 108-109; Tea Hasić, 'Običaji kao izvor trgovačkog prava' (2014) 30 *Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta JJ Strossmayera u Osijeku* 242–3.

[17] Ibid.

[18] Hasić (n 16) 242. Hasić notes that the subjective concept of trade usages was enshrined in the Law on Obligations (1978). Her remarks are made in relation to Croatia, which, just like Serbia and Bosnia and Herzegovina, used to be part of the Socialist Federal Republic of Yugoslavia. The Law on Obligations (1978) was a federal law, and after the dissolution of Yugoslavia, the newly formed States took over the Law on Obligations (1978) as their own legislation. In the meantime, Croatia adopted a new Law on Obligations in 2005 that departed from the subjective theory of usages. In contrast, Serbia and the constituent Entities of Bosnia and Herzegovina still adhere to the Law on Obligations (1978) and its subjective theory of trade usages.

[19] Law on Obligations ('Sl. list SFRJ', br. 29/78, 39/85, 45/89 - odluka USJ i 57/89, 'Sl. list SRJ', br. 31/93, 'Sl. list SCG', br. 1/2003 - *Ustavna povelja i* '*Sl. glasnik RS*', br. 18/2020). The text used here is a translation by Đurica Krstić and obtained via the official website of the Ministry of Justice of Serbia: <https://mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf>. The text is practically verbatim the same in the Laws of Obligations of the Entities of which the countries is comprised: the Federation of Bosnia and Herzegovina and the Republic of Srpska.

transaction.[20] For instance, let us assume that two parties—Party A and Party B—are unfamiliar with a particular trade usage, and only after the contract is concluded does Party A become aware of its existence. After carefully studying the contents of this trade usage, Party A realizes that its application would be in their interest. Moreover, the contract contains no provision that purports to deal with a contingency for which the trade usage in question provides a rule. This means that there is no conflict between the trade usage and the expressly agreed upon contract terms. In this scenario, Party B, who is unaware of the existence of the trade usage, would end up being bound by it provided that the trade usage represents a legal norm.

The PICC 2016 as well as PECL navigate towards the objective theory in their approaches to trade usages. Both Article 1.9(2) of the PICC 2016 and Article 1:105(2) of the PECL simply provide that parties are bound by usages of trade, and they proceed by putting forth criteria for determining whether a particular trade usage constitutes a legal norm.[21] Thus, the PICC 2016 require that the trade usage be 'widely known to and regularly observed in international trade by parties in the particular trade concerned'.[22] As for the PECL, it sets the condition that 'persons in the same situation as the parties' need to perceive the usage as generally applicable.[23] What is important to note is that both the PICC 2016 and the PECL provide the decision-maker with an escape route from applying the usage, and that is when its application would be deemed as unreasonable.[24] However, neither the PICC 2016 nor the PECL take into account the knowledge of the parties to the transaction, thus opening the path for the application of trade usages unknown to the parties.

The approach to trade usages in the CISG is not easy to classify into either the subjective or into the objective theory. Article 9(1) of the CISG, on its own, embodies the subjective theory, since it states that the parties shall be bound by the usages upon which they have agreed. However, it is Article 9(2) that complicates the classification of the CISG's approach to trade usages. It states that parties will be considered to have impliedly made applicable trade usages to their contract provided that certain conditions are met. The first condition is the one of knowledge—the parties either have to know of the usage or they ought to have known about it. The second condition is that the usage must be widely known and regularly observed in international trade. The assessment of whether a usage is known and regularly observed in international trade is not to be made from a general perspective. Instead, the assessment should be conducted in relation to other parties who conclude the same type of a contract in the same line of trade or industry.

While Article 9(2) of the CISG purportedly does not make the usages binding on the parties directly, it does so through a legal fiction. More precisely, Article 9(2) creates a presumption that, when the conditions laid out above are met, the parties have impliedly agreed to trade usages. There is, thus, no need to examine the acts and interactions of the parties to determine whether an implied agreement was indeed reached; the CISG itself presumes such an implied agreement. The implication of this is that the parties who do not know of a trade usage may end up being bound by it as a result of Article 9(2) of the CISG. One could argue that the difference between this approach and an outright adherence to objective theory of trade usages seems to be of cosmetic nature at best; their appearance seems vastly dissimilar, but what hides behind different make-ups is not that much different. Consequently, in the literature, one can find a variety of views stemming from those where the approach to trade usages in the CISG nominally reflects subjective theory to

[20] Pamboukis (n 16) 108–9; Hasić (n 16) 242–3.
[21] For the full Article 1.9 of the PICC 2016 and Article 1:105 of the PECL, see note 9.
[22] Ibid.
[23] Ibid.
[24] Ibid.

those where it is a mix of the two theories, and going as far as opining that, in essence, the CISG reflects the objective theory of trade usages.[25]

The disparity between the subjective and objective theories of usage is simply the beginning of what is, in essence, a rather complex quest for an explanation—or, rather, justification—for how trade usages become binding on the parties. The ensuing subsections paint a more detailed picture of different approaches to how usages are transformed into legal norms.

B. Trade usages as custom

One theory posits that usages of international trade are akin to rules of customary international law, with the binding effect stemming from the perception of the members of the trading community that the usages are binding on them.[26] For a rule to be considered as legally binding under customary international law, it is generally accepted that such a rule must fulfil two conditions: (i) the rule in question must be observed as a matter of general practice and (ii) the rule must be observed because those entities whose behaviour the rule is intended to regulate or govern perceive it as legally binding (*opinio juris*).[27] Traditionally, strong views have been espoused that usages of international trade ought to fulfil the same criteria as any other rule of customary international law in order to acquire a binding effect.[28] If we were to accept this approach, then to show that a trade usage in international trade actually exists, one would have to demonstrate that a particular course of action is taken by traders as a matter of general practice in given scenarios, and that they do so not merely as a matter of convenience or courtesy towards their counterparts but because they deem it as a legal obligation. Thus, any normative value of trade usages, as per this approach, would follow from a sense of obligation nourished by the community of traders.

The approach described here is influential in many national legal systems, including that of England. Under English law, while the normative value of trade usages is implied via the parties' contract, there is one requirement that must be met before such an implication shall take place, and that is that the usage in question must be perceived by its users as a binding rule.[29] The English approach was succinctly encapsulated by Lord Justice Slade in *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria*:

> There is, however, the world of difference between a course of conduct that is frequently, or even habitually, followed in a particular commercial community as a matter of grace and a course which is habitually followed because it is considered that the parties concerned have a legally binding right to demand it.[30]

The general criticism directed at custom may be extended to the notion that trade usages ought to be equated with custom—namely, the *opinio juris* element of custom is often critiqued as constituting a circularity or simply amounting to a paradox.[31] If one has a correct

[25] Pamboukis (n 16) 108–9. Hasić (n 16) 242–5. Coetzee (n 7) 245. Patrick X. Bout, 'Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods' [1998] Pace Essay Submission. The author (citing Fritz Enderlein and Dietrich Maskow, *Kommentierung der Konvention der Vereinten Nationen über Verträge über den internationalen Warenkauf vom 11.4.1980* in *Internationales Kaufrecht* (1991) 68) notes that 'the solution of [A]rticle 9(2) CISG resembles mostly the objective theory'.

[26] Roy Goode, 'Usage and Its Reception in Transnational Commercial Law' (1997) 46 *International & Comparative Law Quarterly* 8.

[27] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* (9th edition, Routledge 2022) 35–48.

[28] Goode (n 26) 8.

[29] *Cunliffe-Owen v Teather & Greenwood* [1967] 1 *WLR* 1421, 1438; *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] QB 856, 874 (Slade LJ); Coetzee (n 7) 251–2. Coetzee observes that a similar approach can be discerned in Italian and Estonian law as well as the law of the Philippines.

[30] *General Reinsurance Corp v Försäkringsaktiebolaget Fennia Patria* (n 29).

[31] Goode (n 26) 9.

perception that an existing custom is legally binding, then an argument can be put forth that such perception is superfluous.[32] If, however, there is an entirely erroneous belief that a particular conduct is expected because it is ostensibly legally binding, then such an erroneous belief would consequently elevate a non-binding expectation to a legally binding norm.[33] Moreover, given that *opinio juris* is concerned with the state of mind of a group to which a particular custom purportedly applies, proving it in practice may be a daunting task.[34] As a consequence of these critiques, the trend in some jurisdictions and legal regimes has been to dispense with the *opinio juris* requirement altogether in connection with trade usages.[35]

C. Trade usages without *opinio juris*

The law may simply bestow upon the usages of trade a normative value by unequivocally stating that the parties shall be bound by them.[36] This is the approach that is, for example, enshrined in the PICC 2016.[37] As noted above, the PICC 2016 states that the parties are bound by usages that are 'widely known' and 'regularly observed'.[38] There is no mention that the users of the relevant trade usages must deem them as legally binding. The answer in the positive to the question of whether a trade usage is widely known and regularly observed elevates that usage to the level of a legal norm because that is the result expressly prescribed by the applicable legal rule.

Dispensing entirely with the *opinio juris* has been met with some sharp criticism in the literature, with the following passage from Roy Goode's article eloquently encapsulating the disapproving sentiment:

> [T]hey fail to distinguish usage observed as binding from usage followed purely as a matter of habit, courtesy or convenience or simply a desire to accommodate one's business counterparty voluntarily where this is not detrimental to one's own interests. Clearly there must be some perception of obligation, even if it is not obligation in the full legal sense of that which has been ordained by law. Perhaps the most satisfactory way of capturing the element of obligation without reference to law is to say that the usage relied on must be one which is considered by the relevant mercantile community to bear on the making, proof, interpretation, performance or enforcement of the parties' commercial engagements towards each other.[39]

The PECL reflects the criticism of the approach to dispense with the *opinio juris* entirely. Hence, the PECL makes those usages binding that 'would be considered generally applicable by persons in the same situation as the parties'.[40] The expression 'generally applicable' denotes that the users of a trade usage perceive it to be of relevance in concrete scenarios, but they do not necessarily have a perception that the trade usage is binding on them. In

[32] Ibid.

