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DEVELOPING A "TRANSNATIONAL" LAW FOR INTERNATIONAL SALES: THE VIENNA CONVENTION'S TREATMENT OF TRADE USAGES

AINHOA VEIGA-TORREGROSA
University of Georgia School of Law

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Ainhoa Veiga - Torregrosa

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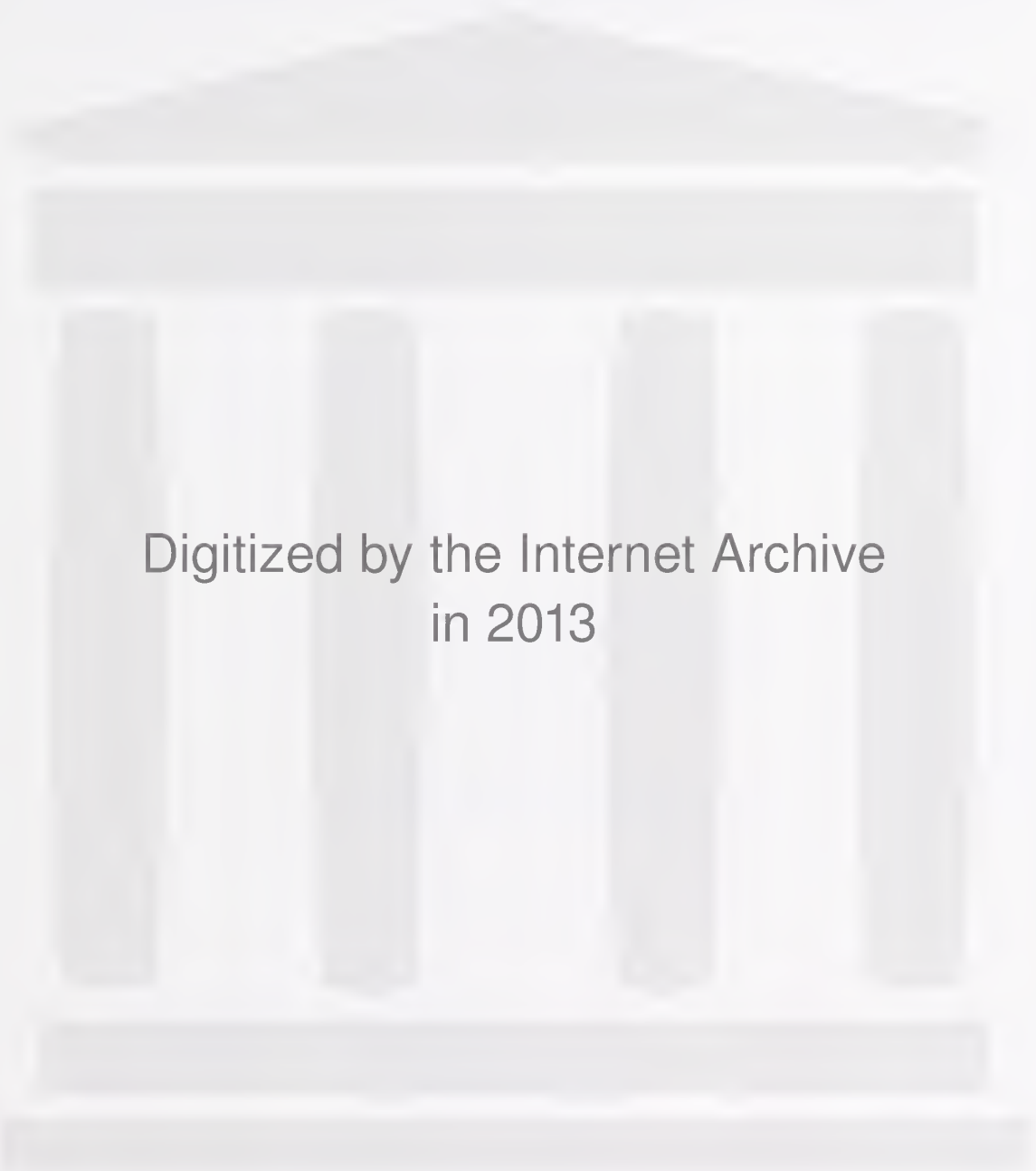

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by

AINHOA VEIGA-TORREGROSA

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AINHOA VEIGA TORREGROSA

Approved:

Date 17 June 1997

Major Professor

Date 17 June 1997

Chairman, Reading Committee

Approved:

Graduate Dean

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Date

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CHAPTER I

Preliminary Considerations

The 1980 United Nations Convention on Contracts for the International Sale of Goods(hereinafter CISG or Vienna Convention)[1], conceived for worldwide acceptance[2], sets forth a uniform set of rules aimed at regulating some of the issues that, in an international sales contract, are likely to arise between the parties to such international transaction[3]. The extent to which the substantive solutions that the Vienna Convention provides with the aim of filling in gaps within international sales contracts,

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1 United Nations Conference on Contracts for the International Sales of Goods, at 178, Final Act (April 10, 1980), U.N. Doc. A/Conf. 97/18, Sales No. E.81.IV.3 (1980), *reprinted in* INT'L LEGAL MAT. 668 (1980). There is an abundant bibliography on the Vienna Convention. See, *e.g.*,.C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION (GIUFFRE, Milan 1987); JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES (1989); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (Kluwer 2nd Ed. 1991); FRITZ ENDERLEN & DIETRICH MASKOW, INTERNATIONAL SALES LAW (New York: Oceana 1992); ALEJANDRO M. GARRO & G. ZUPPI, COMPRAVENTA INTERNACIONAL DE MERCADERIAS (1990); BERNARD AUDIT, LA VENTE INTERNATIONALE DE MARCHANDISES (1990); ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1989). For other publications *see* Peter Winship, *The UN Sales Convention: A Bibliography of English-Language Publications,* 28 INT'L LAW. 401 (1994).

2 As of 5 February 1997, 48 States are parties to the CISG: Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina,Bulgaria, Canada, Chile, China, Cuba, Czech Republic, Denmark, Ecuador, Estonia, Egypt, Finland, France, Georgia, Germany, Ghana, Guinea, Hungary, Iraq, Italy, Lesotho, Lithuania, Luxembourg, Moldova, Mexico, Netherlands, New Zeland, Norway, Poland, Romania, Russian Federation, Singapore,Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda Ukraine, United States of America, Uzbekistan, Venezuela, Yugoslavia, Zambia. *See*, *United Nations Treaty Section* (visited 5 Feb., 1997) <http://www.un.org/Depts/Treaty/bible/ Part_I_E/X_/X_10.html>.(This locator is a printed version of the United Nations publication, *Multilateral Treaties Deposited with the Secretary-General*, which has been available on the Internet since the end of November 1995. The electronic version of this document contains detailed information on the status of the of the CISG and other treaties and it is updated once a week).

3 See infra at 10.

are to achieve the standing of a predictable,global, and uniform legal background for these contracts, is the question to be treated in this paper from the analysis of the treatment that the said Convention dispenses to international trade usages as a part of the legal regime of an international sale transaction to which the CISG technically applies[4] and the practical consequences deriving from that treatment.

I will proceed first with some considerations as to the notion of "transnational law" in order to see how the Vienna Convention and international trade usages fit togegher within the same notion. Second, I will present the main features of interrnational sales of goods followed by a narrative of their regulation by international conventions. The proposed discussion on international trade usages will then proceed within the frame of the following preliminary considerations.

A. As to the Notion of "Transnational Law".

The reference made in the title of this paper to the term "transnational uniform law"asks for an explanation as to its meaning. Three different usages of the term "transnational law" have been pointed out:

-"as a general description of the legal regime of an international commercial transaction";

-"as a label for the factual uniformity or similarity in contract laws applicable to or contractual patterns used in international commercial transactions"; and

-"as a term to denote international sources of commercial law, i.e. internationally uniform law in the proper sense".[5]

Keeping in mind that "transnational" is, first, the subject-matter or the object of regulation, here the international sale of goods, [6] it seems practical to me to comprise

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4 See *infra at* 22..

5 Nobert Horn, *Uniformity and Diversity in the Law of International Commercial Contracts, in* THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS, 13 (NOBERT HORN and CLIVE M. SCHMITTHOFF eds., 1982).

within the term "transnational law" "all the law which regulates actions or events that transcend National frontiers"[7]. Thus, following the usages of this term mentioned above, it is the first of those that best describes the actual legal landscape before a transnational commercial transaction. [8]In this sense, "transnational law" would comprise all the norms or rules integrating the legal regime to which a transnational transaction is subjected, independently of their having, they themselves, a transnational nature, in the sense of their being thought to apply, exclusively, to cross-border transactions. This is why the proposed used of the term 'transnational law' does not carry in itself any element of uniformity. In effect, it would not be realistic to think that, at present, a given transnational commercial transaction, e.g. a sales contract, is framed within a transnational uniform legal regime where the parties to such transaction could anticipate their rights and obligations and judges or arbitrators adjudicate transnational commercial disputes on the basis of uniform legal patterns and resorting to transnational uniform solutions. However, a certain level of uniformity is to be found in the norms and rules integrating the legal regime of a transnational contract. In this sense, it is possible to talk about 'developing a transnational uniform law'. For the purpose of identifying its contents the two other usages of the term 'transnational law' mentioned above have to be brought into consideration.

B. Lex Mercatoria

The second of those usages would describe 'an actual uniformity or similarity of rules and patterns' which 'serving uniform needs of international business and

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[6] The term 'transnational' is used here rather than 'international' as more accurately describing the transactions across national boundaries between private parties..*See*, Ronald A. Brand, *Nonconvention Issues in the Preparation of Transnational Sales Contracts,* 8 J.L. & COM. 145, 145 n. 2 (1988).

[7] Philip C. Jessup, *The concept of Transnational Law,* 3 COLUM. J. TRANSNAT'L L. 1 (1964).

[8] It goes almost without saying that most of the transnational transactions and, in particular, international sales, take place among business people, merchants or professionals. People, usually, do not transact internationally outside the context of a business or commercial activity.

economic cooperation' are increasingly guiding and coordinating international commerce[9]. 'Transnational law' in this sense is also referred to as *lex mercatoria*[10]. Although *lex mercatoria* is often meant to cover the third of the usages of the term 'transnational law' under consideration, *i.e.*, 'as a label for internationally uniform law in the proper sense, based on international sources of law, *i.e.* either on conventions ('international legislation') or on customary law'[11], this notion is rooted under the observation of the impact that, in the context of international trade, the principles of the autonomy of the parties' will and freedom of contract has exerced on the participants to such transactions in that they are the firsts to construe the legal regime governing their contracts[12].Then, *lex mercatoria*, is first defined as 'the autonomous law of international trade'[13], 'that has grown independently of national systems of law'[14]. In

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9 Nobert Horn, *see supra* note 5 *at* 14.

10 The concept of *lex mercatoria* has made the object of a great amount of writing. *See, e.g.,* Berthold Goldman, *Frontieres du droit et lex mercatoria,* ARCHIVES DE PHILOSOPHIE & DROIT, 177 (1964); Berthold Goldman, *La lex mercatoria dans les contrats et leur etage international; Realites et Prespectives,* JOURNAL DE DROIT INTERNATIONAL [Clunet], 475 (1980); PHILIPPE KAHN, LA VENTE COMMERCIALE INTERNATIONALE, (Paris 1961); CLIVE M. SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW, 131,243 (Ed. Chia-Jui Cheng 1988) (Most of the essays collected in the cited work have previously been published elsewhere from 1937 to 1987 as essays, articles, or chapters in other publications. I refer to the pages which are the object of Part II of this collection . The essays included in this Part are devoted to 'an examination of the nature, characteristics, sources, and scope of international trade law, which constitute the substantive part of the modern *lex mercatoria*") *Id. at* xi.; Paul Lagarde, *Approche critique de la lex mercatoria, in* LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES (ETUDES A BERTHOLD GOLDMAN),123 (Paris 1982); Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions,* 2 B.U. Int'l L.J., 317 (1984); F. DE LY, DE LEX MERCATORIA (NORTH HOLLAND Ed. 1992).

11 Nobert Horn, *see supra* note 5 *at* 14.

12 *See* Aleksandar Goldstajn, *Usages of Trade and other Autonomous Rules of International Trade according to the U.N. (1980) Sales Convention, in* DUBROVNIK LECTURES, 55, 61 (PAUL VOLKEN and PETAR SARCEVIK Eds. 1986) ('Regardless of the economic order of individual countries and differences in social systems, the view generally has been accepted that international trade functions within the framework of market economies, [the consequence being that] [f]or the purposes of foreign trade, all countries have accepted the legal concept of freedom of contracting'). *See also,* Horacio A. Grigera Naon, *The U.N. Convention on Contracts for the International Sale of Goods, in* THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS, *supra* note 5 , 89 ('The classical approach of supporters of *lex mercatoria* and 'transnational law' is based upon the recognition of the great influence which the will of the parties taking part in international transactions has had upon the sources of the law of international trade'). *Id. at* 90.

13 Aleksandar Goldstajn, *supra* note 12 *at* 69.

this sense, the term 'autonomous' would evoque the rules and principles developed by the merchants' own choosing[15]. The questions arising out of this phenomenon are as to the degree of uniformity found in transnational commercial practice[16] and as to the legal value to be attached to the clauses, rules and patterns developed by such practice in the sense of their being applied on objective basis thus, bypassing their original contractual character[17]. In the process of developing a transnational uniform law for

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[14] *Id.Lex mercatoria* becomes a controversial concept when it is elevated to the category of 'autonomous legal order'since its self-sufficiency and internal coherence would have to be presumed. Thus, the critics arguing that '(l)ex mercatoria is a myth without substance because it is incapable of generating a coherent body of rules that would make it unnecessary to have recourse to either domestic or international law' would be engaged in a futile discussion. *See,* Georges R. Deleaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria,* 63 TUL. L. REV. 575, 577 & n.7 (1989). In effect, it had already been stated by Berthold Goldman, the first,in modern times, to greet this concept, that the *lex mercatoria* is incomplete. *See,* Berthold Goldman, *Une Bataille Judiciaire autour de la Lex Mercatoria,* 4 REVUE DE L'ARBITRAGE 379, 407 (1983). Also Clive M. Schmitthoff, a veteran supporter of this notion, has acknowledged that *lex mercatoria* derives its authority from the sovereign power of national lawgivers. *See*, Scmitthoff, *Nature and Evolution of the Transnational Law of International Commercial Transactions, in* THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS, *supra* note 5, *at* 22('It is [ ] wrong to attribute the character of international or supranational law to international trade law. It acquires its autonomous character by leave and license of all national sovereigns. In character it is very different from public international law. Ultimately it is found on national law but has been developed by international business in an area in which all national sovereigns are, in principle, disinterested.').*Id.*

[15] According to some authors, when 'autonomous law' is also used, in the context of international legislation, to mean an international as opposed to a national source of law, conventions on commercial matters, like the CISG, would come under the concept of *lex mercatoria. See,* Nobert Horn, *supra* note 5 *at* 15. ('[L]*ex mercatoria*: a uniform and, in some ways autonomous , law of international commerce). *Id.* Thus, in a broad sense, the rules of the *lex mercatoria* would be founded 'on usages developed in international trade, on standard clauses, on uniform laws, on general principles of law and on the contract negotiated by the parties'. HANS VAN HOUTTE, THE LAW OF INTERNATIONAL TRADE, (SWEET & MAWWELL Eds. 1995), 26. Then, as it has been appointed, '*lex mercatoria* is simply the name most commonly given to the substantive solution to cross-border commercial conflicts questions'.RAISCH & SHAFFER, INTRODUCTION TO TRANSNATIONAL LEGAL TRANSACTIONS, 151 (Oceana Ed. 1995).

