

# The Existence of International Unchangeable and Changeable Trade Usage

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## Introduction

The existence of international trade usage in the handling of documentary credits, or letters of credit, is a matter of importance for international trade, and a matter of great interest for our understanding of the nature of law. Such trade usage, which must primarily be a matter of the trade practice of bankers, has been identified as the classic example of the new *lex mercatoria* of our globalised age.<sup>1</sup> It may feature in arbitrations, National litigation, or non-contentious understanding of parties to international contracts. It may be incorporated into transactions through express incorporation of the Uniform Customs and Practice of Documentary Credits (UCP), or be implied through the interpretation of contracts. Some variation of trade usage may be important as an express term of a contract, as an interpretative tool when construing a contract, or as the source of guidance on the standards to be applied to a banker's actions or office systems.

Of course because something is useful to have does not mean that it exists. Indeed, given the power of the legal fiction, the fact that something does not exist does not mean we cannot use it in the law: we may just act as if it exists, as when a statute deems something to be so. We argue if international trade usage exists then it must be manifested in local trade usage, and that there is a need to investigate local banking usages, in order to ascertain how sociologically real the trade usage is. Furthermore, we argue that such studies can help in the use of "trade practice" by parties, or arbitrators, or National courts. We argue that the failure to conceptually distinguish between different categories of international trade usage throws uncertainties in the investigation of the nature of *lex mercatoria*. Finally, we argue that the dynamic relationship between the UCP and trade practice means that the UCP should be taken to be evidence of trade practice and in this aspect recognised as a part of the *lex mercatoria*.<sup>2</sup>

Given the potential importance of the internationally recognised usage of bankers dealing with documentary credits it is peculiar to reflect that the identification of the same is not subject to any "rule of recognition".<sup>3</sup> Indeed the very importance of the usage is partially derived from the impossibility of any over-arching rule of recognition being applicable. We have re-discovered "transnational law" because we lack a simpler and workable alternative. Therefore, it is sensible to start our account with a very brief account of why the question of what the nature of trade usage remains novel after so many centuries of international trade.

## The Context of Modern Trade usage

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<sup>1</sup> Roy Goode, *Rule, Practice, and pragmatism in transnational commercial law* [2005] International & Comparative Law Quarterly 539 at 547: and see also, Roy Goode, *Usage and its reception in transnational commercial law* [1997] International & Comparative Law Quarterly 1.

<sup>2</sup> Contra Goode [2005] ICLQ 537 at 550.

<sup>3</sup> H.L.A. Hart, *The Concept of Law* (1997) Oxford University Press.

The first, and essential point, is to notice that the scale and extent of international trade means that the modern age of globalised international trade raises problems qualitatively different to earlier ages. This period did not start in the 1990s. Certainly the nineteenth century saw globalised international trade, and important features of the same were present in the eighteenth century. However, it is submitted that earlier trade networks, such as the silk-road or fairs in medieval Europe, were not directly comparable. Therefore, although the old *lex mercatoria* and transnational (pre-national?) law can be illuminating it must always be recognised as analogous, and as such not directly applicable to modern conditions.

For much of the nineteenth century the financing of world trade centred upon the City of London. The peculiar prestige of the City as a semi-independent and vital part of the British Empire meant that the practice in London was the single most important source of law and practice in the financing of international trade.<sup>4</sup> Between 1945 and 1971 the dollar of the United States of America was the foundation of the system of international money, and the financial institutions that controlled the dollar exercised a financial hegemony over the trade of the world.<sup>5</sup> These periods, characterised by a single hegemonic financial power, have passed and with them the convenient recourse to a preeminent source of practice and law in the international finance of trade. Although the English language has become an international language of commerce it can no longer be assumed that any English speaking jurisdiction is the best starting point for seeking out the nature of bankers' understanding of the finance of trade. The international standing of the English language is poorly explained as a reflection of the hegemony of the English speaking Nations.<sup>6</sup>

The international private organisations as formulating agencies of rules offer an alternative source of reference for international trade practice and usage. The International Chamber of Commerce (ICC),<sup>7</sup> the World Trade Organisation (WTO),<sup>8</sup> the International Organisation for Standardisation (ISO),<sup>9</sup> the UNCITRAL<sup>10</sup> and the International Institute for the Unification of Private Law (UNIDROIT)<sup>11</sup> are the most powerful international private organisations in regulating the behaviours of traders and business sectors in international commerce. These organisations publish rules "self-regulatory rules"<sup>12</sup> endeavouring to regulate a particular field in international trade. Prominent among these rules is the Uniform Customs and Practice for Documentary Credits (UCP), which is promulgated by the ICC. The UCP purports to be declarative of pre-existing and current practice relative to documentary credits, the Drafting Group of the UCP "also tried to envisage the future evolution of that practice".<sup>13</sup>

Yet, the effectiveness of the rules created by international private organisations engenders a new paradigm of law- making in transnational commercial law. Thus the

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<sup>4</sup> John Darwin, *The Empire Project: The Rise and Fall of the British World System 1830-1970* (2011) Cambridge University Press.