[33] Ibid.

[34] Saidov (n 5) 103.

[35] Uniform Commercial Code (n 11). A prominent example of this approach can be found in the Uniform Commercial Code in the United States.

[36] Ibid. § 1-303(e) establishes a hierarchy in case there is a conflict between an express term in the contract, course of performance, course of dealing, and usage of trade: 'Except as otherwise provided in subsection (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable: (1) express terms prevail over course of performance, course of dealing, and usage of trade; (2) course of performance prevails over course of dealing and usage of trade; and (3) course of dealing prevails over usage of trade.'

[37] For the full Article 1.9 of the PICC 2016, see note 9.

[38] Ibid.

[39] Goode (n 26) 10.

[40] For the full Article 1:105 of the PECL, see note 9.

other words, the threshold 'generally applicable' as opposed to 'legally binding' seems to be one that is lower, and thus easier to satisfy in practice.

D. Trade usages as contractual terms

Another view is to give normative value to trade usages as contractual terms.[41] Under this approach, the requirement of *opinio juris* may be dispensed with, and the focus is on the regular observance of a trade usage.[42] If a particular trade usage is regularly observed in international trade in general, or within niche sectors of international trade, then the parties wishing to give effect to it may either (i) expressly agree that they will observe that trade usage; or (ii) they can impliedly agree to do so—for example, by mutually engaging in a conduct that constitutes a trade usage. This scenario presupposes that the parties know of the existence of a trade usage, and they proactively decide to integrate a trade usage into their contractual arrangement, thus assigning a normative value to it, but only between themselves. Moreover, this approach, in essence, would be a quintessential reflection of the subjective theory of usage.[43]

In this context, one may be inclined to question the utility of distinguishing between the general contract terms and those that are deemed as trade usages. After all, the normative value of both is exactly the same since they form part of the contractual arrangement on equal footing, and they do so as a result of a pro-active and informed action by the parties to the contract. Nevertheless, the fact of the matter remains that the usage is widely observed in the parties' line of trade (or even trade in general) and has withstood the test of time as the optimal solution in a given trade scenario. In contrast, other terms in the contract do not enjoy such a status, and may even be peculiar to one specific transaction, never to be repeated again.

However, a more pertinent question is how to deal with a situation in which the parties are unaware of a trade usage? Are they still bound by it? If one perceives trade usages as being akin to customary international law, then the parties' knowledge of usages is irrelevant. The parties are bound by them just as they would be by any other legally binding rule. This does not hold water if trade usages are deemed to extract their normative value by virtue of being contractual terms. A way to overcome this problem is to rely not on the actual knowledge of the parties but on their constructive knowledge.[44] The question thus becomes whether the parties ought to have known about the existence of a particular trade usage that is of relevance to their contractual arrangement. If the answer is in the positive, the presumption is made that the parties would have incorporated such usage had they known about it, and through this legal fiction, the usage is then deemed implied in the parties' agreement.[45] The rationale for this is that the role of law ought to be to uphold the commercial parties' reasonable expectations.[46] A party entering into a transaction would be

[41] Coetzee (n 7) 249–50. Coetzee notes that '[c]ourts mostly recognize trade usage on the basis of implied agreement'. Goode (n 26) 7–8. Goode states that one theory on unwritten trade usage is that 'it takes effect as an implied term of a contract'.

[42] Goode (n 26) 9–10.

[43] Peter J. Mazzacano, 'Harmonizing Values, Not Laws: The CISG and the Benefits of a Neo-Realist Perspective' (2008) *NJCL* 23. Mazzacano reiterates in line with other authors that, according to subjective theory, 'usages can only be applicable if parties have agreed to them'.

[44] Goode (n 26) 10. Juana Coetzee, 'Trade Usage: Still Law Made by Merchants for Merchants?' (2016) 28 *SA Mercantile Law Journal* 85. Coetzee notes that '[n]ational laws normally sanction the use of trade usage on the basis of the parties' assumed or constructive knowledge of such usage, on condition that certain requirements are met'. She goes on by observing that '[i]nternational instruments regulating international commerce [e.g., CISG and PICC] also recognise the binding effect of agreed usages and practices established between contractual parties on the basis of party autonomy and freedom of contract'.

[45] Ibid.

[46] Saidov (n 5) 96. Saidov explains the relationship between the modern commercial law and trade usages as follows: '[M]odern commercial law regimes continue to recognise and enforce TUs [ie, trade usages] in order to promote commerce by meeting the business persons' needs and expectations. As a creature of the business community, a TU is seen as an important source of identifying and channeling such expectations into commercial

reasonable in their expectation that the usages of trade, given their widespread acceptance and presumptive superiority as rules for given scenarios, would be honoured by their contracting counterpart(s). The law then takes upon itself to be the conduit for streamlining the parties' expectations, thus contributing to efficient contracting.[47] This approach, as already noted earlier in the text, is reflected in the CISG.

E. Trade usages as part of *lex mercatoria*

Some argue that trade usages form an integral part of *lex mercatoria*,[48] and if one accepts the binding nature of *lex mercatoria* as such, then by the same token, trade usages are binding on the parties. The legal literature often takes a rather romanticized view of *lex mercatoria*, or law merchant.[49] The simplified narrative goes as follows. Before the age of nationalism and the rise of a nation State, the traders' relations were governed by a set of rules that the traders had developed among themselves. These rules were uniform no matter where the traders travelled in order to engage in trade. What is more, the substantive rules of *lex mercatoria* were interpreted and applied by the specialized merchant courts.[50] However, with the age of nationalism, which began roughly in the late 18th century and culminated in the 19th century and the beginning of the 20th century, the concept of a nation State came to the forefront, becoming the dominant form of political organization of the globe.[51]

A nation State is sovereign, meaning that 'it decides for itself how it will cope with its internal and external problems, including whether or not to seek assistance from others and in doing so to limit its freedom by making commitments to them'.[52] More precisely, a nation State enjoys the highest possible authority over its territory. In the legal context, this means that it is within the State's prerogative to formulate rules to be applied within its territory. Thus, the strict concept of nation State is incompatible with *lex mercatoria*. If *lex mercatoria* is viewed as binding on the traders, this means that when traders transact within the territory of a nation State, the rules applicable to the traders' transactions are those that have possibly been formulated outside of that State's territory, and without that

law, enabling commercial law to align itself with commercial reality. Therefore, conceptually and functionally, a TU lies at the heart of modern commercial law.'

47 Stephen Bainbridge, 'Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions' (1983) 24 *Va. J. Int'l L.* 655. Bainbridge writes as follows: 'CISG significantly reduces the potential for, and cost of, future misunderstandings in that idiosyncratic parties are given an incentive to study trade usage. A party's expectation that the other party to its contract knows of, and is bound by, the usage is protected.'

48 Markus Petsche, 'The Application of Transnational Law (*Lex Mercatoria*) by Domestic Courts' (2014) 10 *Journal of private international law* 503. Petsche writes that 'trade usages are the core of the *lex mercatoria* notion as envisioned by Goldman and Schmitthoff, ie, of an autonomous body of rules created by merchants, rather than legislators (or courts)'.

49 Albrecht Cordes, 'The Future of the History of Medieval Trade Law' (2016) 56 *American Journal of Legal History* 12. There are differing opinions as to whether medieval *lex mercatoria* truly existed in practice in the form as presented in the literature on new *lex mercatoria*. Some have sought to dispel the notion of a true *lex mercatoria* during the medieval ages as nothing short of a myth. Charles Donahue Jr., 'Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica' (2004) 5 *Chi. J. Int'l L.* 21. Donahue Jr. opens his article with the following observation: 'It has been too confidently assumed by most writers that the law merchant' arose in Italy in the central part of the Middle Ages, was chiefly founded on Roman law, and was carried by the traders of that country … into every country which they penetrated. That the law merchant was indeed the law of the merchants is true enough, and so is the assertion that it was applied to all transactions of a mercantile character between merchants, particularly at the great international fairr.'

50 Anthony Connerty, 'Lex Mercatoria: Reflections from an English Lawyer' (2014) 30 *Arbitration International* 702–3. Emily Kadens, 'Myth of the Customary Law Merchant' (2011) 90 *Tex. L. Rev.* 1155–6.

51 Aira Kemiläinen, 'The Idea of Nationalism' (1984) 9 *Scandinavian Journal of History* 31. Mads Mordhorst, 'Nation Branding and Nationalism', *Nationalism and the Economy: Explorations into a Neglected Relationship* (CEU Press 2019) 189. Mordhorst notes that 'the modernists argue that the nation-state emerged in the late eighteenths century and became, as part of the process of industrialization and modernization, a dominating pattern during the nineteenth century'.

52 Fernando R. Tesón, 'International Obligation and the Theory of Hypothetical Consent' (1990) 15 *Yale J. Int'l L.* 84. Kenneth N Waltz, *Theory of Intenational Politics* (McGraw Hill) 36.

State's participation. Consequently, nation States began the process of compartmentalization of law merchant, with each State deciding to have its own commercial law applicable within its territory.[53] This, in a sense, was the trumpet that sounded the end of *lex mercatoria*.

Akin to a phoenix, *lex mercatoria* went through a process of rebirth in the second half of the 20th century.[54] The revival was further spurred by the uniform law movement, whose pinnacle was the adoption of the CISG, as well as the proliferation of arbitration as the dominant method for resolving international commercial disputes.[55] This reincarnation is often referred to as the new *lex mercatoria*, with some referring to the later stages of this conception as new new *lex mercatoria*.[56] The fervent proponents of the new *lex mercatoria* go as far as theorizing that the law merchant is not simply a body of rules that the parties may incorporate into their contract, thus displacing the non-mandatory rules of the otherwise applicable national law.[57] They opine that *lex mercatoaria* is an autonomous legal system that is capable of being self-sufficient.[58] Thus, a parties' choice of *lex mercatoria* as the governing law of their transaction would mean that all the legal issues arising in the dispute between such parties would have to be resolved exclusively by reference to *lex mercatoria*, and without any role whatsoever played by any national law.