[16] If the notion of delevoping a transnational uniform law is to be interpreted broadly, the question arises as to what degree 'the practice of those concerned' can constitute a factor tending to unify commercial law. In order to answer this question attention has been paid to general conditions of business, standard-form-contracts and trade terms that, originally drawn up but individual traders and enterprises have been adopted and perfected by professional organizations. This so-called 'corporations' law' or 'droit corporatif' because of its widespread use and knowledge 'can often be looked upon as the statement of the customs of a particular trade'. Rene David, *The International Unification of Private Law,in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, Vol. II, Ch. 5, 55 (1971).

[17] *Id.* ('The question is whether particular general conditions of business should be regarded, in certain circumstances as constituting a *usage*, binding traders independently of any wish to refer to it manifested by the contracting parties') *at* 57.

transnational commercial transactions by means of international legal instruments, such as the Vienna Convention, the above questions cannot be obviated because the success of these efforts will depend, in a great part, on the attention payed to the trade usages that the business community develops, in their transnational dealings, within the limits of private autonomy.

C. Public Policy

In effect, private autonomy and freedom of contract, as fundamental principles of the general law of contracts[18],are subject to the restrictions that mandatory rules impose on them. National contract laws offer two types of contract rules; those of an optional character and those which, reflecting public concerns of a social and economic nature, are imposed on the parties who transact within their reach [19]. In international commerce, the first type of rules, as long as they are deemed to be at odds with the

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[18] While for some authors private autonomy and freedom of contract are synonimous terms; *see, e.g.*, Clive M. Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions, supra* note 13 *at* 20 (The cited author says that a wide area of contract law 'is governed by the principle of the autonomy of the parties' will, in the common law countries called the principle of freedom of contract'); others would distinguish both notions in terms of their validity today., and then, while the principle of private autonomy would still have some validity, 'in the sense that the expressed will of the parties serves as the impetus to the formation of contract and as the justification for its legal enforcement', as to freedom of contract, they would say that '[o]ne may, however, question the underlying assumption that if the parties have come to an agreement, that is enough and no investigation of the economic and social circumstances in which they did so is called for'. K. ZWEIGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW, 354 (Clarendon Press. Oxford Ed. 1987) (The authors cited concluded that, if freedom of contract means 'the freedom to select and enter contracts of any imaginable type, the freedom to decide whether to contract or not, and the freedom of each contractor to fix the terms of his own promise, subject to the agreement of the other party', realizing that freedom of contract has been 'obstructed by social or economic facts', it cannot truly exist 'unless the parties to the contract are economically and socially equal'). *Id. at* 355. While at national levels, one easily finds, next to the optional contract rules, mandatory rules which, besides of imposing a minimum of morality as to the object of the transactions, they will also impose a minimum of morality, based on economic and social concerns, regarding the balance of rights and obligations the parties have created between themselves , it is doubtful whether, in the context of transnational commercial contracts, the same concerns have been able to develop rules capable of adjusting the balance between the parties on the basis of wider social considerations.

[19] For the impact of national mandatory rules or domestic public order on transnational contracts, *see* generally, Paul Lagarde, *Private International Law, Chapter 11, Public Policy in* III INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (J.C.B. MOHR (PAUL SIEBECK) TUBINGEN Ed. 1994).

parties contracting on transnational basis, and with the dynamics of their contracts, are replaced by more sophisticated provisions which are to be found in the contracts themselves or in the source of law that the parties choose to complete the setting of their rights and obligations [20] But the parties, at least theoretically, will be subjected to a forum's public order or to its mandatory rules or the mandatory rules of the otherwise applicable law according to the forum's conflict of law rules[21]. At this point, it has to be noted that, as long as arbitration is increasingly resorted to by parties engaged in international trade, and as pointed out regarding the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[22], nowadays it is easier to enforce an arbitral award than a foreign judgement[23], the question arises as to the effect

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[20] The parties could choose the contractual rules of a given domestic law, e.g. Section 2 of the Uniform Commercial Code as implemented by the State of New York; or the practices and usages of a given business sector which could have been drawn up by a business organization, e.g.,the standard conditions of the London Corn Trade Association, of the Grain and Feed Trade Association (GAFTA). Regarding a contractual general reference to the *lex mercatoria*, such a clause could not be held as a valid choice although one can find some courts holding arbitral awards basing their decisions on *lex mercatoria* as the applicable law to the dispute. See,*e.g.,* D. RIVIKIN, *Enforceability of Arbitral Awards based on Lex Mercatoria,* ARBITRATION INTERNATIONAL, 67 (1993).

[21] For a distinction between the exception of public order and mandatory law, *see e.g.,* HANS VAN HOUTTE, *supra* note 15 *at* 19-20 (When the contractual provisions stipulated by the parties, or those provisions found in the source the parties have referred to in their contract, or the provisions found in the foreign law which the forum, according to its conflict of law rules is led to apply, lead to 'an infringement of the fundamental principles of the ethical, political or economic order of society', the exception of public order comes into force. On the other hand, mandatory law, consisting of 'rules, the substance of which is considered to be so vital that they are always applied when there is some connection with the forum', is distinguished from the exception of public policy 'in that [it] impose some substantive law, but do not otherwise prevent the application of the normal conflict of law rules') *Id.* (There are cases when a court is obliged to apply the mandatory laws of another country, *e.g.*, Article VIII (2) (b) of the Charter of the International Monetary Fund which obliges a Member State to recognize the exchange regulations of other Member State when the former is brought to meet exchange contracts involving the currency of the latter) *Id. at* 20. (In other cases the courts of the forum may also apply foreign mandatory law if it is decided the the issue under consideration is in closer connection with a foreign forum.) *See, e.g.,* Article 17(1) of the Rome Convention on the Law Applicable to Contractual Obligations, 1980, 23 *Official Journal of the European Communities* (L266) 1980.

[22] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

[23] L. Matray, *Union Internationale des Avocats Quelques Problemes de la Lex Mercatori[International Union of Lawyers.Some Problems of the Lex Mercatoria]* 69 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARE, 333,333 (1992) ('Desormais, il est plus facile d'executer a l'etranger, une sentence arbitrale qu'un jugement!').

of national public policies on transnational contracts and, more important, the question as to the emerging of a "truly" transnational public order[24].

As to the first of these questions, there are those who support that the limits imposed by public policy, being applied to domestic relations, they do not operate in the field of transnational relations where the parties can completely evade the application of any national system of rules, by creating "self-regulatory" contracts or contracts "without law"[25]. It is true that in the practice of the international business community, one finds in certain market sectors, e.g. commodity markets, such contractual relations where the respective rules, usages and customs will amount to provide the parties with a complete self-regulatory scheme which, to the extent conflicts arise, will be further supported by resorting to arbitration procedures. Under this scheme, it is true that States'laws do not intervene at all. However it is without foundation to build further theories regarding an 'automous legal order' in international trade, on a deliberately incomplete picture. Indeed, in a final analysis, the truly authority to enforce the above 'autonomous' scheme will still be a national judge who will be able to remember the lack of supremacy of such private systems[26].

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[24] See, P. Lalive, *Ordre Public Transnational (ou reellement International) et Arbitrage International* [*Transnational Public Order (or truly International) and International Arbitration*], REVUE DE L'ARBITRAGE, 329 (1986).

[25] For a discussion of these theories, *see e.g.*,Michael Joachim Bonell, *The Relevance of Courses of Dealing, Usages and Customs in the Interpretation of International Commercial Contracts, in* UNIDROIT, NEW DIRECTIONS IN INTERNATIONAL TRADE LAW, 109 (Oceana Publications, Ed. 1977) (The supporters of this view called 'autonomists' hold that 'in the field of international contracts and arbitration the supreme and exclusive source of authority derives not from the various positive systems but rather from the parties themselves, who have an unlimited power to regulate their relations autonomously') *Id. at* 116-117.

[26] See Bonell *supra* note 23 (Recourse to the authority of States becomes inevitable 'when the party against whom an arbitral award has been given refuses, notwistanding the threat of the corporative santions applicable in such an eventuality, to abide by the decision and thus obliges the other party to turn to the only authority at present in a position to ensure forced execution, that is to say to a national judge. And since States will, before exercising their 'secular arm', usually insist on effecting not only a formal but also a substantive control over the decision in respect of which execution is requested, it is understandable that at least on such occasions they will always demonstrate their supremacy over private systems'). *Id. at* 119.

Regarding the second of the questions above, under the view that private parties conducting business in international trade, are in need of a truly transnational legal regime, the notion of a truly "international public order" independent from national internal laws has emerged which would avoid a conflictual approach in dealing with transnational contracts. However the recognition of such "intenational public order" is somewhat illusory when one comes to the identification of its content, and yet, more important, when one tries to adjust the balance between private parties in international trade on the basis of some principles that although, could well be considered increasingly mandatory in an international context, they suffer from a lack of clear saction to interfere between the parties in the context of, *e.g.* an international sale. This goes with more evidence as regarding modern principles in terms of equality of treatment, protection of weaker parties and the like, often related to internationalised notions of human rights and basic protections, alongside the combating of fraud, sharp practices, use of excessive power, cartels or insider dealing in market related assets. Thus, although there are courts and, more often, arbitrators that have founded their decisions on international public policy, it can be asserted that "when no international convention is directly involved it is no easy for the notion of a truly international public policy to establish itself notwithstanding the professions of some writters"[27]. In this respect, it is well-known to refer to some French case-law that from the fifties have avoided the traditional private international law approach in favour of applying substantive rules by means of invoking the "ordre public international"[28].. On the other hand, the same courts are found holding opposite oppinions by refusing to apply "the

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[27] Paul Lagarde, *supra* note 17 *at* 50 (notwihstandig the ambiguity in invoquing an international public policy based on rules of international *ius cogens*, it is interesting to point that out) *Id. at* note 339.

[28] See, *e.g.*, Bonell, *supra* note 23 *at* note 58; Lagarde, *supra* note 17 *at* note 340.(citing cases involving bribery, supplies to support a *coup d'etat*, smuggling and the like) (But the author also cites cases where French courts refuse to apply the same exception of public policy in similar cases) *Id.*, at note 341.

principles of an alleged international public policy superior to all domestic legislation the existance of which is not known in any legal system in force"[29]. When one comes to the field of international commercial arbitration, the appeal to an international or transnational public policy is more often found. Here, it is generally accepted that arbitrators are not subjected to any conflict of law rule but to the intention of the parties, that a national legal system will intervene outside the parties'will, as long as the award will be sought to be recognized or enforced, and that as a consequence, international arbitrators, either expressly or implicitly, will try to adopt a substantive transnational approach[30]. In this context, international awards are more readily to refer to the notion of international public policy although its substance will still remain quite uncertain[31].

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[29] Lagarde, *supra* note 17 *at* 50 (citing the Court of Appeal of Paris) *Id., at* note 342.

[30] See in general, Berthold Goldman, *Les Conflits de Lois dans l'Arbitrage International de Droit Prive* [*The Conflicts of Laws in International Arbitration of Private Law*], 108 RECUEIL DES COURS (1963 II), 351; Goldman, *La Protection International des Droits de l'Homme et l'Ordre Public International dans le Fonctionnement de la Regle de Conflict des Lois [The International Protection of Human Rights and the International Public Order in the Operation of the Conflict of Laws' Rule] in* RENNE CASSIN, *AMICORUM DISCIPULORUMQUE LIBER* ,I, 449. *See also,* Filip De Ly, *Current Issues in International Commercial Arbitration: The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning,* 12 J. INT'L L. & BUS., 48 (1991).

[31] Lagarde, *supra* note 17 *at* 51 (Citing contradictory arbitral awards on cases involving bribery. While some of the awards cited have annulled these contracts on the basis of international public policy, others have held similar contracts by invoking the *lex mercatoria* and 'the general principles of obligations applicable in internatinal commerce'). *Id., at* notes 348-349.

CHAPTER II.

The Idea of Codification . A Uniform Law for International Sale of Goods.

A. Main features of an international sale.

International sales are among the most important and more common transactions ocurring in international commerce[32]. In an international sale, as in a domestic sale, one party, the seller, promises to deliver either a specific good or a specified quantity of (generic) goods to the other party, the buyer, at a price and with the aim of achieving a transfer of ownership from the former to the latter[33]. In order for the contract to exist, this is the minimum the parties are expected to agree to although additional terms will be normally found or referred to in the contract on issues such as the quality of the

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[32] See, *e.g.*, C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION (GIUFFRE, Milan 1987) ('While nowadays international trade has reached an unprecedented intensity, the sales contract, which constitutes the most important legal instrument in this context[ ]'). *Id at* 3. *See also,* FRITZ ENDERLEN & DIETRICH MASKOW, INTERNATIONAL SALES LAW, (New York: Oceana 1992) ('[T]he most important practical field of international economic relations between enterprises on a universal level, namely contracts of sale.'). *Id at* 9.

[33] These are the essential elements of a sales contract in all domestic legislations. See, *e.g.,* Articles 1582 *et seq.* of the French Civil Code ('Sale is an agreement whereby one party obligates himself to deliver a thing, and the other to pay for it.' '[T]he ownership passes by law to the purchaser from the vendor, from the moment when the agreement is concluded with regard to the thing to be sold and the price, although the thing may not yet have been delivered or the price paid'); Sections 433 *et seq.* of the German Civil Code ('The sales contract is mutually binding agreement under the terms of which the seller is committed to transfer the ownership of the sold commodity and the buyer is likewise committed to pay the price agreed upon'); Section 2(1) of the Sales of Goods Act of 1979, Chapter 54 ('A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration called the price'); Uniform Commercial Code, Section 2-106 ('A sale consists in the passing of the title from the seller to the buyer for a price').See, in general, *Some Comparative Aspects of the Law Relating to the Sale of Goods,* 9 INT'L & COMP. L.Q. (1964) (Supplementary Publication). For a definition based on the CISG's provisions, *see,* Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing,* 15 J.L. & COM.1 (1995) ('[T]he sales contract can be defined as the contract by virtue of which the seller deliver the goods, hand over any documents relating to them and transfer the property in the goods, whereas the buyer is bound to pay the price for the goods, and take delivery of them') *Id. at* 52.

goods, the conditions of physical delivery, of the passing of the risk in the event of the goods being damaged or lost, and the modalities of payment. More detailed contracts will likely include provisions on remedies or on the termination of the contract upon certain events such as default, force majeure, frustation or hardship[34]. However, all these additional terms beyond quantity and price may well not derive from the contract itself. In such a case the general law of sale will provide with such terms to fill in the gaps within the contract.

International sales as a subject of regulation constitutes a term of reference presenting some special features and problems which normally are not to be thought of domestic sales:

In the first place, there is the question of identifiying the internationality of the sales contract. In this sense, and depending on the purposes behind such task, different theories could be advanced[35]. However, in a legal sense, one could generally say that a sales contract is international when there could be a doubt as to the law to be applied in case of a dispute arises. The most common example is where buyer and seller transact from different countries[36].

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[34] For a complete view of the principal terms of a sale contract, *see,e.g.,* INTERNATIONAL TRADE: LAW AND PRACTICE, 11 (JULIAN D.M. LEW & CLIVE STANBROOK Eds. 1983).