<sup>5</sup> Charles P. Kindleberger, *A Financial History of Western Europe* (1993) Oxford University Press.

<sup>6</sup> See: David Bellos, *Is That a Fish in Your Ear?: The Amazing Adventure of Translation* (2012) Penguin Books.

<sup>7</sup> <http://www.iccwbo.org>.

<sup>8</sup> <http://www.wto.org>.

<sup>9</sup> <http://www.iso.org>.

<sup>10</sup> <http://www.uncitral.org>.

<sup>11</sup> <http://www.unidroit.org>.

<sup>12</sup> They are called as "self-regulatory rules" in Filip Ly, *International Business Law and Lex Mercatoria*, (1992) North Holland, at 164. They are called as "code like" in Klaus Berger, *The Creeping Codification of the New Lex Mercatoria*, (2edn, 2010) 38-51 Wolters Kluwer.

<sup>13</sup> Introduction of UCP 600.

initiative in the creation of law is taken by individuals in organisations who rely on their expertise and they are driven by their commercial interests. Law-making is no longer conferred to the legislative authority which represents the public in sovereign state. This is known as the theory of privatisation law-making.<sup>14</sup>

The new paradigm in law-making generates a shift in the creation of many modern international trade usages. International trade usage is no longer solely a spontaneous-creation. The self-regulatory rules published by private organisations envisage expected future trade usage. So, the evolution of many modern trade usages begins with an express promulgation which acts as an embryonic stage. The second stage is acclamation through acceptance and adoption of the proclaimed usage by traders and other market participants which is an essential step for the envisaged trade usage to qualify as trade usage *de facto*. Thus the scheme of envisaged trade usage needs to be universally followed by the practice of traders, bankers and the involved parties in the international trade in order to become international trade usage. Accordingly, many modern international trade usages are still treated as organic – not legislated – but the embryonic stage of such organic law is not spontaneous. The birth of international trade usage requires “spontaneous” behaviours.

We must beware of claims to promulgate international banking practice as a trade usage, even if the attempt is temporised by a humility that aspires merely to “reflection”.<sup>15</sup> Surely as is the case with money the validity of trade usage must be a matter of acclamation rather than promulgation.

### **Promulgation and Acclamation**

Promulgation by non-governmental organisations of rules can be an effective method generating, or guiding the development of, international trade usage. Uniformity is the underlying purpose of the attempts to create international trade usage for a particular commercial instrument cross borders.<sup>16</sup> The promulgated rules by international private organisations might operate directly as international trade usage or through incorporation into incorporated standard contractual terms. Acclamation, or general adoption, is not only essential to determine whether the promulgated rules have become trade usage, but it is also important for the reproduction of the rules as standard contractual terms. Indeed, if the practice of bankers and traders differs from the practices expressed or implied by the promulgated rules then the latter would give way to the practice. An example of this relationship between promulgation and acclamation is the English case of *Kredietbank Antwerp v Midland Bank Plc*.<sup>17</sup>

The context of this case is that sub-article 20 (b) of UCP 500 - which was promulgated in 1993 - purported to set a new practice governing the presentation of original documents in documentary credits, it states:

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<sup>14</sup>For the theory of privatisation law-making: Klaus Berger, *The Creeping Codification of the New Lex Mercatoria*, (2edn, 2010) 38-51, Wolters Kluwer.

<sup>15</sup> A humility we should recall that was shown by Coke CJKB who asserted the judicial power in the service of declaration of the common-law in the seventeenth century.

<sup>16</sup> Introduction of UCP 600.

<sup>17</sup> [1999] Lloyd's Rep. Bank. 219; [1999] C.L.C. 1108.

"Unless otherwise stipulated in the Credit, banks will also accept as an original document(s), a document(s) produced or appearing to have been produced:

- i. by reprographic, automated or computerized systems;
- ii. as carbon copies;

provided that it is marked as original and, where necessary, appears to be signed".

The rule was intended to establish a practice of writing the word "original" on documents that are produced by reprographic, automated or computerised means in order to constitute such documents as original. In effect article 20 aimed to impose a formality in the interests of clarity and certainty.