While passionate arguments have been put forth to support its existence, there is no unified front on what comprises the new *lex mercatoria*.[59] In spite of its supposed indeterminacy, trade usages are generally deemed to play a significant role in the composition of *lex mercatoria*. In relation to the medieval *lex mercatoria*, Peter J. Mazzacano notes that '[w]hile it emerged initially from a set of commercial customs, practices and trade usages, the *lex mercatoria* ultimately evolved into a body of law that transcended State borders'.[60] As for the new *lex mercatoria*, Alec Stone Sweet sees it as 'the totality of actors, usages, organizational techniques, and guiding principles that animate private, transnational trading relations'.[61] In the same vein, Gilles Cuniberti observes that the 'new *lex mercatoria* is composed of commercial customs, but also includes a variety of other international norms that are regularly respected by international commercial actors'.[62] Moreover, Cuniberti portrays some of the actions taken by the International Chamber of Commerce (ICC) as attempts to promote the use of *lex mercatoria* by the parties. Thus, in one of its model contracts, the ICC has included a choice of law clause that designates the following to be applied in the descending order in case of a dispute:

53 Friedrich K Juenger, 'The Lex Mercatoria and Private International Law' (1999) 60 *La. L. Rev*. 1135.

54 Ralf Michaels, 'The True Lex Mercatoria: Law beyond the State' (2007) 14 *Ind. J. Global Legal Stud*. 448. Michaels states that there have been three stages of conception of *lex mercatoria*: (1) medieval conception, (2) new *lex mercatoria* (20th century renaissance of medieval conception, this time manifesting itself through 'informal and flexible net of rules and arbitrators establishing a private international commercial law'), and (3) new new *lex lercatoria* (evolving into 'an established system of law with codified legal rules' and 'strongly institutionalized court-like international arbitration').

55 Ibid. Monica Kilian, 'CISG and the Problem with Common Law Jurisdictions' (2000) 10 *J. Transnat'l L. & Pol'y* 217. Killian notes that the 'CISG has gained the status of a *lex mercatoria*, at least in arbitral proceedings'. She gives case law examples in arbitration, including ICC 7331/1994 in which the tribunal held that, absent a choice of law clause, the contract shall be governed 'the general principles of international commercial practice and accepted trade usages, and as such by CISG, which reflects those principles and usages.'

56 Michaels (n 54) 448.

57 Peter J. Mazzacano, 'The Autonomous Nature of the Lex Mercatoria' (2012) 16 VJ 71. Mazzacano notes that '[t]here are the supporters who view the *lex mercatoria* as an autonomous global legal order and evidence of private law-making that is independent of any national sovereign'. Berthold Goldman, *Lex Mercatoria* (Kluwer Law and Taxation Pub 1983). Goldman opined that *lex mercatoria* is attaining the status of a legal order that has been formed by a specific social group (ie, traders or merchants). That legal order arose as a result of formation of this social group as well as their activities, and is reflected in concrete rules and institutions.

58 Ibid.

59 Gilles Cuniberti, 'Three Theories of Lex Mercatoria' (2013) 52 *Colum. J. Transnat'l L.* 369.

60 Mazzacano (n 57) 74.

61 Alec Stone Sweet, 'The New Lex Mercatoria and Transnational Governance' (2006) 13 *Journal of European Public Policy* 629.

62 Cuniberti (n 59) 371.

(i) 'the rules and principles of law generally recognized in international trade as applicable to international contracts'; (ii) trade usages; and (iii) the PICC 2016.[63]

In a constellation where one accepts *lex mercatoria* as a self-sufficient and autonomous legal system, the normative value of trade usages would stem from the very fact that they form an indispensable part of *lex mercatoria*. The controversy in terms of determining what constitutes a trade usage, however, remains. In other words, the divisions that exist in the literature and practice in terms of what conditions a particular rule must satisfy in order to be deemed a trade usage is something that is of equal concern in the domain of *lex mercatoria*.

While the re-emergence of *lex mercatoria* as a full-fledged autonomous legal system has been disputed by some, what cannot be denied is that traders in this day and age are empowered to choose *lex mercatoria* as the rules of law to govern their transaction. If the dispute between such parties ends up before the court of law of some nation State, the court is likely to give effect to the parties' choice by viewing the rules of *lex mercatoria* as being incorporated into the parties' contract, and they will displace the default rules of the otherwise applicable national law. The mandatory rules of that national law will still be applied by the court. This is so because the rules of private international law of individual States generally only empower traders to select a national law to govern their transaction.[64]

The situation is different in arbitration. Since an arbitral tribunal is not a body of a State, it is generally not bound by the rules of private international law of any State—not even that of the seat.[65] In practice, the rules of private international law that are going to be relevant for the arbitral tribunal are the special rules that are contained in the arbitral rules, and occasionally in *lex arbitri*, although the latter will usually give way to the former in case of a conflict.[66] These special rules will, if they reflect the modern trends in international arbitration, allow the parties to choose, in addition to law, the so-called *rules of law* to govern their transaction.[67] It is generally understood that the expression *rules of law* encompasses a-national bodies of rules such as *lex mercatoria* or non-binding restatements of the general principles prepared by reputable bodies—examples being the PICC 2016 and the PECL—and international conventions such as the CISG.[68] Moreover, in the absence of the choice by the parties, the modern approach among the global arbitral institutions has been to enshrine the *voie directe* into their rules.[69] What this means is that the arbitral tribunal is empowered to choose directly the applicable substantive law or rules of law that it considers appropriate in the given case. The tribunal is thus under no obligation to first

[63] Ibid., 425.

[64] For example, this approach is enshrined in the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I). Recital 13 of Rome I Regulation provides as follows: 'This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.' Thus, while *lex mercatoria* can be incorporated into the contract, it cannot be a self-standing body of law that governs a contractual transaction in cases where Rome I Regulation applies.

[65] Stefan Kröll, 'Arbitration and the CISG', *Current Issues in the CISG and Arbitration* (Eleven 2014) 65.

[66] Ibid. The Model Law on ICA (n 9). Article 28(2) states that, where the parties fail to choose the rules of law applicable to their contract, 'the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'. However, the UNCITRAL Arbitration Rules (with Article 1, paragraph 4, as adopted in 2013 and Article 1, paragraph 5, as adopted in 2021) provide in Article 35(1) that, when parties fail to choose the rules of law applicable to substance, 'the arbitral tribunal shall apply the law which it determines to be appropriate'. Since the Model Law on ICA allows the parties to make their own arrangements as to the law applicable to substance, their selection of the UNCITRAL Arbitration Rules would be deemed as such an arrangement. Thus, the special private international law rule contained in the UNCITRAL Arbitration Rules would take precedence over the special private international law rule found in the Model Law on ICA. This would be in a scenario whereby the parties are arbitrating their dispute in a Model Law country.

[67] Ibid.

[68] Kröll (n 65) 68.

[69] For example, see the UNCITRAL Arbitration Rules or the ICC Rules of Arbitration (entered into force on 1 January 2021). Both follow *voie indirecte*.

resort to the rules of private international law that would then point to the applicable law—that is, to *voie indirecte*.

Whether the tribunal arrives at the application of *lex mercatoria* as a consequence of the parties' express choice or by relying on *voie indirecte*, either way, trade usages may come to be the pivotal rules on which the tribunal relies to resolve the dispute. If the arbitrators happen to be the proponents of the view that *lex mercatoria* is a self-sufficient legal system, by that token, they may deem the trade usages as being integral part of it. As already noted, this would then automatically bestow upon trade usages a normative value.

3. Categories of trade usages and their hierarchical position

There are different ways in which trade usages may be categorized. The most obvious categorization draws on the geographical spread of trade usages.[70] To this end, trade usages may be of local, regional, or global character.[71] These designations are, in a sense, self-explanatory. The local usage would be the one that is observed in a particular locality, but outside of it; it is highly likely that it will not be applied in practice. The term local may be used in a narrow sense. For instance, trade usages of a particular trade fair taking place in a particular city would be deemed as local trade usages in the narrow sense of the term. In contrast, trade usages that are observed in a particular country may also be termed as local usages of trade, but in this context, the use of the term 'local' would be in its broad sense. Another appropriate term to use in this context would be national usages. As for regional trade usages, they transcend the boundaries of States, and thus are applicable in two or more States that generally share borders, or in a particular region. Global usages, as the name suggests, are those that are widespread across the planet.

Another way to categorize trade usages is based on the industry or branch of trade in which they tend to be observed.[72] Usages that appear only in a particular line of trade may be referred to as trade-specific or sector-specific usages of trade. In contrast, usages that find application across various branches of trade or different industries may be deemed as trade usages of general application, or generic usages.

In addition, one may also distinguish between uncodified and codified trade usages.[73] The former are those that are simply observed by their users on a regular basis without any organized attempt to reduce the usage to writing. Opposite to these are codified usages – these have been written down, usually by some organization with sufficient credibility and legitimacy to engage in such an undertaking. For instance, traders in a particular branch of trade may found an association to represent their interests and to work on codification of usages specific to that type of trade. If that particular association indeed reduces the usages generally relied upon by its members to writing, then such usages may be viewed as codified. Trade usages may be codified at an even larger scale—an example being extensive efforts by the ICC, including its Uniform Commercial Practice for Documentary Credits (UCP) and International Commercial Terms (Incoterms). The practice of codifying usages has been extensively criticized, with some noting that the process itself involves severe disagreements as to the contents and meaning of usages.[74] Based on this, an argument can be

70 In legal literature, the basic distinction is between local and international (or global) usages. Coetzee (n 7) 264. Coetzee notes that '[t]he usage is not restricted to international usages but could include local and national usages as long as the usage usually binds parties engaged in international trade.' 'Case 425: CISG 4(a), 9, 39(1)', *Case Law on UNCITRAL Texts (CLOUT) (A/CN.9/SER.C/ABSTRACTS/37)* Austria: Oberster Gerichtshof 10 Ob 344/99g 21 March 2000. In this case, the Austrian court found the 'Tegernseer Gebräuche' (regional trade usages) to be applicable to the sales contract.