[35] See, Dr. A. Kaczorowska, *L'Internationalite d'un Contrat [The Internationality of a Contract],* 72 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARE 204 (1995) (The author identifies two methods used by the doctrine and the jurisprudence in order to determine the internationality of a contract: the economic and the legal methods. The first, favoring a wide meaning by taking into consideration all the circumstances observed in the practice, would consider international a contract involving the interests of international commerce. The legal method, on the other hand, would see an international contract whenever it is apt to involve different legal systems given some factor such as the place of its conclusion or of its execution, the place of the parties to the contract or their nationality or domicile, the cross-border movement of the goods and the like)*Id. at* 207-208.

[36] This is ,on the other hand, the solution adopted by CISG to determine the internationality of a sales contract:

'This Convention applies to contracts of sale of goods between parties whose places of business are in different states[ ]'.

See, *supra* note 1, Article 1(1). It is to be noted, however that the internationality of a sales contract, according to the Vienna Convention does not determine by itself the application of the Convention. See Franco Ferrari, *supra* note 33 ('[U]nder the CISG the internationality of a contract depends merely on the parties having their places of business (or habitual residences) in different states[ ]') *Id. at* 23.

Secondly, the parties to an international sales contract will both usually be professionals or merchants. Thus, consumer sales will not normally be thought to be covered by the subject[37].

Thirdly, as to the object of an international sale is concerned, *i.e.*, the goods, different kinds of sales will also be excluded from the general subject to the extent they are deemed not to evolve under a, more or less, common pattern; *e.g.*, sales of real state, of negotiable instruments, etc. In this sense, 'goods' are generally understood as movable and corporeal assests[38].

As to the price, the designation of a foreign currency may well be considered a special feature of international sales contracts which is not deemed to appear in domestic sales in which such designation could well bring the contract under a different qualification, *e.g.*, an exchange rather than a sale. In international sales the issues arise as to exchange rates, currency control restrictions, inflationary variations, etc.[39]. Also,

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[37] Consumer sales, for instance, are excluded from the CISG on the basis of the purpose for which the goods are purchased. Thus the Convention does not cover sales:
'of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use'.
See *supra* note 1, Article 2(a). See *also*, Franco Ferrari, *supra* note 33 ('This exclusion, [ ] leads the facto to a limitation of the CISG's sphere of application to commercial contracts.'). *Id. at* 72. On the other hand, independently of how often consumer contracts could carry with themselves an international element, the legislative activity of States in the field of consumer protection has accentuated the different nature of consumer contract so that they can hardly be thought as being part of 'international sales' as a subject of regulation.

[38] See, FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW, CONVENTIONS, (Oceana Publications Ed. 1992). (Regarding the CISG, '[t]he *goods* referred to are conceived as movable assets; and the common-law tradition sets great store by noting that they have to be corporeal as well) *Id. at* 29. (The Vienna Convention excludes from the term 'goods', stocks, shares, investment securities, negotiable instruments or money; ships, vessels, hovercraft or aircraft; and electricity). *See supra* note 1, Article 2 (d), (e) and (f). ('Goods' are also those 'to be manufactured or produced [ ] unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production'; and 'goods' also are distinguished from 'services' in that the CISG exclude those contracts 'in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services')*Id.*, Article 3.

[39] For a general overview of these issues, *see, e.g.*, PAUL H. VISHNY, 1 GUIDE TO INTERNATIONAL COMMERCE LAW, 2.01 (December, 1981).

price determination in an international sales transaction, given that they generally involve the cross-border movement of goods, involve additional costs related to transportation, insurance, customs, documents, increased risks, etc.[40].

Another relevant feature in international sales is that special duties will arise for the parties from the necessary arrangements as to transportation and insurance and that these arrangements are likely to condition other issues such as the passing of the title and especially of the risk[41].These arrangements are usually determined by the use of trade terms which while defining the parties' rights and obligations regarding the performance of the contract, they will also, to a large extent, define the costs borne by the parties[42].

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[40] *Id.*

[41] Although a transfer of ownership of the goods is the foremost aim of a sales contract, the effects of the contract as to the passing of the title will often be left to the applicable domestic law under the contract. Eventually other laws different from the *lex contractus* will have to be considered as to the ownership of the goods when varied property rights might need accomodation, *e.g.*, in third-party claims, or when *de facto* ownership changes,*e.g.*, goods are converted into semifinished products. In this respect, the starting point universally accepted is that the *lex situs* prevails. *See* DICEY & MORRIS, THE CONFLICT OF LAWS, 942 (11th ed. 1987). *See also,* CHESTERMAN, *Choice of Law Aspects of Liens and Similar Claims in International Sale of Goods,* 22 INT'L & COMP.L.Q. 213 (1973); SAMPSON, *The Title Passage Rule : Applicable Rule under the CISG,* 16 INT'L TAX J. 137 (1990).

[42] There is a wide range of trade terms which provide buyers and sellers which a wide variety of arrangements according to the nature of their transactions. These trade terms are highly standardized so that the parties can achieve a certain degree of simplicity in their contracting. These standardized terms are identified by their abreviations worldwide known, such as *c.i.f., f.o.b., f.r.c., c.i.p,* etc. Trade terms meet a variety of versions of which INCOTERMS (International Commercial Terms), published by the International Chamber of Commerce since 1936 and last revised in 1990, are simply the most known. *See,* INCOTERMS 1990, INTERNATIONAL CHAMBER OF COMMERCE, Brochure No. 350 (1990) . A recent codification of trade terms available to traders is the so-called INTRATERMS; *see,* ADOLF H. HERMANN, INTERNATIONAL TRADE TERMS: STANDARD TERMS FOR CONTRACTS FOR INTERNATIONAL SALE OF GOODS, (Graham & Trotman/Martinus Nijhoff Eds. 1993). Some of these terms have also been codified in Article 2 of the (USA) UNIFORM COMMERCIAL CODE. Although the definitions the above systems give to this terms are similar, there are still differences that can create interpretative problems where the relevant abrevation of a trade term in a contract is not accompanied with further references. Since the standardization of trade terms above mentioned do not by themselves have the force of law, it will be the governing law of the contract which with give a term its precise meaning. However it is to be noted that standardized terms such as INCOTERMS, could well be used by courts ar arbitral tribunals to interpret the contract. See *infra,* Chapter II.

It is also a feature in international sales that when disputes or anomalies arise between the parties, special duties of care will result in view of the distance that generally exist between the parties to the transaction, *e.g.* seller's duty of care when the buyer, although bearing the risk, has not taken delivery yet[43], or a buyer's duty of care to protect the goods upon arrival when disputes arise and goods may be rejected[44].

Another salient feature of international sales is that such transactions are likely to be accomplished by the use of intermediaries, thus facilitating the flow of business considerably. Physical delivery of the goods will necessitate some sort of international transportation. Thus, in arranging transportation of the goods, the buyer and the seller will deal with different kind of intermediaries such as freight forwarders, brokers, warehouses, port authorities ,etc. Arrangements for transportation will then involve the conclusion of separate contracts. Given the complexities and sensitive issues surrounding the international carriage of goods, it has become a specific area of regulation at international level [45].

On the payment side, the manner in which the money is to be transferred will possibly involve third party financial intermediaries. Cross-border transactions present added risks and dangers for the parties than domestic ones. As a consequence, the necessity for the parties to assure as much as possible their respective interests in the transaction has developed all kind of payment arrangements in which a bank in essence

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[43] See CISG, *supra* note 1, Article 85. (Even though risk has passed to the buyer, according to the contract or the Convention (Articles 67 and 69), since the seller may retain control over the disposition of the goods, *e.g.*,by retaining the bill of lading, Article 85 requires that 'the seller must take such steps as are reasonable in the circumstance to preserve them'). *See,* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 1 *at* 454.

[44] See CISG, *supra* note 1, Article 86 (This article requires the buyer 'to take reasonable steps to preserve the goods since it is difficult for a seller to preserve and dispose of the goods that have been rejected at a remote destination). *See,* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 1 *at* 455.

[45] See I.D. HILL & M. EVANS, TRANSPORT LAWS OF THE WORLD (Oceana Publications 1977). See also, Paul Engels, *International Carriage of Goods, in* INTERNATIONAL TRADE: LAW AND PRACTICE, *supra* note 34 *at* 25.

operates as the independent third party[46]. In this field different terms of payment developed by the practice have made also the subject to standardization by organizations such as the United Nations Economic Commission for Europe and the International Chamber of Commerce[47]

B. The conception of a Uniform Law. Its Function.

The law of sales tends to concentrate on the different issues mentioned above, *e.g.*, transfer of ownership, physical delivery, transfer of risk, duties of care, the division of labor and costs in the transaction, etc, in a non-mandatory manner, in the sense that it will function as a gap-filling instrument when the sales contract lacks specificity. But the law of sales will be expected also to provide the infrastructure of the contract through regulating subjects that the parties cannot easily cover by themselves, such as precontractual duties, offer and acceptance, defenses like incapacity or illegality and the like. For other important issues the law of sales will rely on the applicable general law on contract or the law of obligations, *e.g.*, the concept of good faith in the interpretation and execution of the duties of the parties.

The law of sales has been the subject of much codification, on the European contitent as part of national codifications, but also in common law countries[48].

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[46] See James A. Ounsworth, *International Payment Mechanisms, in* INTERNATIONAL TRADE : LAW AND PRACTICE, *supra* note 34 *at* 117.

[47] The Working Party on Facilitation of International Trade Procedures, a subsidiary body of the United Nations Economic Commission for Europe (ECE) , issued Recommendation No. 17 in March 1982 (ECE/TRADE/142), by which attention is drawn to the 'PAYTERMS' as 'those conditions of payment which are the most frequently used in international trade' and 'which can be employed when the contract of sale to which they relate makes this appropiate'. This need for standardization has been compelled by the disputes arisen from the lack of precision in terms of payment as well as their different interpretations. According to ECE the use of these standardized terms would result in the harmonization of international trade law through the development of standardized trade practices. This codification of payment terms takes notice of the work undertaken by the International Chamber of Commerce (ICC) and thus Documentary credits as governed by the ICC Uniform Customs and Practice for Documentary Credits are incorporated in the 'PAYTERMS'. See *UN/ECE Trade Facilitation Recommendaiton* (visited 16 Feb, 1997) <http://www.unece.org/trade/rec/rec17en.htm>.

[48] In England, the Sale of Goods Act of 1893, re-enacted in the Sale of Goos Act of 1989 with more recent legislation relating to the sale of goods, like some parts of the Misrepresentation Act of 1967, the Supply of Goods (Implied Terms) Act of 1973, and other more concerned with consumer protection. In

Differences among national laws as a consequence of their belonging to different legal systems which, on their part, reflect a variety of economic and political organizations and of different degrees of development, are at the origin of the legal problems which international trade, in general, constantly faces and to which solutions are permanently being sought as a response to a common interest among the nations in international trade.

Regarding the rules governing the international sale of goods, this community of interests led to the idea of a Uniform Law which would provide this field of international trade with a set of substantive uniform rules. Given the high elusive ingredient which is present in the regulation of this subject, this idea is necessarily confronted to the concerns regarding its function[49]. In effect, as pointed out before, the practice itself has long developed a sort of 'living law' which to a certain extent has been able to by-pass the different domestic laws. In this sense, Ernst Rabel, a pioneer of the idea of a Uniform Law, as regards the importance of standard form contracts in international trade gave some reasons why international unification through the adoption of a general law for international sales would be useful:

"The law would fill in the gaps left by standard form contracts, it would unify the mandatory law which could not be touched by the standard form contracts, it would

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the United States there is Article 2 of the Uniform Commercial Code (UCC) prepared in 1951 as a joint project of the American Law Institute, a private body devoted to the harmonization of legal concepts among the various states of the United States , and of the National Conference of Commissioners on Uniform State Laws which has drafted a number of other Uniform Laws. The UCC which since 1951 has been subjected to several amendments, is now adopted (with modifications) in all states of the Union. It contains, besides its Article on Sales, others on Bills of Exchange and similar types of payment instruments (Article 3), on Bank Deposits and Collections (Article 4), on Letters of Credit (Article 5), on Documents of Title (Article 7) or on Secured Transactions in Movables (Article 9). See in general, SURVEY OF THE INTERNATIONAL SALE OF GOODS (LOUIS LAFILI *et al.* Eds., 1986).

[49] See John O. Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964,* 30 LAW & CONTEMP. PROBS., 326 ('There is something peculiar and elusive about sales as subject for statutory rules. This special elusive quality comes from the fact that nearly every 'rule' of sales law yields to the parties' intent'.) *Id.* at 334.

suppress differences in the interpretation of standard form contracts due to different mentalities of various national legislators; it would be useful as a basis for the law of standard form contracts; it would influence arbitration; and it would be useful as a general law, as opposed to the diversities of national legislation"[50].

Another concern regarding the function to be given to a Uniform Law, comes from the fact that sales contracts, covering a great varietyof goods, differ widely between themselves. In this respect critics have early been raised as to the ability for such a Law to deal such variety. In this sense, the critics raised by Philippe Kahn are well illustrative. They have been summarized as follows:

"According to Kahn, at the one extreme we find sales of commodities such as grain, silk, coffee, oil, sugar etc., which are bought and sold in great quantities in international markets. For the sale of commodities, strict rules on duties of seller and buyer and on the remedies for breach of contract are required.[...] At the other extreme, for sales of complex machinery, above all machinery specially manufactured for the buyer, more lenient rules are suitable[...].[51].

1. The Hague Conventions

Despite the above concerns as to the function that a Uniform Law could have in the context of international sales, the work on the idea of such a Law capable to provide international sales transactions with a universal regulatory framework begun to be worked out in UNIDROIT[52].

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[50] Jan Hellner, *The Vienna Convention and Standard Form Contracts, in* INTERNATIONAL SALE OF GOODS, DUBROVNIK LECTURES, 336-337 ('An expression that Rabel used is that the law should provide an 'infrastructure' for standard form contracts') *Id.*, citing Rabel *at* note 1.

[51] *Id. at* 337-338 *and* note 3.

[52] The International Institute for the Unification of Private Law (UNIDROIT), seated in Rome, was set up in 1926 as an auxiliary organ of the League of Nations. Following the demise of the League, the Institute was re-established in 1940 on the basis of a multilateral agreement, the Unidroit Statute. It is an independent intergovernmental organization whose purpose is to examine ways of harmonising and co-ordinating the private law of States and of groups of States, and to prepare gradually for the

In 1928 Ernst Rabel proposed a UNIDROIT project which formed the basis of a first draft in 1935[53]. This first draft, which met a strong opposition, specially regarding the subject of contract formation, was split out in two projects, one on the formation of international sales contracts, and the other on the international sale itself[54]. After the impass of the II World War the process of unification continued, and both drafts were taken up again at UNIDROIT's request by the Netherlands government which provided the venue for two Diplomatic Conferences held at The Hague, one in 1951 with 21 participating nations, and the other in 1964 with 28 participating nations[55]. Two Conventions were completed during the Hague Diplomatic Conferences, containing respectively two different documents: the Uniform Law on the International Sale of Goods (ULIS), and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF)[56].

These Conventions entered into force in 1972. They received only seven ratifications[57]. The Hague Conventions have been critized by being a product of

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adoption by the various States of uniform rules of private law. As to June 1, 1995 UNIDROIT has 56 Member States. For an overview of the structure, activities, working methods and achievements of the Institute, *see*, THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), *in* INTENATIONAL TRADE LAW (ITL), University of Tromso, Norway, (visited January 20, 1997) <http://ananse.irv.uit.no/trade_law/nav/unidroit.html>.

[53] See, Rene David, *The International Unification of Private Law, supra* note 16 *at* 136.

[54] *Id.*

[55] *Id.*

[56] Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107; Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169.