In 1996 the case of *Glencore v Bank of China*<sup>18</sup> was brought before the Court of Appeal. One of the main disputed matters was the originality of a tendered document under a documentary credit subject to UCP 500. The document was a photocopy of a document that had been computer –word process - generated and printed, and then had been clearly hand-signed, in an attempt to give it status as an original. The Court rejected an argument based on expert evidence of international banking practice which would have treated the disputed document as an original one.<sup>19</sup> It was held that "there is no escape from the plain language"<sup>20</sup> of sub-article 20 (b) of UCP 500. Pursuant to this article, it was plain that computerised or photocopied documents must have the word "original" written upon them in order to be recognised as original. Even though the requirement of marking the document with the expression "original" was technical, and lacked any intrinsic merit; and even if it upset the practice of international banking and trading communities;<sup>21</sup> Sir Thomas Bingham, with whom the other judges agreed, stated that:

*"Article 20(b) is, as it seems to us, designed to circumvent this argument by providing a clear rule to apply in the case of documents produced by reprographic, automated or computerised systems".*<sup>22</sup>

The 1999 case of *Kredietbank Antwerp v Midland Bank Plc*<sup>23</sup> before the Court of Appeal turned upon the status as original of a word-processed document, tendered in purported compliance with the terms of a documentary credit subject to UCP 500, and not marked with the word "original". It was held that the requirement that a document be "marked as original" in sub-article 20 (b) of UCP 500 applies to photocopies of computerised documents, but not to the word-processed and laser printer documents. The case of *Glencore* was distinguished on the basis that the computerised document in that case was a photocopy whereas the word – processed document in *Kredietbank* was not. Lord Justice Evans, with whom the other judges agreed, opined that if the above quoted *dictum* of Sir Thomas Bingham in *Glencore* intended to imply that word-processed and laser print documents were within the terms of 20(b) then such a *dictum* would be treated as *obiter*.<sup>24</sup>

It is submitted that it is clear from the language of sub-article 20 (b) of UCP 500 that it applies to documents produced by use of a word-processing programme *run upon a*

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<sup>18</sup> [1996] 1 Lloyd's Rep 135.

<sup>19</sup> *Glencore v Bank of China* [1996] 1 Lloyd's Rep 135 at 118.

<sup>20</sup> *Glencore v Bank of China* [1996] 1 Lloyd's Rep 135 at 118 per Sir Thomas Bingham.

<sup>21</sup> *Glencore v Bank of China* [1996] 1 Lloyd's Rep 135 at 148 per Sir Thomas Bingham.

<sup>22</sup> *Glencore v Bank of China* [1996] 1 Lloyd's Rep 135 at 118.

<sup>23</sup> [1999] Lloyd's Rep. Bank. 219.

<sup>24</sup> *Kredietbank Antwerp v Midland Bank Plc* [1999] Lloyd's Rep. Bank. 219 at [51].

computer and printed out on a *laser printer controlled by an electronic signal emanating from the computer* running the word-processing programme. Such documents are obviously produced by an automated or computerised system. They are neither handwritten nor typed.<sup>25</sup> The expression "word-processed" applied to such documents provides no principled basis for distinction, it does not magically reclassify them as "typed", because "typed" implies produced upon a type-writer, a machine that is now obsolete because they have been replaced by computers. That computers are also controlled by key-boards does not make them any the less computers. Article 20 suffered not from linguistic ambiguity but from the effects of technological and business changes, specifically the shift from type-writers to word-processors, or computers, in offices across the world.

However, the court in *Kredietbank*, was willing to avoid such mechanistic interpretation of a clear expression, despite precedent for such a reading, where the resulting legal effect made no sense because it was contrary to the international trade usage.<sup>26</sup> Despite the clear terms of UCP 500, the supplementary guidance provided by Case Study Number 20 under UCP revision 500,<sup>27</sup> and the guidance given by the court in *Glencore*, the formality of marking word-processed documents as original had never been widely adopted. In the same year as *Kredietbank* the ICC issued a paper regarding the requirements of article 20 of the UCP 500 that had to be met to give a document the status of originality. The ICC paper declared that a hand-signed document, such as the one in *Glencore*, should be considered as original.<sup>28</sup> In effect the Court in *Kredietbank* had anticipated the ICC by its refusal to give full effect to article 20 in the face of the commercial reality that the formality had not been accepted by the trading community, nor insisted upon by the banking community, in the years following the promulgation of UCP 500.

In conclusion, the interpretation of article 20 UCP 500 by the Court of Appeal and the ICC provides a clear example of the operation of the proposition that: acclamation is necessary for the evolution of rules promulgated by international non-governmental organisations into international trade usage. In more abstract terms, it is an example that provides support for the proposition that: the normative force of international trade usage is higher than that of self-regulatory rules.