71 Ibid.

72 Fabien Gelinas, 'Trade Usages as Transnational Law', *Trade Usages and Implied Terms in the Age of Arbitration* (Oxford University Press 2016) 257. Gelinas observes as follows: 'The narrow conception limits relevant usages to contractual practices in a particular trade or industry, a particular exchange platform, or a particular harbor, whereas the broad conception also includes normative practices (rules or principles) that cut across particular trades, industries, or trading venues.'

73 Roy Goode, 'The Codification of Commercial Law' (1988) 14 *Monash UL Rev*. 142. Coetzee (n 7) 245.

74 Lisa Bernstein, 'The Myth of Trade Usages: A Talk' (2017) 23 *Barry L. Rev*. 121.

made that, just because something is codified as a usage, it may not necessarily reflect the true situation on the ground. Some have even gone as far to argue that 'formalisation of a [trade usage] leads to its death'.[75]

Another pivotal issue in relation to trade usages is the hierarchical position that they occupy among different categories of legal rules. Depending on the applicable legal regime, the answer to this question may differ significantly. For example, the PICC 2016, which adheres to the objective theory of trade usages, places trade usages hierarchically above its default provisions.[76] This means that, if there is a conflict between a provision of the PICC 2016 and an applicable trade usage, the latter will prevail.[77] The exception is provisions in the PICC 2016 that are declared to be of mandatory character.[78] When mandatory provisions of the PICC 2016 are in conflict with the applicable trade usages, then the former will prevail. It is important to note that very few provisions in the PICC 2016 are of mandatory character. One such rare example is found in Article 1.7, which requires parties to act in good faith, with paragraph 2 stating that '[t]he parties may not exclude or limit this duty'.

When it comes to the CISG, it enshrines a similar approach to that found in the PICC 2016. Trade usages applicable as a result of Article 9 of the CISG will take precedence over the Convention's default provisions.[79] An opposite approach can be found in legal regimes adhering to the subjective theory of trade usages. For instance, as noted above, the legal regimes of Serbia and Bosnia and Herzegovina still adhere to the subjective theory, with their Laws on Obligations hierarchically placing their default provisions above trade usages.[80] In these countries, for trade usages to displace the default provisions of law, the parties have to reach an express agreement to this end.[81]

4. Significance of trade usages

What makes trade usages of such paramount importance that justifies assigning them normative value? The optimal way to answer this question is to return to the basics and ask the following foundational question: Who creates commercial law? If one takes a strict positivist approach towards law, one would be inclined to remark that it is the State that formulates and passes legal rules that the commercial actors then have to take into account and follow. While, in essence, this view would not be incorrect, it does fail to paint a full picture. For instance, it does very little to tell us about the origin of many legal rules and concepts that are enshrined in today's commercial acts and codes. As a matter of fact, many legal rules and concepts of commercial law that we take for granted today were initially developed and formulated not by the State but by commercial actors themselves, through their practices and usages. It was only later that the State would, in some instances, step in and transpose such rules and concepts into legislation, with some or no alterations, or would regulate them in some way.

Various historical accounts may be used as an illustration. A quintessential example is the story of how bills of exchange came to be—namely, in medieval times, transporting anything by ship in the Mediterranean was a risky endeavour, with many ships never reaching their final destination.[82] Numerous dangers loomed for traders and sailors in those times, including storms on high seas that were the culprits for innumerable

[75] Saidov (n 5) 121.

[76] *Unidroit Principles of International Commercial Contracts 2016* (International Institute for the Unification of Private Law (Unidroit) 2016) 26 <https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf>.

[77] Ibid.

[78] Ibid.

[79] William P. Johnson, 'The Hierarchy That Wasn't There: Elevating Usage to Its Rightful Position for Contracts Governed by the CISG' (2011) 32 *Nw. J. Int'l L. & Bus.* 285–6.

[80] Hasić (n 16) 242. Law on Obligations (n 19).

[81] Ibid.

[82] Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law: Texts, Cases and Materials* (2nd edn, Oxford University Press 2015) 6.

shipwrecks and pirates who were lurking at every corner, seeking to steal the precious cargo that was being transported onboard the vessels.[83] Given this state of affairs, it was hardly surprising that the traders were reluctant to move large quantities of money every time they entered into a commercial transaction.[84]

A solution to this problem was devised by the Italian money-changers, who were in the know about the applicable exchange rates and could thus provide a rather effective currency clearing house.[85] They set up arrangements whereby a buyer of goods would no longer be required to ship money in order to pay for their purchase, but instead would deal with their own local bank.[86] More precisely, the buyer, who would normally hold funds with their local bank, would request the bank to arrange for a payment instruction to a correspondent bank in the seller's locality.[87] The buyer's bank would then proceed by issuing a draft—a document that the buyer would then send to the seller who, in turn, would be able to obtain the payment for their goods by presenting the draft to the correspondent bank.[88] The two banks would then, later on, settle their accounts at some major international fair or commercial centre.[89] Fast forward to today, and bills of exchange are still frequently used by commercial parties, but an array of rules in relation to them, including those on their issuance and form, are generally put forth by the State. The concept itself, and many of the accompanying rules, however, were actually devised by the commercial parties themselves.

Another example to this end would be hire-purchase agreements that originated in 19th century England.[90] It was at that point in time that the middle class began to rise in England.[91] Their purchasing power was growing steadily, and the sale on credit began to flourish across the country.[92] With the sale on credit, naturally, comes the risk of a buyer's failure to service the credit. In 19th century England, this risk was further exacerbated by the possibility of the buyer selling the goods that he bought on credit to a third party.[93] Imagine the following scenario: Party A, the buyer, purchases a piano on credit from the seller, Party B. Before repaying the full amount owed to Party B, Party A decides to sell the piano to Party C. In the meantime, Party A begins experiencing financial difficulties, and is no longer able to service the credit to Party B. In turn, Party B seeks to repossess the piano, but discovers that he cannot do that because the ownership over the piano was transferred to Party C, a good faith third party buyer. In a scenario such as this one, English law would side with the third party, deeming them to be the rightful owner of the piano.[94]

In response to these kinds of occurrences, the commercial parties, together with their lawyers, devised a contract whereby the buyer of goods on credit would not be deemed as a buyer *per se*, at least not initially.[95] Instead, as per the contract, the buyer would first hire the goods for a certain period of time, and in return would be paying a monthly instalment to that end.[96] Once the hire period was completed, the buyer would then have an option to purchase the goods in question, usually for a symbolic amount of money.[97] This would result in the same outcome as the sales contract in terms of monetary gains for the seller, but

83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid.
87 Ibid.
88 Ibid.
89 Ibid.
90 Michael Furmston, 'What Is Commercial Law?', *Commercial Law* (2nd edition, Pearson 2013) 2.
91 Ibid.
92 Ibid.
93 Ibid.
94 Ibid.
95 Ibid.
96 Ibid.
97 Ibid.

would be a much safer option in case the buyer were to renege on the credit and sell the goods to a good faith third party. Since in the eyes of the law the buyer would not be deemed as a buyer until the very end of the transaction, he would not be able to pass the good title to the good faith third party purchaser.[98] Thus, in case of the failure on the part of the buyer to service the credit, the seller would always have the option to repossess the goods.

Commercial law, in many of its aspects, may be seen as a result of a trial-and-error process in which commercial parties regularly engage. Medieval traders in the Mediterranean must have been suffering immense losses before they finally managed to conceive of a way to mitigate the risks with the help of bills of exchange. And in 19th century England, many pianos were probably sold on credit and then resold to good faith third-party buyers before the sellers on credit finally managed to find an effective way to safeguard their interests through what later came to be known as hire-purchase agreement. All of these traders had one thing in common—their commercial activities involved a degree of risk that could potentially result in immense losses for them. Thus, they had the incentive to find ways or methods in which they could either mitigate or eliminate those risks.

A trader who first finds an optimal solution to the risk will inevitably want to implement it as a practice in their dealings with other traders.[99] If other traders see that practice to be suitable in their own commercial dealings, they will soon follow suit.[100] In a nutshell, this illustrates how trade usages come to be.[101] Commercial parties will think about how to solve a particular problem (for example, how to avoid losing money due to ships sinking during medieval times). To this end, they will develop arrangements and rules to be used among themselves or in dealings with their clients, with such arrangements and rules evolving into a practice when used repeatedly. In turn, when and if the practice becomes universally accepted or widespread within a particular industry, it then metamorphoses into a trade usage.[102]

Once a trade usage is in place, the ball is then on the State's side of the court. The State may leave the usage as is, allowing it to operate within the existing legal framework. If perceived as necessary or advisable, the State may transpose the usage into law or even regulate it.[103] Should a usage be deemed unlawful or its effects be detrimental to the society at large, the State may take steps to ban such usage.[104] Thus, many of the rules and concepts of commercial law are the result of a bottom-up approach. The State will not be the one to actively pursue legal solutions to problems faced by the commercial parties, but it will be the commercial parties themselves who will engage in such an endeavour. After all, they are the ones directly affected, and thus it is only natural to perceive them as best positioned to determine the appropriate course of action.[105]

[98] Ibid.

[99] Coetzee (n 7) 249–50.

[100] Ibid.

[101] Ibid.

[102] Ibid.

[103] Goode *et al.* (n 82) 7. It is noted as follows in this book: 'The more widespread the market practice, and the more damaging the effects of invalidating it, the more likely it is to be upheld by the courts. Even so, there are occasional upsets which either force the modification or abandonment of the practice or lead to corrective legislation.' Saidov (n 5) 97. Saidov points out as follows: 'Many rules, concepts and instruments in sales law and practice—such as trade terms, a bill of lading ('b/l') and aspects of its conformity—originate from the usages of the mercantile community, which, in turn, have been absorbed and developed in different ways by national legal systems.' 'Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law' (1955) *55 Columbia Law Review*. Noting as follows: 'A custom which becomes accepted throughout a jurisdiction and loses its uniqueness to a particular locale, in reality, becomes part of the common law. In one case a custom was recognized in a state allowing certain fowl freely to trespass. This, in effect, means that in this particular jurisdiction the rule of fencing in has been changed to a rule requiring fencing out.'