[57] Federak Republic of Germany, Belgium, Italy, The Netherlands, United Kingdom, Saint-Marin and Gambia. Israel only ratified the ULIS.

Western European scholars, largely influenced by the civil law tradition[58]. On the other hand, they have neither been the object of an extensive use or application[59].

2. Two different approaches: Uniform Law and Private International Law

At this point it is important to link with the fact that The Hague, apart from having hosted the two Hague Conferences leading to the adoption of ULIS and ULF, it has long been the home of the Hague Conference on Private International Law, set up in 1893 whose approach to deal with different and conflicting domestic laws surrounding international transactions is not that of formulating uniform laws but that of unifying conflict of laws rules by producing draft treaties on many private international law topics[60]. Thus, here there is a basic difference between both approaches: while the private international law approach tries to establish common conflict of law rules under

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[58] For an American view of the development of the Hague Conventions, *see*, John O. Honnold, *A Uniform Law for International Sales,* 107 U. PA. L. REV. 299 (1959); John O. Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964, supra* note 49; Harold J. Berman, *The Uniform Law on International Sale of Goods: A constructive Critique,* 30 LAW & CONTEMP. PROBS.354 (1965); John O. Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview,* 27 AM. J. COMP. L. 223 (1979).

[59] For an explanation of the small success of ULIS and ULF as 'living law', *see e.g.,* VICENT HEUZE, LA VENTE INTERNATIONAL DE MARCHANDISES, DROIT UNIFORME, 68-79 (GLN Joly Ed. 1992) (The most important reasons the author points out are the great amount of reservations available to the ratifying States as well as the possibility for the parties to escape most of their provisions ,whose incompatibility with the provisions of the most used general conditions by businessmen in sales contracts, was effectively practiced).

[60] The Hague Conference on Private International Law is an intergovernmental organization whose purpose is 'to work for the progressive unification of the rules of private international law' (Statute, Article 1). Its First Session convened by the Netherlands Government on the initiative of T.M.C. Asser, took place in 1893. The Conference met on an irregular basis until its Seventh Session in 1951 when a statute was prepared which entering into force in 1955, made the Conference a permanent intergovernmental organization holding regular plenary sessions every four years, the last of which, Eighteenth Session, having been held in October 1996. The Hague Conference addresses different fields of Private International Law,*e.g.,* international judicial and administrative co-operation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, recognition of companies, jurisdiction and enforcement of foreign judgements, etc, by the drafting of multilateral conventions. 43 States are now Members of the Conference representing a wide range of legal traditions although the absence of most of the African countries is worthnoting. For more and updated information, *see,* THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *in* INTERNATIONAL TRADE LAW (ITL), University of Tromso, Norway (visited Jan. 20, 1997) <http://ananse.irv.uit.no/trade_law/nav/hague conference.html>.

which a national law will result as the most appropiate law to govern the issue under dispute, the uniform law approach tries to formulate a worldwide set of norms for a particular subject, here international sales.

The basic principle of the private international law approach is well set in the Serbian Loans judgment of the Permanent Court of International Justice:

"Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country"[61].

This approach, in its orthodox view, meant to produce objective rules to reach a given domestic law which would govern the contract regardless of the end result[62].
The uniform law approach, on the other hand, is more likely to accept that in the international sphere legal relationships by their very nature might be denationalised, that application of a national law results to be inappropiate since the legal method to reach it is not able to take into account the particular nature of the relationship between the parties and the balance of their interests.

The private international law approach by emphasizing the domestic law, it overlooks the real practice of transnational commercial transactions the consequence being that international commercial customs and trade usages come to scene as long as the appointed domestic law recognizes them.[63]

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[61] See, EUGEN LANGEN, TRANSNATIONAL COMMERCIAL LAW, 2 (Sijthoff Ed. 1973).
[62] Indeed, nowadays choice of law rules are drafted according to different theories that although some of them are substative oriented, they still ignore the particular nature of transnational commercial relations. For a brief overview of the different theories behind choice of law rules, *see* RAISCH & SHAFFER, *supra* note 15 *at* 141.
[63] However an opposite view has been advanced in the sense that a uniform law such as ULIS by eliminating from the law of international sales the application of national law, it also excludes 'the large body of international commercial law and custom contained in national law' and that this fact is not likely to be subsanated by conceiving the uniform law as a subsidiary set of rules to be applied 'in the light of particular contracts and in the light of usage' when there is no any guidance as to the interpretation of usages. Harold J. Berman, *supra* note 58 *at* 355-356.

Regarding the regulation of international sales contracts, these two different approaches clashed for the first time during the 1950's when the Hague Conference at its 7th Session in 1951 and 8th Session in 1955 completed a private international law convention on the law governing the international salw of goods[64]. The Diplomatic Conferences concerning the uniform sales laws mentioned above, immediately followed the 7th and 8th Sessions of the Hague Conference. At that point the relatinship between both approaches gave rise to some controversies since ULIS and ULF excluded the rules of private international law for the purpose of applying the uniform Laws[65]. Thus the view was that "[w]ithin its corners,[...], the text[s] must be self-sufficient. Where a case is not expressly covered the text is not to be supplemented by the national laws-which would at once destroy unity-but to be construed according to the principles consonant with its spirit"[66]. This view, however, has revealed itself to be unrealistic. This is so if one considers the basic approach to unification of internatinal sales law taken by ULIS and ULF and followed to a considerable extent by the Vienna Convention. It mainly consits of a partial approach which undertakes at providing uniform general rules on issues to which the parties themselves or the general commercial practice may regulate otherwise. Such uniform law can never by itself provide a single legal framework to an

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[64] Convention on the Law Applicable to International Sales of Goods, 510 U.N.T.S. 147 (1964) (The Convention was adopted at the 7th Session of the Hague Conference but signed in 1955 at its 8th Session). This Convention has been followed by the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, *reprinted in* 24 I.L.M.1573 (1985). Although the latter Convention is meant to suceeded the former it has not entered into force yet. The 1955 Hague Convention is in force between the following States: Belgium, Danemark, Finlande, France, Italy, Norway, Sweden and Switzerland. For and insight of these two Conventions, *see* VINCENT HEUZE, *supra* note 59 *at 21-51.*

[65] See *supra* note 56, Articles 2 and 1(9) respectively. See *also* Ole Lando, *Private International Law, Chapter 24, Contracts in* III INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW,126 (J.C.B. MOHR (PAUL SIEBECK) TUBINGEN Ed. 1976).

[66] Ernst Rabel, *The Hague Conference on the Unification of Sales Law,* 1 AM. J. COMP. L. 58, 60 (1952).

international sales contract because it is not conceived with such function despite its having presided the main idea of unification[67].

In fact the two approaches under discussion have been to a certain extent reconciled. Unlike the ULIS which relied on its general principles[68], the Vienna Convention accepts private international law rules in areas not directly or indirectly covered by it, although after consideration of the general principles on which the Convention is based[69].

3. The Vienna Convention. Application and Scope.

Despite the little success of the Hague Uniform Laws, the idea of a universal uniform law for international sales continued, this time under the aegis of the United Nations Commission on International Trade Law (UNCITRAL)[70]. These Conventions were finally succeded by the 1980 Vienna Convention[71].

Unlike the Hague Conventions where in order for them to apply it was enough for the contract of sale to be international according to the said Conventions[72], according to

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67 See *supra* at 16 *and* note 50.

68 See *supra* note 56, Article 17.

69 See *supra* note 1, Article 7. For a deep study on this article, *see* Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law,* 24 GA. J. INT'L & COMP. L. 183 (1994).

70 UNCITRAL was established by the UN General Assembly Resolution 2205/XXI of December 17, 1966. The objects of the Commission, according to Article 8 of its Statute are 'to furher the progressive harmonization and unification of the law of international trade' by coordinating 'the work of organisations active in this field and encourag[ing] co-operation among them, and promot[ing] wider participation in existing international conventions and wide[ning] acceptance of existing model and uniform laws' and by 'further engag[ing] in the preparation or promotion of new international conventions, model laws, and uniform laws, and the codification and wider acceptance of international trade terms, customs and practices'. Clive M. Scmitthoff, *The Unification of the Law of International Trade, in* CLIVE M. SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 206,215 (CHIA-JUI CHENG Ed.1988).(Already in its first Session held in 1968, the Commission decided to give priority to the study and consideration of the international sale of goods)*Id. at* 216.

71 See *supra*, note 1.

72 See ULIS, *supra* note 56, Article 1.(The Convention applied to contracts of sale when the parties' places of business were in different States independently of the fact that these States were parties to the Convention. This 'universalist' approach was intended to avoid the application of rules of private international law as well as obsolete domestic sales laws).*See*, JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 1 *at* 80.

Article 1(1), for the Vienna Convention to apply, parties must have either their place of business in different contracting States or the applicable private international law should point to the law of a contracting State[73]. Although the Convention is silent as to its 'opting-in', its applicability may also be achieved by a contractual choice of law[74]. On the other hand, Article 6 allows the parties to exclude the application of the CISG[75]. This provision acknowledges the dispositive nature of the Vienna Convention as well as the the role given to party autonomy as the primary source of international sales law[76]. For the rest, it has already been signaled that the Convention does not apply to consumer sales [77], the supply of services, the sale of securities, electricity, ships or aircrafts[78]. CISG neither applies to sales by auction[79].

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[73] See CISG, *supra* note 1, Article 1(1)(b).(Contracting States may however opt out of this latter provision).*Id.*, Article 95. Some States, including the United States, have made use of the reservation contained in this Article. For a critic of the United States reservation, *see* Dennis J. Rhodes, *The United Nations Convention on Contracts for the International Sale of Goods: Encouraging the Use of Uniform International Law,* 5 TRANSNAT'L LAW., 387 (1992). (The author, pointing out that the reason behind this reservation was to 'accommodate certain states which already developed a set of rules to govern their international sales transactions', does not find a reasonable justification for the U.S. reservation because although Article 2 of the UCC 'may be capable of application to international sales transactions, it is not a body of law created solely to accommodate international sales transactions) *Id* at 407-408. (The author asks for a reconsideration of the U.S. reservation to 'allow the U.S. to take a leadership role in interpreting the CISG) *Id. at* 412.

[74] It has been argued that in such a case it may be safest for the contractual choice of law to be valid, to refer to the Vienna Convention but as part of the law of a Contracting State. This is so because State courts are not likely to allow the parties to directly choose an international Convention. *See* C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 1 *at* 63-64.

[75] Article 6 states that '[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions'.(Although not express reference is made to the possibility of an implicit exclusion, the doctrine generally accepts this possibility). *See*, Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing, supra* note 33, *at* 86-91.

[76] *Id. at* 84-85 *and* accompanying notes.

[77] See *supra, at* note 37.

[78] See *supra, at* note 38.

[79] See CISG, *supra* note 1, Article 2(b). Special probles typical of auction sales are generally addressed by domestic special regulations. *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 1 *at* 98 (It is pointed out that '[s]ales at a commodity exchange are not sales 'by auction', but rather rapidfire communication of offers and acceptances') *Id. at* note 3.

Regarding the scope of the Vienna Convention it only contains a partial codification of the law of sales as it relates to the formation of the sales contract and the rights and obligations of the parties and notably not to questions of validity and the property aspects of the sold goods[80]. From the subjects covered, the scope of the Vienna Convention goes narrower as it avoids all general contractual (except for offer and acceptance) and proprietary aspects. Areas not covered are notably: consent (or its lack in case of coercion, abuse of power, undue influence or unconscionability at the time of formation, mistake or misrepresentation); precontractual rights and duties, capacity, legality, validity and nullity; abuse of rights, property rights that may be created and prescription[81]. The Vienna Convention, by special provision neither applies to seller's liability of death or personal injury caused by his goods[82].It is then to be observed that, with the exception of this last rule, these are all aspects of the general part of the law of contract or property and, consequently they concern the typical contractual legal infrastructure, not likely to be covered in the contract itself. In view of all the above, one could say that the Vienna Convention is of relatively modest importance since its coverage mainly is on points on which the parties are likely to make provisions themselves. Thus, except for some aspects of offer and acceptance, the more general aspects of the law relating to sales remain mostly unconsidered. In short, the Vienna Convention is meant to cover areas at the disposition of the parties and to provide

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[80] See CISG, *supra* note 1, Article 4. For a deep study of this Article, *see* Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods,* 18 YALE J. INT'L L. 1 (1993). (The author 'explores the tension between domestic public policy and the needs of international commerce in the context of the international sale of goods') *Id. at* 1 (The article rightly points out that the exclusion of rules of validity 'seriously handicaps the CISG's potential for achieving its goals') *Id. at* 5.

[81] Prescription has made the object of the UNCITRAL Convention on the Limitation Periodin the International Sale of Goods of 14 June 1974. This Convention has been adapted to the CISG pursuant to Article XIV, paragraph 2 of the Protocol Amending the Convention on the Limitation Period in the International Sale of Goods. This Convention , in its original and amended versions, is reproduced and analysed in ENDERLEIN & MASKOW, INTERNATIONAL SALES LAW, *supra* note 1.

[82] See CISG, *supra* note 1, Article 5

solutions when the contract, standard terms or usages do not provide enough guidance. Or, as it has been said: "[t]he dominant theme of the Convention is the role of the contract construed in the light of commercial practice and usage"[83].

With this character then the Vienna Convention centers on some aspects of offer and acceptance, conform (physical) delivery, transfer of risk, payment, default, damages, force majeure and a duty of care for seller or buyer if something goes wrong in the implementation of the contract in order to protect the goods. As a whole the CISG consits of 101 articles structured in 4 Parts[84]

If, as Ernst Rabel believed, for an international sales law to be useful it should cover "the maximum possible number of matters which fall outside the autonomous intentions of the parties"[85], the extent of the utility of the Vienna Convention regarding its substantive provisions, remains to be seen.

In effect the question arises as to the function and utility of a Convention whose provisions can be evaded not only by the parties to contracts falling under the scope of application of such Convention but also by the courts and arbitral tribunals considering disputes under such contracts. This is so in view of the adjudicatory approach inferred from Articles 6, 8 and 9 of the Vienna Convention. According to these articles, a dispute arising out of a contract to which the CISG applies, is to be solved, first by looking at the contract itself[86]. The contract, according to Article 8(3) is further to be interpreted giving due consideration "to all relevant circumstances of the case including the

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[83] JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 1 *at* 47.

[84] Part I (arts. 1 *to* 13). 'Sphere of Application and General Provisions'; Part II (arts. 14 *to* 24). 'Formation of Contract'; Part III (arts 25 *to* 88). 'Sale of Goods'; Part IV (arts 89 *to* 101). 'Final Provisions'.

[85] Ernst Rabel, *Observations on the Utility of Unifying Law of Sales from the Standpoint of the Needs of International Commerce* (1929), *reprinted in* LEAGUE OF NATIONS: DRAFT OF AN INTERNATIONAL LAW OF THE SALE OF GOODS 123, 128-131 (1935).

[86] Article 6 makes the contract between the parties the primary source to regulate the parties'rights and obligations. *See supra* note 75. *See also,* Dennis J. Rhodes, *supra* note 73 *at* 396-400.

negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties"[87]. Finally, Article 9 , gives priority, unless otherwise agreed, to the practices which the parties have established between themselves and trade usages to which they have (expressly or impliedly) agreed over the CISG's substantive provisions[88]. However this adjudicatory phylosophy behind the Vienna Convention, it has not the effect of validating any alleged practice or usage because under Article 4 it is to the domestic laws, according to their mandatory rules or public policy to give a final judgement regarding these practices and usages.[89]. Nevertheless, it has been noted that a court or arbitral tribunal could not apply domestic rules on validity if the contract's interpretation is in conformity with substantive provisions of the CISG[90].