[104] Goode *et al.* (n 82) 7. Citing the decision of the House of Lords that 'held that swaps transactions entered into by local authorities were ultra vires and wholly invalid'.

[105] Jan H. Dalhuisen, 'Custom and Its Revival in Transnational Private Law' (2007) 18 *Duke J. Comp. & Int'l L.* 339. Dalhuisen's remarks in this context are quite telling: 'In business, custom reflects what is most

Moreover, legislators and courts are few, and traders are many. The challenges and obstacles faced by traders are numerous and often vary from industry to industry. If the top-down approach were to be implemented—where the only applicable and relevant rules and concepts would be the ones formulated by the State—the result would be suboptimal, since the State's legislature is concerned with countless issues of importance for the nation, with commercial matters being one drop in a vast sea. The legislature simply does not have enough resources at its disposal in order to monitor the activities of commerce closely and react swiftly when the rules of commerce need to be changed or when the new rules and concepts need to be introduced. Consequently, the State allows the commercial parties a high degree of autonomy to formulate their own rules and legal solutions to the problems they are facing—and usages of trade, the argument goes, are an integral part of this process.[106]

It is through usages of trade that commercial law gravitates towards achieving the optimal state of affairs.[107] Being developed and well-known by traders, usages of trade constitute a shared legal and commercial language between the trading parties.[108] Having organically grown out of the traders' practices, trade usages are seen as reflections of common standards and benchmarks for the trading community.[109] To this end, they are perceived as tools that work towards the reduction of transaction costs and the promotion of economic efficiency.[110] As Djakhongir Saidov notes:

> [Trade usages, or] TUs[,] can save parties time, effort and costs of negotiating and drafting their contracts ('drafting costs')* and lead to an efficient allocation of risks when the contractual performance does not occur as planned. Because TUs usually evolve over time, they are likely to evolve, in a competitive environment, in a way that is deemed efficient by the business community.* TUs can also reduce the costs of dispute resolution and enforcement of a decision ('administrative costs').* If a TU is identifiable and its meaning is ascertainable with relative ease and at a reasonable cost,* it enables adjudicators to quickly determine the meaning of the contract and resolve the case.*[111]

5. Criticism of trade usages

Arguments have been advanced in the legal literature that are critical of, or at the very least, sceptical about, trade usages. Probably the strongest critique advanced in relation to trade usages is concerned with the sheer difficulty of proving them. To this end, Saidov argues that, in practice, adjudicators have been willing to find the existence of trade usages based on what were, at best, unconvincing arguments or flimsy proof.[112] The adjudicators have, Saidov notes, been willing to ignore key requirements, such as, for instance, the one on regular observance of trade usage, and have been relying more on their intuitive judgements than on statistics or empirical evidence.[113] The result was that the adjudicators, in many

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

106 Clayton P. Gillette, 'Harmony and Stasis in Trade Usages for International Sales', *The Creation and Interpretation of Commercial Law* (Routledge 2022). Gillette's observation works towards supporting this position: 'But usages of trade, what I call custom,[*] provide an alternative source of majoritarian defaults. [...] Indeed, custom is superior to legal defaults insofar as it provides rules more highly tailored to the requirements of a particular industry and, theoretically, is more susceptible to changes warranted by commercial need than is the process of legislative revision. Hence, custom is seen as the result of an evolutionary process in which suboptimal commercial practices are displaced by superior ones.'

107 Saidov (n 5) 97–101.

108 Ibid.

109 Ibid.

110 Ibid.

111 Ibid.

112 Ibid., 128–9.

113 Ibid.

instances, did not merely confirm the existence of a trade usage but have, in effect, acted as creators of one. Saidov refers to usages established in this way as phantom usages.[114]

The criticism advanced by Saidov is certainly not without merit. If one focusses carefully on the supposed benefits and advantages stemming from usages of trade, one will see that all of them rely on the organic creation and spread of usages. A particular usage will only constitute a benchmark rule if it has truly been developed, tried, and tested by traders, and has withstood the test of time. In this scenario, it is unlikely that any other rule or solution will lead to a more optimal result for the majority of traders than the trade usage itself. If, however, the adjudicators erroneously find the existence of a supposed trade usage, then this would mean that they are giving a stamp of approval to a rule that has not withstood the rigorous test of time, and what is more, they are imposing it on the traders and their transaction.

A vocal critic of trade usages has been Lisa Bernstein, who has undertaken extensive research focusing on this area, and she has used the results to question some of the entrenched views that have come to enjoy the status of a truism.[115] She has gone as far as to suggest that trade usages may be a myth that only exists in theory, and that in practice, interactions between traders do not spontaneously lead to widespread patterns of uniform behaviour or to common understandings of widely used designations.[116] Her research focused on the efforts to codify usages of trade in four industries: hay, grain and feed, textiles, and silk.[117] Bernstein opines that, had the clear usages of trade existed, then those entrusted with codifying usages would have had a rather straightforward task before them.[118] However, this was not the case, with differences of opinion arising even in relation to some of the most widely used designations—the example being a '2×4' that is frequently referred to in the lumber industry.[119] While Bernstein does acknowledge that her findings may not be extensive enough to be used as fool-proof repudiation of trade usages, she does maintain that they are a starting point towards undermining the reverence that permeates the legal literature.[120]

In spite of Bernstein's critique of trade usages, the widespread conventional wisdom on their significance persists. Thus, in 2018, Phillip Hellwege wrote that '[t]he importance of usages is uncontested' and that 'they are of special relevance in the commercial context'.[121] So far, no steps have been taken in Bernstein's native USA to reform the approach of the UCC to usages, and there are no indications that that is going to happen in the future. While Bernstein's criticism is not without merit, it is submitted here that it may be overstated. The fact that disagreements exist within industry on what constitutes the correct usage, or that such disagreements often may be exacerbated by geographical considerations, simply serves as an illustration that there is a certain discord between theory and practice. While within the theoretical realm, one would expect that sector-specific usages of trade be equally understood and perceived by all users, the world of practice is more complex and subject to ambiguities. To quote a statement usually attributed to Albert Einstein, '[i]n theory, theory and practice are the same', but '[i]n practice, they are not'.

Trade usages will often consist of rules, designations, concepts, or standards. What a particular designation may come to mean for one subgroup of traders may be different to the meaning assigned to it by some other subgroup of traders in the same line of trade. Given that numerous traders in one line of trade will have conflicting interests and that

114 Ibid.

115 Lisa Bernstein, 'Custom in the Courts' (2015) 110 *Nw. UL Rev.* 63–113. Bernstein (n 74) 119–27.

116 Ibid.

117 Ibid.

118 Ibid.

119 Ibid.

120 Ibid.

121 Phillip Hellwege, 'Understanding Usage in International Contract Law Harmonization' (2018) 66 *The American Journal of Comparative Law* 127.

they may operate in different localities within differing contexts, the consequence may be that they come to view or interpret the same rule, designation, concept, or standard with some variation as to its meaning and practical application. However, the fact remains that within one subgroup, the views on the content of a particular usage are harmonized. For instance, such subgroups seem to have emerged in relation to a 2 × 4 in terms of the West versus South divide in the USA, as per Bernstein herself:

> Although it was true many people knew that a 2 × 4 was not a board measuring exactly two inches by four inches, for a very long time there was no agreement on what the measurements of a 2 × 4 actually were. The term had one meaning in the West and one in the South, one for dry wood and one for wet wood, one at the mill and another at the lumber yard, and so on.[122]

Thus, the very fact that a clear subgroup may be identified within which a clear, common understanding of a usage may be discerned serves as an illustration that interactions between traders do spontaneously result in such usages. The fact that this propensity is undermined in the long run due to differing needs and interests of different traders should not be interpreted as proof that usages do not exist, but as a guiding light in terms of how usages ought to be established by courts and arbitral tribunals. In this sense, Saidov's criticism of usages and suggestions on the way forward seem to be a realistic proposition.[123] Since decision-makers have been willing to ignore some of the key elements in establishing the existence of trade usages (for example, regular observance and knowledge) and have gone as far as finding usages intuitively, without relying on any statistical evidence, Saidov argues for a stricter approach whereby 'regimes, governing international sales, should continue to recognize [trade usages] subject to the robust application of the relevant preconditions'.[124] This, among other things, would involve a strict application of the observance and knowledge requirements, and reliance on concrete evidence to establish the existence of an alleged usage.[125] The reason why Saidov simply opines that the role of trade usages should be limited, and not eliminated, is because he finds that 'the social phenomenon of usages undoubtedly exists' and that '[t]he rationale for ["recognising and giving legal effect to a usage"] is convincing'.[126]

In establishing the existence of trade usages, what seems to be the most challenging aspect is the lack of statistical or empirical evidence to that end—namely, the details of individual as well as repeat transactions between traders, including the texts of the contracts, are almost never available in the public domain. This makes it extremely difficult, if not impossible, to rely on statistical or empirical evidence. A party is likely to allege the existence of a trade usage once a disagreement or a full-blown dispute erupts with their counterparty. In theory, the party alleging a trade usage could solicit a complex research project to obtain the necessary empirical or statistical data that proves or refutes the observance element. However, in the vast majority of instances, this would not be practical. The cost of such research would very likely be exorbitant, thus prohibitively inflating the cost side of any cost-benefit analysis. This serves as an incentive for the parties to rely on less costly ways of proving a usage (for example, witnesses) even though they may not be as convincing as statistical or empirical evidence.[127]

122 Bernstein (n 74) 120.
123 Saidov (n 5) 128–30.
124 Ibid.
125 Ibid.
126 Ibid.
127 Ibid.

III. Speculating on the future of trade usages in the era of AI

While many scholars—including Saidov and Bernstein—have decried the scarcity of reliance on statistical and empirical evidence to prove usages, the future may bring some positive developments. The rapid advance of AI technologies begs the question of to what extent AI could be used in monitoring the activities of traders for the purpose of spotting repetitive patterns in their interactions. This novel approach would not only address the challenge of proving the existence, or lack thereof, of trade usages but would also streamline their development and creation process.

While appropriate AI technology could be designed to improve the traders' experience with trade usages, the paucity of relevant data to train AI would constitute a major challenge. That being said, it would not be unthinkable for the trading community to be convinced to provide data voluntarily, on the condition of ensuring anonymity and confidentiality, where appropriate. After all, the theory behind trade usages and their significance is convincing. It is the practical implementation that seems to be fraught with difficulties, thus suppressing their potential.

This invites the idea of building an AI model that would harness or maximize the benefits of trade usages for the trading community while minimizing associated disadvantages and costs. All of this is explored further in this part of the article.

1. Brief overview of AI technology and its application in law

There does not exist a universally accepted and entirely precise definition of AI.[128] Put in most general terms, one can perceive as AI any computer system that is capable of performing tasks that require an input of human intelligence.[129] From a functional perspective, these systems are successful at achieving satisfactory results in the domain of learning, decision-making, problem-solving, reasoning, comprehension, creativity and autonomy, and so on.[130]

Take, for instance, the art of translation. In order to translate a text from one language to another, a human deploys their cognitive capabilities in order to understand the text in one language, and then generate a text in another language that conveys the same meaning as in the original language, as much as that is possible. To this end, the human translator understands the meaning of individual words as well as sentences that are formed out of those words. She is not only able to match the words and sentences mechanically (this approach would render incoherent results) but is also able to understand subtle differences between synonyms and to take into account any relevant context as well as any figurative or metaphorical meaning. This ensures the highest level of approximation between the two texts in the meaning conveyed, ensuring that two random persons, with one reading the original text and the other reading the translation, would arrive at the same understanding, unless the meaning conveyed in the original text was intentionally or inadvertently made vague or open to interpretation. A good translator in the latter situation would seek to ensure the same result in the translated text.

In recent years, AI-powered translation tools have managed to achieve satisfactory results in the domain of translation.[131] For instance, when Google Translate first appeared, the results were, more often than not, inaccurate and even nonsensical. With the

[128] Saheed Adebayo Gbadegeshin and others, 'What Is an Artificial Intelligence (AI): A Simple Buzzword or a Worthwhile Inevitability?' (IATED 2021) 0468–0479.

[129] Ibid., 0473.

[130] Cole Stryker and Eda Kavlakoglu, 'What Is Artificial Intelligence (AI)?' (*IBM*, 9 August 2004) <https://www.ibm. com/think/topics/artificial-intelligence>.

[131] Yasir Abdelgadir Mohamed and others, 'The Impact of Artificial Intelligence on Language Translation: A Review' (2024) 12 *IEEE Access* 25553. The authors note as follows in this recent publication: 'The investigation highlights that Artificial Intelligence, particularly Neural Machine Translation, stands at the forefront of this transformative movement. Translation accuracy has achieved new heights due to improved capabilities in understanding context, subtleties, and idiomatic expressions.'

deployment of AI technology in 2016, Google Translate managed to improve its results by leaps and bounds.[132] Although not as reliable as human translation, Google Translate is able to achieve 'good enough' results.[133] What ought to be noted—and not just in relation to the use of AI to achieve good-enough translation results, but elsewhere as well—is that AI does not achieve satisfactory translation outcome in the same way that a human does.[134] AI relies on vast amounts of data in order to spot patterns, and then, based on the patterns in the data set, renders a certain result.[135] Unlike humans, AI does not possess the intellect or cognitive capabilities in the same way as humans do.[136] In other words, when it comes to achieving outcomes for which a human intelligence has historically been required, AI and humans achieve the same or similar outcomes, albeit based on different processes.

Another important consideration to bear in mind is that AI is not a homogenous field, but comprises diverse areas such as machine learning, robotics, computer vision, and natural language processing.[137] Thus far, in the area of law, particular attention has been given to machine learning and its subset, deep learning. Machine learning involves enabling a computer system not only to perform a task or a set of tasks without concrete instructions but also to autonomously improve its performance as it is fed more data.[138] As a subset of machine learning, deep learning relies on neural networks characterized by multiple layers to spot complex patters in data, which in turn improves the system's accuracy.[139] Although deep learning systems are designed to mimic the human brain, they cannot be equated with human intelligence for an array of reasons, including for their lack of deep understanding, consciousness, and emotions.[140] The human brain, to this day, remains largely a mystery for the scientific community. As a result of this, effectively transposing its mechanisms into an algorithm is still an insurmountable challenge—an on-going work-in-progress.[141]

[132] Burgert Senekal and Eduan Kotzé, 'Open Source Intelligence (OSINT) for Conflict Monitoring in Contemporary South Africa: Challenges and Opportunities in a Big Data Context' (2019) 28 *African Security Review* 23. Davide Castelvecchi, 'Deep Learning Boosts Google Translate Tool' (2016) 10 *Nature*. Noting as following: 'Internet giant's latest service employs neural networks to cut error rate by 60 per cent, the company says'.

[133] Alice Carré and others, 'Machine Translation for Language Learners', *Machine Translation for Everyone: Empowering Users in the Age of Artificial Intelligence* (Language Science Press 2022) 195–6. Although this book primarily focusses on the use of machine translation for learning languages, the observations made in this chapter are also relevant for the accuracy and reliability of AI-powered translation services such as Google Translate, on which the authors relied in their research. Among other things they note as follows: '[Y]ou need to consider that [Machine Translation or MT] may be very good with some language pairs, and less good with others. Indeed, because [Neural] MT [or NMT] systems are corpus-based (as explained in Chapters 2 and 7), they will produce poorer results when too little data is available to train the system. In the examples given in this Section, we use the FR<>EN language pair (looking at translations from French into English as well as from English into French), for which current MT solutions often produce good enough results, but we certainly encourage readers to find examples in their language pairs and compare them with ours.'

[134] David De Cremer and Garry Kasparov, 'AI Should Augment Human Intelligence, Not Replace It' [2021] *Harvard Business Review* <https://hbr.org/2021/03/ai-should-augment-human-intelligence-not-replace-it>. The authors briefly explain the difference between human intelligence and AI, noting that it is 'a decidedly different type of intelligence what we [humans] possess'.

[135] Haroon Sheikh, Corien Prins and Erik Schrijvers, 'Artificial Intelligence: Definition and Background', *Mission AI: The new system technology* (Springer 2023) 15–41.

[136] Ibid., 18. De Cremer and Kasparov (n 134).

[137] Harry Surden, 'Machine Learning and Law' (2021) 89 *Washington Law Review* 87. Mohsen Soori, Behrooz Arezoo and Roza Dastres, 'Artificial Intelligence, Machine Learning and Deep Learning in Advanced Robotics, a Review' (2023) 3 *Cognitive Robotics* 54–70. Yasunari Matsuzaka and Ryu Yashiro, 'AI-Based Computer Vision Techniques and Expert Systems' (2023) 4 *AI* 289–302. Hobson Lane and Maria Dyshel, *Natural Language Processing in Action* (Simon and Schuster 2025). See Chapter 'Wordy Machine: Vector Models of Natural Language'.

[138] Surden (n 137) 89–95.

[139] Osval Antonio Montesinos López, Abelardo Montesinos López and Jose Crossa, 'Fundamentals of Artificial Neural Networks and Deep Learning', *Multivariate statistical machine learning methods for genomic prediction* (Springer 2022) 379–425.

[140] Jing Ren and Feng Xia, 'Brain-Inspired Artificial Intelligence: A Comprehensive Review' [2024] arXiv preprint arXiv:2408.14811.

[141] Ibid.

AI technology has thus far been—and continues to be—applied in law quite extensively. For instance, AI has proven particularly useful in legal research.[142] Since AI is capable of processing vast amounts of data much faster than humans can, it is used to identify the statutes and case law relevant for a particular case, and to pinpoint relevant information in the retrieved statutes and cases.[143] Related to this use of AI in law is Technology-Assisted Review (TAR). When relying on TAR in the discovery process, the person tasked with locating the case-relevant documents uses AI technology to identify those documents likely to be relevant in a vast data set containing an exorbitant number of items.[144] For instance, if one expects to find several emails that would be crucial evidence within a data set of 2 million emails, using TAR may be an effective way to narrow down the number of documents for a check by a lawyer or paralegal. This ensures a more effective use of limited resources; that is, the time saved by the lawyer or paralegal on locating the relevant documents may be used on other important tasks to further the client's interest in a case. In addition to these two uses of AI in law, there are many others, and due to the sheer number of them, it would be impractical to discuss or even mention all of them in this article. Some of them include document analysis (analysing the legal documents to spot deficiencies such as errors or inconsistencies before submission), contract drafting and analysis (preparing first drafts of contracts and highlighting contractual clauses that may involve heightened risks), case outcome prediction (predicting the likelihood of a client winning or losing a case), document summarization (summarizing the key points made in an extensive legal document), and so on.[145]

Given that AI technology is developing at an unprecedented speed, many have begun speculating on the future uses of AI in the realm of law. Some have even gone as far as analysing the possibility of having AI systems replace human lawyers and also serve as judges or arbitrators instead of humans.[146] Commentators have discussed this not only from a technical perspective (that is, whether AI technology will ever reach the level of development in order to be able to effectively do jobs in the legal profession) but also from legal, ethical, and practical aspects. For instance, some commentators have explored whether current legal frameworks would allow for non-human judges or arbitrators, since all of them have been created or drafted with human decision-makers in mind.[147] Others have focused on ethical considerations, such as exposing the disputing parties to an AI decision-maker that lacks empathy and intuition.[148] Finally, some commentators take a practical approach as well, hypothesizing that if, in certain cases, the parties would be willing to knowingly accept any deficiencies in the AI decision-making provided, that the benefits such AI deployment (for example, lower cost and speedier dispute resolution as compared to human-led arbitration) would outweigh its downsides (for example, AI is characterized by the so-called 'black box' problem, meaning that we are frequently not certain how AI reaches a particular result).[149]

142 Md Shahin Kabir and Mohammad Nazmul Alam, 'The Role of AI Technology for Legal Research and Decision Making' (2023) 10 *International Research Journal of Engineering and Technology (IRJET)* 1088–92.