This approach has served those who feared that an international sales Convention could not be in touch with commercial realities, that its application is not to "prejudice the parties' transaction [because] [b]usinesspersons rely on customs and trade usages in conducting their daily business"[91]. It has further been said that "the purpose of the Vienna Convention is not only to create new, state-sanctioned law, but also to give

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[87] See CISG, *supra* note 1, Article 8(3). This paragraph provides an objective standard for the interpretation of the parties' conduct or statements after initial consideration of the parties' subjective intent where the other party 'knew or could not have been unaware' of that intent. See, Timothy N. Tuggey, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?,* 21 TEX. INT'L L. J., 540, 546 (1986).

[88] Article 9 makes the object of analysis in Chapter II.

[89] Article 4 (a) says that the Convention is not concerned with 'the validity of the contract or of any of its provisiond or of any usage'. See *supra* note 80 *and* accompanying text.

[90] See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 1, *at* 116.

[91] Errol P. Mendes, *The U.N. Sales Convention & U.S.-Canada Transactions; Enticing the World's Largest Trading Bloc to do Business under a Global Sales Law,* 8 J. L & COM. 109, 139 (1988). *But see,* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms,* 144 U. PA. L. REV. 1765 (1996) (The Uniform Commercial Code's adjudicative philosophy, which on the other hand appears to be very similar to that of the Vienna Convention, is challenged by the author who by idenfying a number of undesirable effects that on commercial transactions brings such approach that tries to reduce the gap between law and practice, favors a more formalistic adjudicative approach).

recogniton to the rules born of commercial practices and to encourage municipal courts to apply them"[92]

It is the object of the next chapter to analyse in which vein the Vienna Convention by-pass its own substantive provision.

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[92] Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria, in* LEX MERCATORIA AND ARBITRATION (THOMAS E. CARBONNEAU Ed.) *at* 139 (The author stresses that '[t]he Convention's self-effacing character is one of its most striking features'; and, in particular Article 9 (2) which 'gives superior weight to trade usages, regardless of whether the parties specifically designated an applicable law'). *Id. at* 141.

CHAPTER III

The CISG and Trade Usages

The search for a worldwide uniform substantive sales law, capable to provide answers to the problems that the parties have failed to solve in their contracts, thus playing a "supporting role"[93], has obvious problems if one considers the different legal traditions and socio-economic conditions that the world encompasses and that UNCITRAL, which took over this task, represents[94]. In effect, as the Vienna Convention shows, many of its terms and provisions have resulted as a trade-off between different legal concepts and as "hard-fought compromises"[95]. In this vein, Article 9 of the Convention with its ambivalent approach to international trade usages is a reflection and a consequence of the above.

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[93] See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 1 *at* 48 (The author says that 'like most domestic sales rules applicable to commercial contracts, the Convention's rules play a supporting role, supplying answers to problems that the parties have failed to solve by contract'). *Id.* (However unlike these domestic sales rules, the Convention's rules lack the corresponding contractual infraestructure, the result thereof falling short of the correct assumption from which the CISG departs, namely 'that undesirable costs are associated with the special uncertainties of international transactions') Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods,* 45 OHIO ST. L.J. 265, 269 (1984) (The author suggests 'that the basic strategy of attempting to create one exclusive and comprehensive statement of world contract law is ill-conceived') *Id. at* 267.

[94] See JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 1 *at* 55 ('The degree of approval of the UNCITRAL draft resulted from the fact that representatives from each region of the word had participated in preparing the draft').(The UNCITRAL draft was approved in March 1980 at the Vienna diplomatic conference where twenty-two nations from the 'Western developed' world, eleven from 'socialist regimes', twenty-nine from 'Third World' countries, and eight international organisations were represented) *See,* Gyula Eorsi, *A Propos the 1980 Vienna Convention on Contracts fo the International Sale of Goods,* 31 AM. J. COMP. L. 333 (1983).

[95] Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods,* 23 INT'L LAW. 443,444 (1989).

Before going through the different steps necessary for the analysis of this compromised Article, some comments will follow as to the main idea presiding Article 9 and its justification.

A. Looking beyond the CISG's Substantive Provisions.

1. The Justification.

The CISG substantive provisions provide a double justification for looking beyond them. On the one hand, it is obvious as it happens with domestic sales laws, that a set of general rules on sales contracts could not possibly cover the wide diversity one finds in this kind of transactions. The other reason could be that the drafting of general substantive sales rules in the context of a Diplomatic Conference is likely to result in some eccentricity, in the sense that some rules could be completely at odds with the ones that the practice, on the basis of the different needs and dynamics of each kind of transaction, has developed.

It is understandable, for example, that commodities are traded under different conditions that complex machinery. If, for instance, one considers the issue of non-conformity of the goods, contracts for the sale of commodities will not be too much sensible to their avoidance and the determination of dammages given the fact that these contracts are highly speculative in the sense that fluctuations in prices greatly determine gains and losses. This facilitates the seller whose goods have been rejected as non-conforming with the contract to sell them elsewhere and the damages are likely to be the same independently who the buyer is[96]. On the other hand, under contracts for the sale of complex machinery other different circumstances, when thinking on remedies, are likely to be taken into account if the goods are non-conforming. Avoidance could not be a suitable solution for either party specially when the goods have been manufactured

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[96] See, Jan Hellner, *The Vienna Convention and Standard Form Contracts, supra* note 50, *at* 338

according to the buyer's specifications and damages are more likely to be calculated according to the buyer's particular situation[97].

This narrow example could suffice to understand the extreme complexity that would result from a general sales law trying to satisfy the different needs arising from such a wide diversity of sales transactions . On the other hand, it has also been pointed out that the idea of a widest general sales law, in the sense of proposing more precise solutions, would be soon at odds with the needs of these transactions whose patterns are subjected to constant change given the speed at which new technologies, *e.g.* in communications and transportations, are developed[98].

2. The Problem of Standard Business Conditions under the CISG

Commercial sales transactions, either domestic or international, take place under different patterns developed by the participants to such transactions themselves on the basis of their autonomy and freedom of contracting. Recognising the particular needs of the diverse goods' tradings, domestic laws, to different degrees, as well as the Vienna Convention itself, give room to the different contracting patterns mostly contained in standard form contracts and general conditions[99] which on their side will, partially or

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[97] *Id.*

[98] See John O. Honnold, *Uniform Law and Uniform Trade Terms-Two Approaches to a Common Goal, in* THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS, *supra* note 5 *at* 161. (The author regarding proposals to include in the Vienna Convention detailed definitions of trade terms, gives different reasons why it would be a mistake: 'One difficulty is the need to modernise and revise detailed trade terms more frequently than the life-span one may expect from a basic international Convention. A second is the hazard posed by an attempt to cope with the technical details of commercial practice at a diplomatic conference').*Id. at* 170.

[99] Althoug it is often not observed there is a distinction between these two forms of contracting. *See* U. Drobnig, *Standard Forms and General Conditions in International Trade; Dutch, German and Uniform Law, in* HAGUE-ZAGREB ESSAYS 4, ON THE LAW OF INTERNATIONAL TRADE (C.C.A. VOSKUIL & J.A. WADE Eds. 1981), 117 ('[Standard forms] take the form of a pre-printed contract, leaving a few blanks for the insertion of individual *additional* terms; if these are filled in and the form is signed, this is a complete contract. General conditions, on the other hand, take the form of a closed code of contract terms; they do not leave room for individual terms. The contract itself, therefore, must be established separately, in a special space or on a separate sheet') *Id. at* 118.(This distinction is not without consequence since, regarding general conditions, for their contract terms to be considered as

wholly, cover all possible eventualities under the contract, thus avoiding the solutions foreseen in the dispositive rules of the otherwise applicable law.

However, contractual terms found in standard business conditions under a contract to which the Vienna Convention applies are not to displace *ipso facto* the substantive provisions of the Convention. Indeed, it is one of the defficiencies of the CISG the absence of clear provisions to deal with the issue of the incorporation of standard business conditions But it is still more regrettable the total absence of provisions on the control of individual terms of such conditions which is left to domestic laws by virtue of Article 4 of the Convention[100]

As to the first of the problems cited above, *i.e.,* the incorporation of general conditions into the contract, this issue specially arises regarding non-negotiated general conditions which are not explicitly accepted or when both parties try to incorporate their own business conditions. This latter eventuality poses the problem known as "the battle of the forms". These are, on the other hand, the most generalised patterns of contracting in international trade[101]. The Vienna Convention does not provide satisfactory solutions regarding these problems. Article 18 simply says that "silence or inactivity

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part of the contract, these conditions have to be incorporated in the contract. The incorporation of general conditions into a contract is a major legal problem subjected to different solutions in domestic laws and not clearly considered under the Vienna Convention). *See also,* Henning Stahl, *Standard Business Conditions in Germany under the Vienna Convention,* 15 COMP. L. Y.B. INT'L BUS. 381 (1993).

[100] The Convention does not govern 'the validity of the contract or *of any of its provisions* or of any usages'. CISG, *supra* note 1, Article 4(a) (the emphasis is mine). *See also*, Henning Stahl, *supra* note 99, *at* 386-387. ('Reference to individual contractual provisions, that is, the provisions of standard business conditions, is significant. If the Vienna Convention does not govern the validity of individual standard business conditions, the the national law of the respective country mus be used[ ]'). *Id. at* 386.

[101] See, U. Drobnig, *supra* note 99, *at* 121.

does not in itself amount to acceptance"[102]. And regarding the "battle of the forms" the Convention does not give any solution[103].

It has to be noted however that there are cases in which the courts, making use of Article 9 of the Convention, have reached different solutions. For example, in a case before the Civil Court of Basel (Switzerland)[104] in which an Austrian seller sued the Swiss buyer for the purchase price of fiber; the seller argued that a sales contract had been concluded between the parties on the basis of an order sent by the Swiss buyer and a written confirmation sent by the seller. The written letter of confirmation contained the seller's general conditions towards which the buyer did not react. These general conditions contained a term on the interests rate of the purchase price at 9%. According to Article 18(1) of the Vienna Convention, cited above, this term probably could not have been imposed on the buyer because according to the said article "silence or inactivity does not in itself amount to acceptance"[105]. However the court found that "the letter of confirmation sent by the seller and the subsequent omission of any reaction by the buyer reflected a usage as to the formation of the contracts in the sense of Article 9(1) CISG; that the parties had impliedly made that usage applicable to their contract since they knew or ought to have known the binding nature of such confirmations under both Austrian and Swiss law; and that there was no evidence of any other particular

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[102] CISG, *supra* note 1, Article 18. *See,* U. Drobnig, *supra* note 99, *at* 126.(This lack of precision becomes specially problematic when the contract has begun to be implemented).

[103] *Id. But see*, Henning Stahl, *supra* note 99 ('Article 19 governs such an eventuality. [A]n acceptance which contains alterations or supplementations to the original offer, for example, the reference to one's own standard business conditions, shall constitute a rejection of the original offer and is considered a counter-offer') *Id at* 384.

[104] CASE LAW ON UNCITRAL TEXTS (CLOUT), Abstract no. 95, Civil Court of Basel (Switzerland), 21 December 1992, *reproduced in* CISG Database, INSTITUTE OF INTERNATIONAL COMMERCIAL LAW, PACE UNIVERSITY, <http://cisgw3.law.pace.edu/cgi-bin/Sfgate.../cisg/wais/db/cases2/>.

[105] CISG, *supra* note 1, Article 18(1). (The quoted sentence indicates that 'the incorporation of general conditions can only be achieved by observing the general rules on the formation of contract which require assent by the other party to the firt party's general conditions'). U. Drobnig, *supra* note 99, *at* 126.

rules or usages prevailing in the trade of fiber."[106] The court also found that "the exchange of confirmations was consistent with the practice which the parties had established between themselves and which was binding pursuant to Article 9(2) CISG"[107]. Although, in the light of promoting uniformity in the application of the Vienna Convention as well as the taking into account of its international character[108], this decision could be highly critised[109], the solution given by the court could have been the most satisfactory taking into account the incidence of the regional setting, within which the transaction in question took place, on the expectations of the parties. On the other hand, regarding the use that the court made of Article 9, for the purpose of its later analysis, it is to be noted that this decision perferctly reflects the ambivalent approach, pointed out before, that the Vienna Convention takes towards trade usages.

These issues are important since the practice of international trade has generated at different levels contractual rules to meet the needs of individual tradings. Businessmen and their trade associations in different trading sectors regulate themselves through drafting standard business conditions that they are to incorporate in their contracts. The wide use of this patterns of contracting has further led to the formulation of a wide variety of contractual terms and general conditions by diverse bodies such as trade associations or organizations like the Grain and Feed Trade Association (GAFTA) and the International Chamber of Commerce (ICC) and specialised agencies within international organizations like the United Nations Economic Commission for Europe[110].

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106 CLOUT, Abstract no. 95, *supra* note 104.
107 *Id.*
108 See CISG, *supra* note 1, Article 7(1). *See also,* Franco Ferrari, *supra* note 67.
109 See *infra at* 56.
110 See, generally, Rene David, *The International Unification of Private Law, supra* note 16. *See also,* Michael C. Rowe, *The Contribution of the ICC to the Development of International Trade Law, in* THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS, *supra* note 5 *at* 51; Rudolf Dolzer, *International Agencies for the Formulation of Transnational Economic Law, id.*

The instruments issued by the above bodies where the business community is mainly involved, while not being part of a general strategy towars codification of transnational commercial contracts, have to be mentioned as being the product of a unifying activity. Its legal effect, however will mainly derive from their individual adoption by the parties to a contract. The extent to which the rules contained in these instruments can reach any further binding force out of their contractual adoption is a matter pertaining to the corresponding provisions of the applicable law. Regarding a sales contract under the scope of application of the Vienna Convention, the correspondig provision to look at is Article 9.

What I would like to stress at this point is the fact that in many cases contractual terms contained in instruments such as INCOTERMS[111] or the various General Conditions formulated by the United Nations Economic Commission for Europe, *e.g.*, the General Conditions for the Supply of Plant and Machinery for Export[112], could provide more adequate solutions to the kind of contracts they contemplate than the more general and, in some cases, eccentric provisions of the Vienna Convention, that will be applied when it is considered that the contract has not incorporated other more tailored provisions. In order to make this consideration it has already been signaled the unsatisfactory treatment that the Vienna Convention dispenses to the introduction of such conditions during the formation of the contract. However it is not unconceivable

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at 61; Peter Benjamin, *The ECE General Conditions of Sale and Standard Forms of Contract,* 1961 J. BUS. L. 113; A. Slabotzsky, *Grain Contracts and Arbitration for Shipments from the United States and Canada* (1984).

[111] See, *supra* note 42. For a comparison of the detailed rules contained in INCOTERMS on delivery, passing of the risk and 'handing over of documents' with the corresponding much sorter and less clear rules of the Vienna Convention, *see* Jan Hellner, *supra* note 50 *at* 342-347. *See also,* John O. Honnold, *Uniform Law and Uniform Trade Terms-Two Approaches to a Common Goal, supra* note 98.

[112] *General Conditions for the Supply of Plant and Machinery for Export* (574), *reprinted in* 1 Andreas F. Lowenfeld, INTERNATIONAL PRIVATE TRADE *at* DS-53 (rev. 2d ed. 1988). For a comparison of the rules contained in the *General Conditions* on remedies for breach of contract and force majeure with the rather complicated rules of the Vienna Convention, *see* Jan Hellner, *supra note 50, at* 347-355.

that rules contained in instruments such as the ones mentioned could be resorted to prior to the ones of the Vienna Convention as a consequence of their consideration as trade usages binding upon the parties. In this sense, for the rules of the instruments mentioned above to qualify as such, they will have to be considered in the light of the trade usages provisions contained in the CISG, Article 9[113].