143 Ibid., 1090.

144 Charles Courchaine and Ricky J Sethi, 'Fuzzy Law: Towards Creating a Novel Explainable Technology-Assisted Review System for e-Discovery' (*IEEE* 2022) 1218–23.

145 Tanja Mayer, 'AI and LLMs in Legal Technology: Revolutionizing Research and Document Analysis' (2023) 6 *Advances in Computer Sciences* 1–6. Mark K Osbeck, 'Lawyer as a Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law' (2018) 123 *Penn St L. Rev*. 41–102.

146 Maxi Scherer, 'International Arbitration 3.0—How Artificial Intelligence Will Change Dispute Resolution' [2019] *Austrian Yearbook of International Arbitration* 507–12. Dejan Bodul, 'Can Artificial Intelligence (AI) Replace the Judge?' [2023] *Harmonius: J. Legal & Soc. Stud. Se. Eur*. 15–34.

147 Bodul (n 146) 15–34.

148 Cole Dorsey, 'Hypothetical AI Arbitrators: A Deficiency in Empathy and Intuitive Decision-Making' (2021) 13 *Arbitration Law Review* 12.

149 Wasiq Abass Dar and Boris Prastalo, 'The Investor-State Arbitration Legitimacy Crisis: Could AI Be Its Future Savior (or Resurrector)?' (2023) 14 *Pravni zapisi* 21–53.

While one cannot deny the existence of sceptical voices in regard to the usefulness of AI technology in the legal domain,[150] it is a truism that this technology is increasingly being deployed in law. In the context of this article, the relevant question becomes whether, and in what way, the AI technology could be harnessed in relation to trade usages. For the purposes of our discussion, we shall refrain from crossing into fiction or futuristic speculation on the capabilities of AI. Instead, the focus will be on the current AI capabilities. Before suggesting a concrete pathway in which AI technology could be harnessed to maximize the utility of trade usages, we shall first elaborate on the rationale for using AI in the domain of trade usages.

2. Theoretical rationale for using AI in the domain of trade usages

The following observation by Clayton Gillette is very informative to build further discussion:

> Commercial sales contracts typically are imperfectly drafted. They are incomplete over all possible states of the world that might materialize before performance and include terms that can be rendered ambiguous. In the event of dispute, some methodological approach must be employed to fill contractual gaps and resolve alleged uncertainties. In choosing among potential interpretive strategies, commentators who favor an economic perspective on contracts would select a strategy that maximizes the value of the contract, which includes minimizing the sum of all contracting costs. Those comprise specification costs, the costs related to drafting contract terms; administrative costs, the costs related to contract enforcement; and error costs, the costs related to erroneous interpretation of the parties' intended meaning.[151]

Gillette goes on to note that

> [t]he primary competitors for the ideal strategy that considers these factors are the plain meaning rule and the incorporation strategy. The former is a highly formalistic strategy that considers common understandings of a contract term's meaning independent of its context. The latter incorporates context and commercial custom in filling gaps and defining terms.[152]

While the specification costs tend to be higher in regimes preferring the plain meaning rule (that is, additional and clearer specification of contract terms must be undertaken by traders in order to minimize the possibility of assigning other plausible meanings to those terms), administrative and error costs are higher under the umbrella of incorporation strategy (pinpointing usages, their scope, and application is a costly process that may result in errors).[153] The assumption here is that AI technology, by making the determination of usages much more straightforward, precise, and reliable, would significantly decrease the administrative and error costs associated with the incorporation strategy. This, in turn, would decidedly sway the pendulum in the incorporation strategy's favour, allowing the parties to contract more confidently 'on handshakes or minimal writings without incurring the risk that they will be disabled from introducing evidence of their intentions in the event of transactional breakdown'.[154]

[150] See the following two journal articles for a more critical view of AI in law. Joshua P. Davis, 'Artificial Wisdom? A Potential Limit on AI in Law (and Elsewhere)' (2019) 72 *Okla. L. Rev.* 51. Joshua P. Davis, 'Law without Mind: AI, Ethics, and Jurisprudence' (2018) 55 *Cal. WL Rev.* 165.

[151] Clayton P Gillette, 'The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG' (2004) 5 *Chi. J. Int'l L.* 157.

[152] Ibid.

[152] Ibid.

[153] Ibid., 158.

[154] Ibid.

How could AI technology make trade usages more readily observable? AI is fantastic at spotting patterns in big data sets and is capable of spotting patterns that humans would generally overlook. Let us assume that an AI system is trained on a data set that, among other types of data, comprises practices based on which traders across the world enter into transactions. Let us also assume that this data set is regularly updated with the latest practices. Those practices that the AI spots as being regularly observed by a certain class of traders could then be classified as trade usages, provided that they satisfy the relevant legal requirements of the applicable law that determines what constitutes a trade usage. What AI would purport to do is not to automatically decide whether or not a particular practice has evolved into a trade usage, but to provide concrete statistics and suggest that a practice now constitutes a trade usage. The next step would require a human input—a confirmation or rebuttal of AI's findings. With this kind of an AI system, the criticism that proving the existence of trade usages is challenging and that there is significant reliance on usages whose existence or applicability are dubious at best, may become obsolete in the future.

Moreover, as noted earlier in this article, the theory on how trade usages come into existence begins with practices between traders. These practices that surface as an optimal contribution towards cost reduction and efficient contracting metamorphose into trade usages. How does this happen? The only logical assumption one can make is that once the two traders, who have established a good practice between themselves, enter into contractual transactions with other traders, it is entirely plausible that they may try to spread that same practice and establish it with other traders as well. If these other traders find the said practice to be efficient, they too may try to do the same in their commercial relations with other traders. If we accept that the process runs in this way, one could still opine that, while it does get the job done, it does so in a subpar and slow manner. After all, the process is a word-of-mouth dissemination, which, in and of itself, is a creeping and slow-paced process that naturally results in inconsistencies and lack of uniformity. Somewhere down the line it is to be expected that traders will make changes and adjustments to the practice, leading to discrepancies in different localities. In this context, AI technology could be used to make the process of creation of trade usages faster-moving and more consistent.

3. Potential challenges to the deployment of AI in the context of trade usages

The primary obstacle to building an AI system that monitors trade practices and their evolution into trade usages would be a lack of reliable data, at least in this point of time. Reliance could be placed solely upon court decisions and available arbitral awards (that is, those usages that have been confirmed by courts and arbitral tribunals), as well as trade usages codified by national and international organizations. This approach, however, would expose the AI system to criticism based on the so-called AI bias.[155] More precisely, such system would simply reinforce the *status quo* and thus do very little to address the criticism by authors such as Saidov or Bernstein. After all, any AI system is only as good as the data set on which it is trained. If the proposed AI system were to bring any novelty to the table and organically reflect the traders' dealings, it would require data collected directly from the horse's mouth—that is, from traders themselves. The colossal challenge—although not insurmountable—would be to collect such data.

Evidently, collecting data directly from traders would require their consent and their direct participation. This implies two important considerations: (i) successfully encouraging traders to voluntarily share the relevant data; and (ii) conceiving of a method for obtaining the most relevant data possible. As to the first consideration, the traders would first have to be educated and informed about the AI system and the benefits that it purports to bring. Second, since traders are self-interested individuals, expecting them to provide the relevant data solely based on being informed and educated about the prospective collective benefits

[155] Julie Rogers and Alexandra Jonker, 'What Is Data Bias?' (*IBM*, 4 October 2024) <https://www.ibm.com/think/topics/data-bias>.

of the AI system on trade usages may not be a sufficient incentive in and of itself. As an additional incentive, traders could, for example, be offered access to the AI system's premium features for a limited period of time, free of charge, in exchange for the relevant data. As to the second consideration, the method for obtaining the relevant data would have to be simple and not time-consuming for traders. The more time and effort that would be required to share data, the less likely the traders would be willing to participate. After all, their primary concern is to run their business effectively and profitably, and anything that would divert their attention significantly from this primary concern of theirs is likely to be ignored. These considerations, thus, illustrate the importance of having a user-friendly interface that would allow the traders to share the relevant data effectively with as little effort as possible.

Another pivotal matter would be to determine exactly what kind of data would be relevant for the prospective AI system on trade usages. One may be tempted to argue that the relevant data ought to comprise copies of contracts and templates of contracts as well as email exchanges and other correspondence between traders. However, the likelihood of traders voluntarily providing these would be very low—practically close to zero. Contracts frequently contain sensitive information such as pricing terms, strategic partnerships, proprietary technology, and so on.[156] The same holds true in relation to emails and other forms of correspondence between traders. Giving access to third parties to contracts and contract templates would entail a risk of giving competitors an edge or undermining negotiation leverage in future transactions.

Moreover, the relevance of written contracts in this context may be quite limited. If a particular arrangement, designation, or rule keeps emerging across different contracts by different traders, this may be indicative of a trade usage, but not necessarily so. The very notion of a trade usage—and especially so if one adheres to the objective theory of trade usages—implies that the traders can reasonably expect their counterparts to abide by usages without expressly elaborating on them or incorporating them into the contract. Thus, if traders feel the need to incorporate a particular rule, designation, or arrangement expressly into the contract, this may be an indication that it has not attained the status of a trade usage. Furthermore, if traders actually rely on a particular rule, designation, or arrangement as a trade usage and do not expressly spell it out in their contract, this would mean that using written contracts to find such usages would be a futile exercise. They would simply not be elucidated there.

A potential solution to the conundrum of obtaining the relevant data may be to turn to traders and rely on trade practices as a starting point. More precisely, the traders would be asked to distinguish between two types of rules, designations, standards, and arrangements: (i) those that the traders have implemented in practice with other traders and would like to see such practices implemented widely or even universally; and (ii) those that they would prefer to keep as confidential and confined to their trading relations with select fellow traders. It is the former that the traders would be invited to share, and thus they would constitute the backbone of the data set on which the AI system on trade usages would be trained. The expectation would be for these practices to fall into one of three categories.