B. Article 9 of the Vienna Convention.

Article 9 within Chapter II , "General Provisions" of Part I of the CISG, reads 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.[114]."

By virtue of this article, the parties to a contract for the sale of goods to which the Vienna Convention , directly or indirectly applies[115], will be subjected, prior to the substantive provisions of the Convention, *i. e.* Articles 14 to 88, [116] to those identified

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[113] It is to be noted that UNCITRAL has also tried to encourage the use of general conditions of sale and standard contracts through different studies. *See, e.g.,* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, *General Conditions of Sale and Standard Contracts: Report of the Secretary General,* U.N. Doc. A/CN.9/78 (1973), *reprinted as, Report of the Secretary General : the feasibility of the developing general conditions of sale embracing a wide scope of commodities, in* IV UNCITRAL Y.B. 80 (1973). *See, infra at* 38.

[114] CISG, *supra note* 1, Article 9.

[115] Following Article 1(1)(a), CISG directly applies to contracts of sale of goods between parties whose places of business are in different Contracting States. CISG's indirect application is due to the operation of rules of private international law leading to the application of the law of a Contracting State. (Article 1(1)(b)). *See supra,* note 73 *and* accompanying text. *See also,* Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing, supra* note 33 *at* 33-44.

[116] See *supra,* note 84.

by the practices that the parties could have established between themselves and to those contained in the usages referred to in paragraphs (1) and (2) of the quoted provision.

Article 9, as it has been signaled above[117], is the product of a compromise and any analysis intended to identify the usages that are to be part of the legal regime of an international sales contract under the scope of application of the Convention, should not be undertaken without having this important factor into account.

This compromise is first reflected in the recognition of two kinds of usages, namely, the usages agreed by the parties or 'contractual' usages (Article 9(1)) and those binding upon the parties, independently of their contractual adoption, or 'normative' usages (Article 9(2)), although both being linked to the contractual intention of the parties. The compromise is definitive due to the ambivalence of this whole approach, and specially as regards to the latter category of usages, *i. e.,* commercial custom, when Article 4(a) of the Convention declares that it is not concerned with "the validity of [...] any usage"[118].

Since at first sight, it appears that the Vienna Convention opts for 'contractual' usages, *i. e.,* those expressly or impliedly adopted by the parties in their contract, what article 9(2) does is to incorporate 'normative' usages through the creation of a legal fiction by which these usages are link to the intention of the parties[119].

In order to clarify further the above first considerations, I will proceed, first, with some conceptual clarifications to see how the 'living law' expressed in the practice of transnational contracts, is incorporated by to the legal regime governing individual contracts. Secondly, I will illustrate through the legislative history of this provision how

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117 See *supra at* 28 *and* accompanying note.

118 See *supra,* note 80.

119 See C.M.BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 1. ('In this case it is the law itself which confers the binding force on the usage, and to explain its application on the basis of an implied agreement between the parties amounts to a legal fiction'). *Id. at* 107.

one of the major elements which triggered the compromise reflected in Artiele 9, was mainly due to the existance of underdeveloped legal systems what, presumably a eonsequence of the insufficient participation of developing countries in international trade, brings the political debate to the worlwide unification of private law.

1. Preliminary Conceptual Clarifications in Doctrinal Writing.

The legal relevanee of practices and usages of international trade can only be the result, on one hand, of its consideration as objective law or as a source of commercial law, and on the other hand, they are legally relevant on the basis of their adoption by the parties in their contracts.

Trade usages with an objective binding force are no more that what is called eommercial custom. Commercial custom, and in this sense international commercial custom does not differ from the domestic one, derives its binding force or *opinio iuris* from the proof of their extensive practice and consequent wide acceptance. Although between different domestic systems one could find conceptually important differences, from a functional prespective it is widely recognized that independently of the intention and the knowledge of the parties, contracts are interpreted and completed looking at the usual practices in the relevant trade sectors[120]. Then when trade usages are identified as eommercial custom, there is a clear incompatibility with linking them to the intention of the parties. It is true, on the other hand, that the parties can voluntarily exclude the consuetaudinary rule, moreover this is possible with the conventional norms enacted by

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[120] See J.M. Bonell, *The Relevance of Courses of Dealing, Usages and Customs in the Interpretation of International Commercial Contracts, supra* note 25 *at* 126. (When usages and customs are not contemplated by the parties, 'their relevance can only depend on the interpretation of the contract on the basis of the objective and normative criteria'.) *Id.* (Although 'it is well-known that the principles and criteria to be found in the various national legal systems are not, at least at first sight, always the same, [ ] it has become an almost universally recognized principle that in the construction of ambiguous or incomplete contractual terms, regard must be had, especially between merchants, to the normal meaning of such terms and the usual practices in the respective trade sectors, and this independently of the intention of even the knowledge of the parties'). *Id.*

the legislator; but the former cannot derive their binding force from a positive intention of the parties. As such, Article 9(2) of CISG is clearly compatible with the above said regarding the normative force of commercial custom.

However the problem comes when one tries to identify its content. Different criteria will be found according to different domestic legal systems, the consequence being that, in the absence of a clear uniform definition, there will not be predictability, at the international level to determine those practices and usages having a normative character. To this effect one could ask what is the interaction between international commercial custom and its written formulation. At this point it is important to note the evolution of some of the most authoritative doctrine[121].

In this sense, at first the condition of international commercial custom was linked to its susceptibility of being formulated in writing. It was said that "international commercial custom [...] cosists of commercial usages and practices which are so widely accepted that it has been possible to formulated them as authoritative texts"[122]. This association between commercial custom and its written formulation was to be later reinforced by saying that "[i]nternational commercial custom has two characteristics: first, it has been deliberately expressed by an international formulating agency or trade association; and, secondly, in principle, such a formulation applies only if adopted by the parties to the contract"[123].

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[121] See, Rafael Illescas Ortiz, *El Derecho Uniforme del Comercio Internacional y su Sistematica [The Uniform Law of International Commerce and its Systematics],* REVISTA DE DERECHO MERCANTIL, 39, 65 (1993).

[122] Clive M. Schmitthoff, *The Unification of the Law of International Trade, in* CLIVE M. SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW, *supra* note 10, 206,210 (Article first published in, 1968 THE JOURNAL OF BUSINESS LAW, 105-119). (The author presents as examples of formulated international commercial custom the INCOTERMS and the UNIFORM CUSTOMS AND PRACTICES FOR DOCUMENTARY CREDITS sponsored by the International Chamber of Commerce).

[123] Clive M. Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions, in* THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS, *supra* note 5, 19, 24.

There are two observations to make at this respect. First, as indicated above, international commercial custom is not different from the domestic one regarding their binding force in the sense that the conditions that a simple business practice has to meet to become a binding usage are not substantially different. Thus in this respect, although the written formulation of commercial customs can be of great aid in order to facilitate their knowledge and their proof, it is not an existencial condicition[124]. On the other hand, it has also been signaled the clear incompatibility of considering a commercial custom upon agreement of the parties in their contract only. The second observation is that the link between commercial custom and written formulation would suggest a sort of 'legislative' power for international bodies and private associations which undoubtedly are not invested with. Thus, general conditions and other private formulations of commercial rules and practices will only be considered normative binding usages to the extent that the criteria found, for this purpose, under the different domestic legal systems, or international uniform criteria, like Article 9(2) of CISG, permit it. As to this provision is concerned, it could be said that the Vienna Convention contains an 'autonomous' concept of 'international commercial custom' to be construed in the light of the Convention's interpretation provisions, *i.e.*, Article 7[125]. According to the CISG then a normative trade usage will be that 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".Other autonomous rules, practices or line of conduct not meeting the

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[124] See, Rafael Illescas Ortiz, *supra* note 120 *at* 66. (The relation between the consuetudinary rule and is written formulation will be that of facilitating the proof of such rule without loosing its binding force through its consideration as a socially exigible condut instead).

[125] See, *e.g.* C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 1, *at* 111.(The authors support this view by saying, regarding the meaning of the concept of usages in Article 9, that 'it certainly is to be determined in an autonomous and internationally uniform way'.) *Id. at* 111.

requirements above, will be binding upon the parties to the extent they are incorporated in the contract. Then, for example, under Article 9(1) would come sets of rules that, although draft under the heading of "usages" by particular trade associations, indeed they are not but established general lines of conduct[126].

However it has to be noted that if this is the intention of the Vienna Convention, *i.e.*, create an atonomous concept of international trade usages, it appears to be quite illusory for two reasons. First, there is no international body invested with the task of issuing authoritative interpretative opinions on the Convention. And second, as already stressed, it is not concerned with the validity of usages. This is on the other hand, a most striking aspect , moreover if one comes to the existance of a normative usage according to Article 9(2)[127].

It is also important to note that the Convention neither is concerned with the proof of usages. It is said that this question will have to be solved according to the procedural law of the forum[128]. The most common solution at this respect, regarding national courts, is that it will be for the party claiming the usage to prove it[129]. As to arbitration is concerned, it is widely recognized that arbitrators themselves take into account relevant trade usages in making their decisions[130].

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126 *Id. at* 107.

127 See, *id. at* 112 ('A usage may prove to be invalid either because its content is contrary to a legal prohibition or public policy or because the consent of the parties to apply that usage was defecttive.[ ] The possibility of challenging a usage for defective consent is given only when such usage has been expressly or impliedly agreed upon according to article 9(1), not where the usage is applicable on the basis of the legal presumption of article 9(2)'). See *infra at* 54-57.

128 *Id. at* 111.('Whether it is up to the party claiming the relevance of a particular usage to prove both its existance and its content or whether usages may also be applied *ex officio* is to be determined according to the law of procedure of the forum').

129 For a general overview of this issue, *see* INSTITUTE OF INTERNATIONAL BUSINESS LAW AND PRACTICE, INTERPRETATION AND APPLICATION OF INTERNATIONAL TRADE USAGES, ICC, Publication no. 374 (1980).

130 *Id. at 112* (Mentioning national and international legislation as well as rules issued by arbitration institutions expressly allowing and even requiring arbitrators to do so; *e.g.,* Article VII of the Geneva Convention in International Commercial Arbitration of 1961; Article 33 of the UNCITRAL rules of Arbitration; Article 13 of the International Chamber of Commerce; Article 28(4) of the UNCITRAL Model Law on International Commercial Arbitration.).

2. Legislative History of Article 9.

The importance of the legislative history for the interpretation of international legislation such as the Vienna Convention, has been rightly appointed by saying that without it, "tribunals are likely to see the international text as an attempt to state the domestic rules which to them are familiar and natural[...], an approach that would erode the work of half century to provide uniform law"[131]. This is specially true when one comes to a provision as the one under consideration. All along the different stages of the making of the Vienna Convention[132], Article 9 made the object of intense debates with political flavors. It has to be noted at this respect that the Vienna Convention was developed at the same time when the debate on a new international economic order was very strong[133]. Indeed the Preamble of the Convention is quite a reflection of the above: "[...] bearing in mind the broad objectives [set forth in the U.N. Assembly Resolutions] on the establishment of a New International Economic Order, [and very particularly considering the principles of equality and mutual benefit as] important elements in promoting friendly relations among States, [only] the adoption of uniform rules [for the international sale of goods based on the aforementioned principles] would contribute to the removal of legal barriers in international trade and promote the development of international trade'[134].

The Preamble then reveals that, although if it is true that any attempt to develop a transnational uniform law for transnational commercial transactions and in particular, international sales, has to be "in response to the requirements and as the result of

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[131] JOHN. O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES (Kluwer, ed. 1989) *at* vii.
[132] *Id. at* 2 ('The Convention was made in three stages: (1) The UNCITRAL Working Group (1970-1977); (2) Review by the full Commission (1977-1978); (3) The Diplomatic Conference (1980)').
[133] See, Philippe Kahn, *Convention de Vienne du 11 avril 1980-Caracteres et Domaine d'Application,* 15 DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL, 385,396 (1989).
[134] CISG, *supra* note 1, Preamble.

experience of international business"[135]; no rational organisation of public and private international relations, towards which the New International Economic Order,based upon equality and the exclusion of abuse of economic power, aims, will be achieved "without coordinated state legal action attempting to bring the private activities of the parties to international trade in harmony with the public needs of the international community and its members"[136].

In view of the above considerations and thinking about the scope of the provisions of the Vienna Convention as compared with its own Preamble one may asks about the appropriateness for subjects of Public International Law, *i.e.,* States, trying to agree, during more than a decade, on uniform sales law provisions of a complete dispositive nature. In this sense, the Vienna Convention has been explained, in a very diplomatic terms, as "a very difficult task [...] to conciliate the important role played by the free will of the parties and international usages in the legal regulation of international trade with the following objectives: (1) to produce clear rules generally acceptable to the states; and (2) not to curtail the basic role of state law as a source of international trade law and as the main standard to be used in deciding on the validity of international contracts and usages"[137].

In order to see how the above considerations were somehow reflected in the discussion of Article 9, it is first necessary to go back to the starting point, *i.e.,* the Hague Conventions.

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[135] Clive M. Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions, in , supra* note 122, *at* 30.

[136] Horacio A. Grigera Naon, *The U.N. Convention on Contracts for the International Sale of Goods, supra* note 12, *at* 92. *See also,* Aleksandar Goldtajn, *The New Law Merchant,* (1961) J. BUS. L., 17 ('Only deliberate regulation on the international level will make it possible to do justice, on the basis of equality, to the interests and general welfare of all members of the international community. And after all, these are the needs which commercial law must serve everywhere'). *Id.*

[137] *Id. at* 94.

a. Article 9 of ULIS.

It has been already signaled that UNCITRAL in its first Session held in 1968, had given priority to the study and consideration of the international sale of goods[138]. The question arose as to the possibility of promoting the adoption of the Hague Conventions. Consultations to the different governments followed and from the replies it was the conclusion that the said Conventions would not receive a wide acceptance. The main objection was not on the technnical or conceptual side but mostly a political objection: the Hague Convention had been the product of Western European legal scholars with no significant representation of other legal, political and economic backgrounds,while the world was being opened to newly independant developing countries, the Eastern countries, and of course, the new great power, the United States[139]. It has also been added, that despite the important innovations added by the Hague Conventions, regarding certain aspects, they had been based on pre-war studies undertaken mainly by scholars with more civil law than commercial law expertise[140], and that the said Conventions had not been able to succesfully integrated new technological developments[141]. But despite the above, the Working Group established

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138 See *supra,* note 70 *in fine.*

139 Philippe Kahn, *Convention de Vienne du 11 avril 1980-Caracteres et Domaine d'Application, supra* note 131, *at* 386. For a view of the different replies to the different Articles of the Convention, *see, Rep. S.G., Analysis of Replies,* I UNCITRAL Y. B. 159-176.

140 The structure of most of the Western European legal systems support the autonomous nature of commercial law as a branch of law within private law, most often contrasted to the civil law (*droit civil)*, while this distinction is unknown to many other legal systems. *See,* Dennis Tallon, *Civil Law and Commercial Law, in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, Vol. VIII, Ch.2, (J.C.B. MOHR (PAUL SIEBECK) TUBINGEN, Ed. 1983) *at* 3.

141 Philippe Kahn, *supra* note 137, *at* 131.

by UNCITRAL[142] with the aim of preparing a new text, proceeded from the provisions of the 1964 Hague Conventions[143].