The first category would comprise practices that correspond to the already existing trade usages as established by courts and arbitral tribunals, or as codified by the relevant organizations. When and if such practices are shared by a significant number of traders and fed into the data set, they will serve to empirically confirm that such practices are widely observed, thus reinforcing their status as trade usages.

156 Gilles Cuniberti, 'The Laws of Asian International Business Transactions', *Wash. Int'l LJ* 25 (2016): 47. It is due to this reason that confidentiality clauses are so pervasive in commercial contracts, thus keeping contracts out of the reach of many interested parties, including scholars. Cuniberti notes as follows: 'Many commercial contracts are subject to confidentiality clauses. Moreover, even in the absence of a confidentiality clause, private commercial parties are typically not obligated to make their contracts public.'

The second category would comprise those practices that, thus far, have not been established as trade usages by courts or arbitral tribunals, and have not been codified by the relevant organizations. However, let us assume at this stage that numerous traders will have shared them and fed them into the data set, which would allow the AI system to determine that they are widely observed by traders. Depending on the concrete facts of a specific case and applicable law, this could be used as evidence of the usages' widespread use. In other words, the AI system could be used to pinpoint practices that have evolved into trade usages, albeit no court, arbitral tribunal, or the relevant organization entrusted with codifying trade usages have registered them as such previously.

As for the third category, this would comprise practices for which some traders have expressed preference to be adopted as trade usages, but the statistical analysis of the AI system shows that they have not (yet) been widely accepted. These practices are in the system for the traders to see and decide whether they would want to implement them in their respective dealings with other traders. Over time, some may even become widely accepted, thus evolving into trade usages.

The proposed AI system on trade usages, as can be deduced from the discussion above, would directly empower traders as a community in at least three aspects. First, the system would enable the traders to obtain the relevant data in order to determine whether something constitutes a trade usage or not. Second, the system would directly allow traders to exert influence on and shape further development of trade usages because they would be invited to share the practices that they had previously successfully implemented and that they would want to see other traders implement as well. Third, under the assumption that traders from all across the world would embrace the system and voluntarily share the relevant data, this would enable a clearcut delineation of the scope and reach of trade usages. In other words, one would be able to see whether a particular usage is universally followed or whether it is confined to a particular region or country. When it comes to international trade, this would be quite informative in terms of what traders can expect when engaging in international trade with a trader from a particular locality, enabling a more effective contracting process. Overall, the aim would be for such a system to be a tool in the hands of the community of traders to effectively develop, observe, and establish trade usages.

4. Designing an AI system on trade usages

In terms of designing an AI system on usages of international trade, the technical aspects of the project would, naturally, be left to the AI experts. However, since the AI system would be expected to perform a certain function in the domain of law, the input of lawyers becomes indispensable. In this section, the author, who is an academic lawyer, will offer his vision of some of the more concrete aspects and considerations that, in his view, ought to be an integral part of such a system.

It was noted in the previous section that the traders should be enabled to share the relevant data as simply and effectively as possible. Let us illustrate here how that could work through the lens of four traders: Trader A, Trader B, Trader C, and Trader D. Let us assume that Trader A and Trader B have mutually developed a trade practice between themselves that has streamlined and simplified their contracting process. Trader A and Trader B would both want to implement the same practice in their dealings with other traders, and what is more, they would prefer to be able to rely on such practice even in the absence of a contractual provision. Trader A thus decides to access the AI system on international trade usages and enters the said trade practice there. More precisely, Trader A describes the trade practice, discloses her industry or branch of trade, states where her main place of business is located and where Trader B's main place of business is located, and elaborates briefly on the advantages of the trade practice as well as how long they have been implementing the

said practice. Once all of this is submitted, the details are forwarded to Trader B, who receives a link via email. Trader B then reviews Trader A's submission and can confirm it or suggest modifications. Once confirmed, the trade practice is in the data set. Trader C, who is always on the lookout for good trade practices that allow one to contract more effectively, accesses the AI system and enters a prompt, asking for a suggestion on how to deal with an issue that has been repeatedly arising in her commercial dealings. The AI system suggests the implementation of the trade practice as described by Trader A and confirmed by Trader B. Trader C finds merit in the said practice and brings it to the attention of Trader D. Trader C and Trader D implement the practice in their contractual arrangements to their mutual satisfaction. They also confirm the practice in the AI system and provide the relevant data. If this chain were to continue at a grand scale, then the practice started by Trader A and Trader B would have potentially evolved into a trade usage.

The model described here would be the primary way in which the relevant data would be collected for the prospective AI system on usages of international trade. As noted previously, court decisions and arbitral awards confirming the existence of trade usages would also be added to the pool, as well as any prominent codification of trade usages. It is the former method of collecting data, however, that would ensure that the AI system does not simply parrot out the already existing findings by courts and arbitral tribunals, which, judging by what some commentators are observing, tend to be lenient in establishing the existence of trade usages against the background of flimsy evidence. Codifications of trade usages have also been exposed to criticism, as noted earlier in the text.

Now, let us take the perspective of Trader X, who wishes to determine whether a particular practice or notion constitutes a trade usage. As it happens, Trader X is involved in a legal dispute with Trader Y. Let us also assume that the CISG is applicable to their transaction. Trader X wishes to allege that a particular practice constitutes a trade usage. The burden of proof in this matter would be on Trader X.[157] Among other things, Trader X would be expected to show that the supposed usage is regularly observed internationally in the trade concerned.[158] Provided that the AI system on usages of international trade has a rich data set, Trader X could turn to it for relevant statistics to support his legal argument. To take things a step further, the AI system on usages of international trade could be designed in a way so that it not only offers statistics that inform whether a usage is being widely observed in international trade or in a particular locality; additionally, it could be designed to offer preliminary assessment as to whether something indeed constitutes a usage within a concrete context, subject then to final assessment by a human lawyer.

For example, whether a practice of concern to Trader X is indeed a trade usage will depend on the applicable law. In this particular case, that is the CISG. Thus, the AI system could be trained to determine whether something constitutes an applicable or binding usage against the background of applicable law. In the context of the CISG, this would require determining the following elements: (i) whether parties knew or ought to have known about the usage; and (ii) whether the usage is widely known and regularly observed by parties in similar contracts concluded in the same kind of trade. Of course, the AI system would not be in the position to determine whether the parties actually knew about the existence of a usage. However, the AI system could be trained to back the position of whether or not the parties ought to have known about the usage. To this end, the AI system could rely on the CISG case law to learn how the courts and arbitral tribunals have approached this issue, as well as on statistics. The more a particular usage is widely and regularly observed in a particular trade, the more the traders in that line of trade ought to be expected

157 *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (United Nations 2016) 65. It is noted in the Digest as follows: '[T]he party that alleges the existence of a binding usage has to prove the required elements, at least in those legal systems that consider the issue as one of fact.'

158 Ibid.

to be familiar with it. Besides the CISG, the AI system could integrate other legal regimes as well, both national as well as international or transnational ones.

For the AI system on usages of international trade to be functional and effective, it would have to be truly global. In other words, special care should be taken that the data is not merely gathered from the select few jurisdictions—primarily from the developed, Western countries.[159] The aim should be to equally and equitably ensure access to the AI system in all corners of the globe so that all traders have the opportunity to contribute to the data set. In addition to equitable grounds, practical considerations also necessitate that the data be collected as evenly as possible around the world. One could only claim that the AI system provides relevant results on international usages if its data set is as far-reaching as possible, taking into account as many international transactions and between as many different localities and traders as is conceivable and practical. In order to achieve such wide—almost universal—coverage, the AI system would have to be accessible in different languages. Besides accessibility, one would need to ensure that information regarding the AI system is adequately disseminated among traders. In other words, traders would have to be informed on the benefits of feeding data into the system (for this, as remarked earlier, some incentive could be provided, such as temporary access to the AI system's premium features) as well as on how they can actually make use of it. To this end, national and international organizations such as the ICC and UNCITRAL, as well as national and international associations of traders, could be approached for assistance in this matter.

IV. Conclusion

Trade usages continue to play an immensely important role in international commercial law. Most international instruments designed to facilitate international trade, such as the CISG, the PICC 2016, and the Model Law on ICA, integrate trade usages and place them quite high in the hierarchy of legal rules. Irrespective of whether one adheres to the subjective or objective theory of trade usages, the justifications for going as far as ascribing normative value to them are compelling.

Nevertheless, trade usages have occasionally been put under the magnifying glass by several scholars who have articulated some credible criticism. For instance, it has been pointed out that proving the existence of a trade usage is often a demanding and challenging exercise, with the consequence of this being that the courts and arbitral tribunals have been willing to find trade usages based on scant evidence. This, in turn, undermines the very theoretical justifications for ascribing normative value to trade usages. In other words, if trade usages are expected to contribute to the reduction of costs and efficient contracting, it is unlikely that that will be the case if parties end up being bound by rules, designations, or standards that actually do not constitute trade usages.

With the advance of AI technologies, new avenues are being opened to tackle many of the challenges that have previously posed significant, potentially insurmountable hurdles. With some creativity, an AI system could be designed that would tackle the criticism directed at trade usages, and thus secure a new, elevated role for trade usages in international commerce in the 21st century. This AI system could not only ensure access to firm evidence on the existence, or lack thereof, of a particular trade usage but could also bring about a more transparent and verifiable process of creation and dissemination of trade usages.

[159] Boris Praštalo, *Uniformity in the Application of the CISG: Analysis of the Problem and Recommendations for the Future* (Kluwer Law International BV 2020) 131–80. In seeking to build a true Global *Jurisconsultorium* for the CISG, this book provides several pivotal benchmarks, with one of them being an appropriate level of representation of developing States, including their case law and the views of their scholars. This discussion would be relevant in the context of developing an AI system on usages in international trade.

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