CISG's Article 9 was worked out on the basis of the corresponding provision in ULIS:

(1) "The parties shall be bound by any usages which they have expressly or impliedly made applicable to this contract and by any practices which they have established between themselves.

(2) They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present law, the usages shall prevail unless otherwise agreed by the parties.

(3) Where expressions, provisions or forms of contract commonly used in commercial practices are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned"[144].

This provision clearly drew the distinction between contractual usages, *i.e.,* those which the parties "have expressly or impliedly made applicable to their contract" (Article 9(1)); normative usages, *i.e.,* those "which reasonable persons in the same situation as the parties usually consider to be applicable to their contract" (Article 9(2))[145]; and usages as interpretative devices (Article 9(3)).

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142 The Working Group was made of 14 States, 'a cross-section of UNCITRAL's world-wide representation'. JOHN. O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 1, *at* 54.

143 *Id.* (Until 1978 when the UNCITRAL Commission undertook the revision of the Working Group's work, the Vienna Conventios was being developed within two draft Conventions, based, respectively on ULIS and ULF. The Commission then decided to combine them in a single Draft Convention.).

144 ULIS, *supra* note 56, Article 9.(ULF did not have a corresponding provision although from express references in several Articles to the 'practices which the parties have established between themselves' and 'usages' implementing or derogating from its own provisions (*inter alia,* Articles 2(1), 4(2), 8(1), 11), the same effect to usages in connection with the formation of the contract can be inferred. Also, ULF, Article 13(1) defined 'usages' as 'any practice or method of dealing, which reasonable persons in the same situation as the parties, usually consider to be applicable to the formation of the contract'). C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 1, *at* 103.

145 See, *id. at* 105 (Article 9(2) 'clearly recognized the binding force of a different type of usage, i.e., usages not expressly or impliedly agreed upon by the parties in the sense of paragraph (1)').

Although the Vienna Convention has significantly changed the structure and wording of the provision, despite the objections issued during the negotiations to the introduction of normative usages or commercial custom, as it has been already suggested[146] this distinction between contractual and normative usages is also identifiable despite what, at first sight, CISG Article 9(2) would look like: "an ancillary provision to paragraph (1), since its purpose is to define the usages which the parties are deemed have impliedly made applicable to their contract"[147].

As a matter of fact what differs between the corresponding provisions of ULIS and the Vienna Convention is precisely the treatment of normative usages to which both give preference over their respective sales law provisions, although to a different degree. The legal objections were mainly raised by the United States, because it was considered that ULIS "failed to conform to U.S. commercial practice and would not be understood by U.S. merchants"[148]. In this sense, the objection was based on the assumption that ULIS defined usages "in terms of norms, rather than patterns, of behaviour"[149] by providing that the parties "shall [...]be bound by usages which reasonable persons in the same situation [...] usually consider to be applicable to their contract". The objection was as to this wording because it suggested not what in fact is regularly observed but what should be observed. In favor of the new wording, *i.e.,* what in fact is "widely known and regularly observed", it is said that the focus is on "behavioral custom", rather than "normative custom"[150]. In this context, it has to be noted that if according

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146 See, *supra*, note 118 *and* accompanying text.

147 C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 1, *at* 104-105.

148 Stephen Bainbridge, *Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions,* 24 VA. J. INT'L L. 619,633 (1984).See *also,*Harold J. Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique, supra* note 58; *see also,* Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria),* 19 HARV. INT'L L.J. 221,271.(1978).

149 Berman & Kaufman, *supra* note 144, *at* 271.

150 *Id.*

to the above terminology, Article 9(2) binds the parties to "what people do rather than what they think they ought to do"[151], then what is called "behavioral custom" is also a normative usage as opposed to contractural usages as it is understood in this paper, *i.e.*, an objective source of transnational commercial law[152]

Another legal objection to the ULIS's reference to "reasonable persons" referred to its vagueness by saying that "this provision could give rise to doubts and uncertainty; since usages relating to the same kind of contract might differ from one region to another, "reasonable persons" from different parts of the world might consider different usages as applicable to the contract"[153].

b. The Political Debate.

The most important objections to ULIS, Article 9, were of a political and economic nature, opposing developing and socialist countries to Western developed countries.
In spite of having signaled as one of the UNCITRAL's greatest achievements the fact of having established "the character of its work as being of technical, non-political legal nature"[154], trade usages were debated from different political attitudes towards them which have been summarized as follows:

"Viewed in the context of the United Nations, trade usages become political. Generally, developed nations like usages. Most usages seem to be made in London,

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151 *Id.*

152 For the U.S. prespective on trade usages according to Section 1-205 (2) of the U.C.C., *see* Stephen Bainbridge, *supra* note 146 *at* 638-640. See *also,* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 1 *at* 177-178.(According to the usages provision of this section, the parties do not have to be aware of the trade usage which is defined as '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').

153 Working Group Session no. 2-Dec. 1970, II UNCITRAL Y.B.50,58. *Also reproduced in,* JOHN O. HONNOLD, DOCUMENTARY HISTORY, *supra* note 129, *at* 64.

154 Clive M. Schmitthoff, *The Unification of the Law of International Trade, in* CLIVE M. SCHMITTFOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW, *supra* note 121, 206,217.

whether in the grain or cocoa trade, for example. Developing countries, on the other hand, tend to regard usages as neo-colonialist. They cannot understand why the usages of, let us say, the cocoa trade should be made in London. And usages are looked on with perhaps even more suspicion by the Eastern European countries because the Eastern Europeans…like to have everything in their files. There is nothing more distressing to a bureaucrat than the thought that some Englishman or Ghanian is going to appear and claim that there is a usage that he does not have in his file"[155]

These basic attitudes took part in the debate of this provision and it was in the form of a political and economic objection to it that Article 9(2) of ULIS by giving an excessive effect to trade usages, "it would almost certainly be detrimental to contracting parties from developing countries.[…] Since most of the usages nowadays existing in international trade developed at the commodity markets and exchanges situated in the major industrialized nations, not only are they often one-sided as to their content, but are also to a large extent entirely unknown to merchants from other countries"[156].

Leaving aside the concern for legal certainty from the part of socialist countries that led them to object Article 9(2) of ULIS[157], developing countries were confronting the most difficult task, that of incorporating their weak economies to the accelerated

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[155] Stephen Bainbridge, *supra* note 146, *at* 636 (quoting Professor Farnsworth). *See also,* Arthur Rosset, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods, supra* note 93 *at* 285 (The author goes deeper on these ideological considerations by saying that '[s]ome legal regimes are quite content with the past and look to tradition as a fountain of accumulated wisdom. For most Americans, community practice as embodied in common law is a source of just expectations about the future behavior of others. In contrast, those regimes that perceive their society as shackled by the remnants of an unjust past which must be smashed by a revolutionary process of renovation are not likely to be sympathetic to perpetuating past behavior by enshrining it as binding rules').

[156] C.M BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 1, *at* 105 (quoting from UNCITRAL Yearbooks).

[157] See Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods, supra* note 95, *at note* 143 ('Because the socialist view gives priority to the security of the contract and foreseeability, it is nor surprising that prime reliance is placed on the express agreement of the parties and written rules over the more flexible and uncertain outcome provided by trade usages').

activity of international trade "developed over the centuries without their active contribution and without regard to the needs of the new independent developing States"[158]. However, it is striking that this major problem was to be raised in the working out of a provision that was to be part of a legal instrument whose conception, from the beginning avoided any contact with the problem since it was just intended to provide a uniform set of optional rules.without any mandatory framework.

c. The Working-Out of a Compromise.

Along the path that led UNCITRAL's Working Groups to the Draft Convention that was to be discussed during the U.N.Diplomatic Conference in Vienna, the different views on the extent to which trade usages should bind the parties to an international sales contract finished by working out a provision in which normative usages are disguised of contractual usages, in the sense that they are considered to have been impliedly agreed by the parties; and in which only, "widely known" and "regularly observed" usages in international trade could bind the parties in this situation. Although this requirement would seem to indicate that trade usages referred to in Article 9(2) of CISG have to be worldwide accepted[159], this sort of compromised was better assured by sending back the appreciation of the validity of any usage to national law in Article 4(a)[160].

The development of the usages provision is divided in three stages[161]. It was clear from the very beginning of the legislative history of the Convention, that no provision to

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158 Aleksandar Goldstajn, *Usages of Trade and other Autonomous Rules of International Trade according to the UN (1980) Sales Convention, supra* note 12, *at* 75.

159 See, Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods, in supra* note 95, *at* 479 ('The requirement that the usage be 'widely known', seems to indicate that it should be accepted by socialist, developing, and developed market economy countries').

160 See, *supra* note 117 *and* accompanying text.

161 See, *supra* note 130.

this effect was to be agreed upon without narrowing the extensive legal effect that ULIS had given to trade usages[162]. Thus, the new provision would have to conciliate the broader role that trade usages enjoy in Western industrialised countries with the desire of socialist and developing countries of not giving them but a strictly contractual effect. Moreover, these latter countries would support usages as long as they did not conflict with statutory provisions. In this sense, the Mexican and Russian objections to the ULIS' usages provision expressed their concern that the acceptance of normative and interpretative usages would favor the economically stronger party by easily permiting the imposition of unfair and inequitable usages to the prejudice of the waker party[163].

During the first stage of the CISG's legislative history[164], the 14-State Working Group on the International Sale of Goods, established by UNCITRAL in 1969 and with the mandate to prepare draft legislation, produced two draft Conventions, one referred to as the "Sales" draft of 1976 and the draft on "Formation" completed in 1977. The development of the usages provision, in the first stage, is to be found within the evolution of the "Sales" draft of 1976.

As noted before, the main difficulty stemmed from the extensive effect that ULIS gave to trade usages: it had been noted that Article 9(1) of ULIS [165] by giving effect to any usage which the parties have "expressly or "*impliedly*" made applicable to their contract, and paragraph (2) by providing that the parties shall "also" be bound by further usages; this wording suggested that the usages referred to in paragraph (2) could not be based upon the expectations of the parties but "upon some other principle which was unstated, possibly some normative obligation independent of the implied contractual

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[162] See, *supra at* 15-18.
[163] See *Analysis of Replies and Comments by Governments on Hague Conventions of 1964: Report of the Secretary General,* U.N. Doc. A/CN.9/31, *reproduced in* (1970) I UNCITRAL Y.B. 159,169, U.N. Doc. A/CN.9/SER. A/1970.
[164] See *supra* note 130.
[165] See *supra* at 43.

undertaking by the parties"[166]. The Working Group then decided to redrafted paragraph (2) as an ancillary provision to paragraph (1) by defining the usages which under the latter paragraph the parties "impliedly made applicable to their contract".

However the question was raised as to the criteria that should decide when the parties had impliedly agreed to a usage, and in concrete, whether the parties would have to specifically know of the usage or whether the usage would bind also the unaware party if it was widely applied. In this connexion reference was made to the interests of developing States whose merchants had not participated in the development of usages and who might not be aware of them[167].

Representatives who opposed a broad definition of implied usages were also opposed to a proposed provision which provided that in case of conflict between a provision of the uniform law and usages applicable to the contract under paragraph (2), the latter should prevail.[168].

As to interpretative usages, a paragraph similar to paragraph (3) of ULIS Article 9[169], had been proposed but it did not succeded. Different objections were raised to this effect: some representatives objected that in order to interpret expressions, provisions or forms of contract commonly used in commercial practice it was to be difficult to find a meaning for them widely accepted and regularly given to them in international trade. On

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[166] *Report of the Secretary General: Pending Questions with respect to the revised text of a Uniform Law on the International Sale of Goods,* A/CN.9/100, annex III, 18 February 1975; *reproduced in* JOHN O. HONNOLD, DOCUMENTARY HISTORY, *supra* note 129 *at* 218.

[167] *Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session (New York, 27 January-7 February 1975), reproduced in* DOCUMENTARY HISTORY, *supra* note 129, *at* 243.

[168] *Id.* (Some representatives stated that 'as a constitutional matter or as a matter of public policy it was unacceptable that usages would take precedence over a statute or a convention').

[169] See *supra at* 43.

the other hand other representatives though that these difficulties "could be resolved by analogy to the provisions on usages[170].

The Working Group finally adopted a text almost identical to the one which was to be finally adopted in the Diplomatic Conference. This text was incorporated to the 1976 Working Group "Sales" draft[171].

The fact of having ommitted any reference to usages contrary to Convention provisions did not mean any concession to those who opposed this possibility but all the contrary : it was considered that since usages had been incorporated into the contract, either by the express intention of the parties or by implication; trade usages would take precedence over the provisions of the Convention by virtue of the principle of party autonomy embodied in the Convention itself[172].

During the second stage[173], UNCITRAL in its tenth annual session held in Vienna during May-June 1977, in order to review the 1976 Working Group "Sales" draft, constitued the so-called "Committee of the Whole"[174] which prepared the 1977 draft Convention on the International Sale of Goods.

The said Committee in discussing the trade usages provisions proposed by the Working Group noted some of the objections raised, and in particular the view that the proposed text still attached too much importance to usages and that the unification of

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[170] *Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session, supra* note 165, *at* 243.

[171] The text adopted by the Working Group in its Sixth Session read as follows:
'(1) The parties are bound by any usages 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 a usage of which the parties knew or had reason to know 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'

[172] *Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session, supra* note 165 *at* 244.

[173] See *supra* note 130.

[174] This 'Committee of the Whole' consisted essentially of the full Commission. *See,* JOHN O. HONNOLD, DOCUMENTARY HISTORY, *supra* note 129, *at* 318.

law could be compromised unless it became clear that usages were only an additional faction which, in the case of implied usages, become binding on the parties only if the usage was not in conflict with the contract or the Convention[175]. The Committee however did not retain any of the objections raised and decided not to change the proposed text and therefore recommended it for the Commission's adoption. The full Commission unanimously approved it and became Article 8 of the 1978 Draft Convention which was to be discussed during the the third stage, *i.e.,* the 1980 Diplomatic Conference[176].

Before the Vienna Diplomatic Conference took place, the 1978 Draft Convention was circulated to Governments and interested organizations for comments. Regarding the trade usages provision[177] some of the comments raised reflected some of the problems that the interpretation of the said provision, which has remained substantially the same[178], would reveal:

It is worth to note the objections raised by Yugoslavia and the International Chamber of Commerce regarding the reference made in paragraph (2) to a usage "in international trade widely known". The first considered that the word "international" should be dropped as long as the usage was one to which the parties "knew or ought to have

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175 *Id. at* 324.

176 *Id. at* 318. (UNCITRAL, after reviewing the 'Formation' draft in its eleventh session (New York, May-June 1978), decided to integrate the drafts on 'Formation' and 'Sales' and establish a Drafting Group to implement this decision. These proceedings resulted in the 1978 UNCITRAL Draft Convention on Contracts for the International Sale of Goods which by an unanimous UNCITRAL decision was approved and recommended that the U.N. General Assembly convene an international conference of plenipotentiaries to conclude a final Convention. The 1978 Draft Convention was also circulated to Governments and interested international organizations for comments). *Id. at* 364.

177 See *supra* note 169.

178 *Cf.* Article 9 of CISG, *supra at* 35 (The only significant change was made to paragraph (2) which added the words 'or its formation'. This change was made following a United States proposal to make clear that the article applied to the formation of the contract). *See,* JOHN O. HONNOLD, DOCUMENTARY HISTORY, *supra* note 129, *at* 394 *and* 486.

known". The second favored the same result arguing that sometimes local usages must be taken into consideration[179].

Another worthnoting comment in the sense above came from the United Kingdom which illustrated the problem by asking whether, if two merchants in different common law States contract on c.i.f. or other trade terms, the Convention's rules on risk of loss would prevail over the common law rules governing contracts entered into on the basis of those terms[180].

Again the fear was raised, by the Czechoslovakian government, that by permitting usages in contradiction with the provisions of the Convention, abusive usages or unfair practices could be imposed on weaker parties and that then it would be preferable to delete the usages provision and rely upon Article 4(a), in the sense that the Convention is not concerned with the validity of usages[181].

At the Diplomatic Conference different amendments reflecting the above fear were proposed. Although none of them succeded, it is important to note them because during their discussion is is reflected that although most of the delegations at the Conference were aware that the usages provision was being the product of a compromise, this compromise was not the same understood.

In this sense the Czechoslovakian delegate said that "although he was well aware that article 8 [article 9 of the Convention] was regarded as being the result of a compromise, he had grave doubts about its content and the principles it set forth"[182]. According to him it was clear that the wording of the article indicated that in all cases usages took preference over the Convention and, if this was acceptable as regards contractual usages strictly speaking, *i.e.,* those that the parties had agreed to apply according to paragraph

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[179] *Id. at* 394.
[180] *Id.*
[181] *Id.*
[182] *Id. at* 484.

(1), it was not the same with the so-called implied usages of paragraph (2) because that would result in reducing the scope of the Convention. He proposed to limit the usages covered by paragraph (2) to those which were not contrary to the Convention, unless the parties decided otherwise. He argued that "[I]f the existing text of paragraph 2 were retained, a party which noted that certain provisions of the Convention were contrary to its interests would be tempted to substitute a usage which was unknown to the other party, [that] usages were often vague and their existence could be proved only by experts, whose opinions often differ, [and that] it should not be forgotten also that the buyers and sellers from some countries, had not participated in the establishment of usages and would yet be bound by them, even if those usages were contrary to the Convention"[183].

On the other hand there was the position considering that the conditions for a usage to bind the parties under paragraph (2) were strict enough, *i.e.,* that the parties not only should have been aware of the usage but moreover that it should be "widely known and regularly observed in international trade", to compromise further. In this sense the delegate of the United Kingdom said that "she could not support the Czechoslovak proposal because her delegation considered that the parties should be bound by any usage which complied with the provisions of article 8(2) [article 9(2) of the Convention], even if it was not compatible with the Convention. The conditions set forth in that paragraph were strict enough to protect parties which did not know of a given usage"[184].

This position provides a clear understanding of the true nature of the usages covered in Article 9(2) of the Vienna Convention as normative usages despite their being linked to the intention of the parties.

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[183] *Id.*
[184] *Id. at* 485.

This understanding of the usages of paragraph (2) was also shared by the Chinese delegation which considered that if these usages were going to override the provisions of the Convention, it should be made clear that only "reasonable" usages qualify. He then proposed to add the word "reasonable" before "usage"[185]. This proposal was objected under the view that, if a usage has the force to oblige the parties because it has acquired such regularity of observance and wide knowledge, then there is no reason to consider the case of a usage which was not reasonable[186]. The Yugoslavian delegate despite agreeing with this latter position, argued however in favor of the Chinese proposal by saying that "[I]t should not, however, be forgotten that there would be new countries and enterprises entering the international market which would not be familiar with the usages of international trade. It should also be remembered that international arbitrators were often laymen of professional persons belonging to certain associations and that the sole remedy was, as a last resort, supervision by the national courts, which also supervised international arbitration"[187].

In contrast it should be noted the position of those objecting to the above proposals from a different understanding of the nature of the usages covered by Article 9(2) of the Convention. Thus, relying heavily on the legal fiction created by the said provision[188], there were delegates that considering these usages as strictly contractual in nature, opposed the said proposals by arguing from the principle of autonomy of the parties protected by the Convention. Then the contradiction of a usage not actually known solved by arguing that the solution should be the same that if the parties decided to

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185 *Id. at* 483.

186 See, Mr. Boggiano (Argentina), *id.* at 484. *See also*, Mr. Dabin (Belgium) and Mr. LI Chih-min (China) (The Belgium delegate to clear the matter invited the Chinese delegate to quote one or more examples of unreasonable usages. In reply, the latter by reminding the former that meetings of UNCTAD were being held at Geneva on the elimination of restrictive trade practices, said that trade restrictions imposed by certain trade practices could be called unreasonable) *Id.*

187 *Id. at* 484.

188 See *supra at* 37 (discussing the normative force of commercial custom).

conform to a usage contrary to the Convention because "knowledge and consequently agreement by the parties with regard to that usage was presumed"[189].

The rest of the discussions at the Diplomatic Conference focused mainly on the interpretation of trade terms. As said above UNCITRAL had decided to omit the subject from the draft[190]. Nevertheless the issue was raised again at this stage[191], because it was considered that the interpretation of a trade term could result in its being assigned a particular meaning without reference to any usage[192]. The proposals to this effect had in mind a reference to INCOTERMS. It was feared that since these terms could not come under the heading of "usages", a failure to incorporate them could result in that the Convention "might serve to change the customary manner of interpreting INCOTERMS"[193]. However the proposals were defeated again. In view of the comments against, it means that widely known trade definitions such as the above mentioned will only bind the parties to the extent they are expressly adopted by the parties to the contract or because they meet the requirements of Article 9(2) of the

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189 Mr. Mantilla-Molina (Mexico), *id. at* 485. *See also* Mr. Boggiano (Argentina) (In his view, 'the Convention undoubtedly gave precedence to the principle of the autonomy of the will of the parties. If that principle was fully applied, the parties could decide, expressly or even impliedly, to apply a usage to a contract, all the more so because article 8(2) [9(2) of the Convention] admitted agreement to the contrary by the parties, which exactly corresponded [ ] to the provisions of article 5 [6 of the Convention] which permitted the parties to derogate from the Convention both expressly and impliedly.').*Id.*

190 See *supra at* 22.

191 Egypt and Sweden submitted similar proposals aimed at covering the interpretation of trade terms such as 'FOB', 'CIF', 'landed', 'net weight', etc. *See,* JOHN O. HONNOLD, DOCUMENTARY HISTORY, *supra* note 129, *at* 488.

192 *Id.* (The main reason why a provision on the interpretation of trade terms was removed from the draft was the consideration that this point was already covered by other provisions, in concrete the usages provisions).

193 Mr. Dabin (Belgium), *id. See also* Mr. Bonell (Italy) ('Considering the great frequency with which trade terms were used in international transactions and the difficulties which daily arose because of the differences in the meanings attached to them by the various national legislations, it was obvious that much of the litigation arising out of sales contracts was bound to be concerned precisely with the interpretation of trade terms. Accordingly, in order to avoid differing interpretaiond of those terms by judges (and specially arbitrators) in different countries, it was essential for the future of the Convention to deal with the problem in the manner proposed'). *Id.*

Convention, *i.e.*, that they are considered to come under the heading of "implied trade usages"[194].

3. Interpretation of Article 9.

The illustration of the debates encountered through the different stages of development of this provision have predicted the difficulties for a uniform interpretation of Article 9, and in particular its paragraph (2).

Article 7(1) of the Vienna Convention, by stating that for the CISG interpretation, "regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade", would invite to an autonomous interpretation of binding trade usages[195]. Fundamental problems to give uniform effect to trade usages in its role to complement and interpret international sales contracts have already been suggested[196], and although one could seek some guide in the Secretariat Commentary on the 1978 Draft Convention, it has no binding force[197].

According to the Secretariat Commentary, in order for there to be "an implied agreement that a usage will be binding on the parties", it has to meet two conjunctive conditions: the usage must be one "of which the parties knew or ought to have known" and it must be one "which in international trade is widely known to, and regularly

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194 See, *inter alia*, Mr Farnsworth (United States of America) ('There was a well-justified fear that, with a provision of that kind, a party to a contract could be caught by an interpretation unknown to it. Paragraph (2), when it spoke of usage, required that it should be known to the parties-or that the parties 'ought to have known it'-and that in international trade it must be widely known to, and regularly observed by, the parties to contracts of the type concerned. The new paragraph (3) proposed by Egypt, however, contained none of those safeguards.'). *Id. at* 489.

195 See *supra* note 124 *and* accompanying text.

196 See *supra at* 39-40.

197 *Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat,* 14 March 1979, Doc. A/CONF. 97/5, *reproduced in* JOHN O. HONNOLD, DOCUMENTARY HISTORY, *supra* note 129, *at* 408. ('The Commentary provides helpful analysis of the 1978 UNCITRAL draft and reflects the Secretariat's impressions of the purposes and effect of the Commission's work. Some delegates to the 1980 Vienna Conference suggested that the UNCITRAL Secretariat be authorized to prepare a commentary on the 1980 Convention. This suggestion was not implemented by the Conference').*Id. at* 404.

observed by, parties to contracts of the type involved in the particular trade concerned"; and the trade may be restricted to a certain product, region or set of trading partners[198]. The Commentary stresses that the determining factor whether a particular usage is to be considered as having been impliedly made applicable to a given contract will be whether it was "widely known to, and regularly observed by , parties to contracts of the type involved in the particular trade concerned", because in such case it may be held that the parties "ought to have known" of the usage[199].

It has been considered that if Article 9(2) is given effect strictly following the above two conjunctive requirements, and in concrete that the usage has to be widely known and regularly observed in international trade, some difficulties would arise due to the consequence that local custom may fall outside the Convention[200]. In this sense one could mention again the case decided by the Civil Court of Basel (Switzerland)[201] on the basis of Article 9 as an undesirable homeward trend under the Convention. Here the court resorted to paragraph (2) of the said provison to bind the parties to a local rule which it considered to be a binding usage prevailing over the Convention substantive provisions. In the light of pursuing a uniform application of the Vienna Convention, this decision could be critized from two fronts. First, it has to be remembered that the issue under dispute which concerned the formation of the sales contract, could have been solved, although under possibly the price of having reached a different outcome, by applying the CISG's rules on formation, no matter how vague they are. The court,

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198 *Id. at* 409.
199 *Id.*
200 See, Berman & Kaufman, *supra* note 144 *at* 271-272. (The authors say that '[d]espite the apparent flexibility of the UNCITRAL definition of usage, its requirements of wide knowledge and regular observance in international trade may cause some difficulties. Commercial innovations brought on by technological change may have to wait some time before raising to the status of a usage. Also, a sensible local custom,[ ]may be thought by some to fall outside the [ ] provision because it is in conflict with the usual practice elsewhere') *Id.*
201 See *supra* note 104 *and* accompanying text.

however, wrongly took note and applied a different rule under both, Austrian and Swiss law (the seller and the buyer were respectively Austrian and Swiss). Second, even if the court had not brought into play any domestic law, and consequently, in order to bind the parties to the rule according to which a letter of confirmation sent by the seller and subsequent omission of any reaction by the buyer does not affect the formation of the contract, it had relied exclusively in a usage that the parties knew or ought to have known, still it would have consist of a local usage not widely known and regularly observed in international trade.

Although this solution could deserve the above critics from the prespective of a desired uniform interpretation of the Convention, the solution given by the court however, could well be seen as the most appropiate since, given the regional context of the transaction in question, the court rendered a decision consistent with the expectation of the parties to the contract, objectively considered.

In this sense a more consonant interpretation of Article 9 with the above solution has been proposed by saying that "the Convention gives effect to a usage only if, on an objective basis, it constitutes a part of the contractual expectations of the parties"[202]. Consequently then, a local usage or custom could be applicable "if it is "widely known to, and regularly observed by parties to international transactions involving these situations"[203].

Undoubtedly this interpretation appears to be more realistic than the one leading to a progressive disclosure of truly uniform and international trade usages. However, would this approach allow not to impose to new-comers to a given commerce rules raised by the practice regularly observed and widely known there, and specially when those have adjusted their expectations relying on substantives provisions of the Vienna

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[202] JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 1 *at* 178.
[203] *Id.*

Convention?. In this sense, attention has been drawn to a uniform criterion for the evaluation of usages found in Article 7(1) of the Convention: "In the intepretation of the Convention regard is to be had [...] to the need to promote [...] the observance of good faith in international trade". Despite the difficulties of uniformly relying on this corrective principle, it has been pointed out that even when a usage fulfills the conditions for its applications in Article 9(1) or 9(2), its application could be disregarded as running counter to the principle of good faith in international trade[204]

[204] C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW, *supra* note 1, *at* 113.

CONCLUSION

International commercial law has been increasingly growing as a response to the accelerated globalisation of economic relations. Integrated by norms of different origin it constitutes an asystematic body of rules of a transnational nature that having as a first premise the need to accommodate the great diversity of transactions in international commerce to their own nature and dynamics, try to provide with a new way of foreseeability and predictability and avoid the traditional conflictual solutions designed to coordinate the, each time more marginalized application of national laws. The today world-wide accepted principles of party autonomy and freedom of contract have brought about, as a consequence of a high degree of self-regulation, a great amount of what can well be denominated *autonomous* rules that together with internationally legislated instruments are a most important part of the norms engrossing the body of international commercial law. On the other hand the increasing organization of the international business community and the extensive use of international arbitration as a method of solving transnational commercial disputes constitutes a vital factor of development of this incomplete system of regulating transnational commercial contracts. Indeed it is the State which retains the basic role as a source of international commercial law *i.e.,* that of deciding what is acceptable and what is not.

With this picture in view, it has been my intention to show how in developing a transnational uniform law for international sales, the method of convening a diplomatic conference to produce a Convention with the narrow approach taken by the United Nations Vienna Convention on the International Sale of Goods could have been neither the right nor the more efficient method to produce clear rules on the sale of goods

generally acceptable to the States, and Article 9 of the said Convention has been taken as a major exponent to evidence this conclusion.

When in order to facilitate the fluidity of international trade, the different and conflicting domestic legal systems are targeted as hampering the predictability and legal security necessary for the efficient development of commercial transactions, any effort taken by States at the international level to harmonize domestic laws has to be based on considerations of efficiency and justice.

The adjudicative phylosophy behind the Vienna Convention clearly recognizes that the community of merchants had not waited for a uniform law of this kind to efficiently complete and adjust their contracts. This is why it gives priority to the practices they create between themselves and to international trade usages over its own substantive provisions. However in so doing the Convention has remained at the complete disposition of the parties and the necessary balance between public policy and party autonomy remains internationally uncertain because it fails to address fundamental issues when, as Article 9 does, the search for *better* rules is encouraged. Indeed, if the Convention has fulfilled a requirement of efficiency in that it creates a flexible legal framework for the parties to rely on different sources of regulating their international sales contracts, e.g., the contract itself, practices trade usages, the CISG's rules, domestic laws; it however fails to address most fundamental questions for these contracts to be validly held. These are issues on which neither the parties nor private arbitration bodies can develop any autonomous set of rules because their main function is that of limiting the autonomy of the parties and the freedom of contracting on the basis of different considerations of contractual justice and other more particular public policies which are to the States to regulate. Thus, the absence of common rules on issues such the validity of abusive clauses, largely disminishes the importance of the

Convention as an instrument from which legal certainty and predictability in international trade are to be developed.

This is not to say that the Convention lacks any useful function. It cannot be overlooked that it is being worldwide ratified and it has already been the object of numerous applications. In this sense the Convention is playing an important role functioning, for the issues it regulates, as *lex contractus* of an increasing number of international sales contracts, thus simplifying to a certain extent the complexities of private international law approaches and the task of courts in having to apply foreign laws. It represents also a useful tool for less sophisticated merchants in drafting their contracts.