### **Unchangeable, Changeable International Trade Usage and *Lex Mercatoria***

A first and unavoidable problem in any attempt to determine the relationship between international trade usage and *lex mercatoria* is that domestic laws interpret trade usage discretely from one another. Transnational law holds an ever-present potential for fragmentation into National or regional varieties. Even if a trade usage were universally recognised this risk of fragmentation through incorporation into legal systems would exist.

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<sup>25</sup> This expression was used to make the distinction between original documents (handwritten or typed) and those subject to sub-article 20(b) in guidance issued by the ICC as case study number 20 under UCP revision 500.

<sup>26</sup> The case of *Kredietbank Antwerp v Midland Bank Plc* [1999] Lloyd's Rep. Bank. 219 was risen where the ICC paper for originality (ICC Banking Policy Statement, *The Determination of an "Original" Document in the Context of UCP 500*, (1999) July 470/871) was under the discussion by the ICC Banking Commission, the decision of *Kredietbank* was made just before the issuing of the ICC paper for originality.

<sup>27</sup> Quoted at [1996] 1 Lloyd's Rep 135 at 152.

<sup>28</sup> ICC Banking Policy Statement, *The Determination of an "Original" Document in the Context of UCP 500*, (1999) July 470/871.

A second and crucial problem is the failure to distinguish between what we term below "changeable" and "unchangeable" trade usage. Although it is generally unwise and confusing to coin terms, we find other potential synonyms are already loaded with unwelcome and confusing semantic baggage. Thus, for "unchangeable" we might substitute "fundamental", but this word has a history in the jurisprudence of English and Welsh contract law that would be distracting. Some distinction is needed, as a failure to make the conceptual distinction generates confusion in the discourse regarding the relationship of trade usage with *lex mercatoria*. The distinction we are trying to establish is one of function rather than one of genesis or source. Thus, an unchangeable usage may be codified, or not, and any codification may be by international non-governmental organisation or National legislature. Nor is the issue is not one of power or sovereignty. There is no argument that a National legislature could not change an "unchangeable" aspect of trade usage as a matter of law, it may deem some practice to be trade practice. However, the consequence of such a National change would be that the very nature of the underlying transaction would be altered. The idea is that the unchangeable aspects are *constitutive* of the commercial transaction in point. We attempt to explain, and give examples illustrative of this distinction, below.

A third problem is that there is inconsistency and inherent ambiguity in the use of the terms used to describe matters. Thus, the word "custom" might be used as a synonym for "trade usage". This problem is not helped by terms of legal art, such as "custom", which are not always used as terms of art. There is also a problem of linked meanings: thus, trade usage *de facto* is a matter of sociological fact; trade usage *de juris* is a matter of legal fact. The two may or may not coincide in any particular instance. However, the two will always be connected in any rational legal system, and are very likely to have a dynamic and reflective relationship. Terminological confusion is less important than conceptual confusion in theory. However, in practice the two are often impossible to separate out. We try and define our terminological practice for the purposes of this essay below.

Trade usage *de facto* might be defined as: a common practice or set of practices that is or are well known and adopted amongst traders in a particular trade, and which generates expectations of repetition and reciprocation that are recognised as having some normative force. Thus, it is how things are done and variation from the practice is viewed by members of the community of practice as discreditable.

Trade usage *de juris* varies, of course, across legal orders. Most legal orders distinguish between custom and trade usage. The reason for such distinction is that custom but not trade usage is regarded as a source of law, and thus custom has the force of law. On the other hand trade usage is not generally recognised as a source of law. Trade usage has its legal effect through contract law: as an interpretive aid, or as an incorporated or implied term. The distinction accords a greater normative force to custom than to trade usage. One can contract out of trade usage but one is bound by custom.

The requirements for the recognition of a trade usage that will affect the rights and duties of parties to a contract under English law are as follow. First, it must be an universal or general practice in the trade, and not one limited to some specific locality.<sup>29</sup> Second, it must be notorious that the usage must be well known in the trade where it

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<sup>29</sup> *Wood v Wood* (1823) 1 C & P 59; *Gabay v Lloyd* (1825) 3 B & C 793; *Lloyd's Bank Ltd v Swiss Bankverein* (1913) 108 LT 143 at 145; *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas 11 at 18.

applies.<sup>30</sup> This usually requires the occurrence of numerous instances of the same actual practice.<sup>31</sup> Third, it must be certain<sup>32</sup> in the sense that it should not be loose and variable that leaving material element to the individual's discretion.<sup>33</sup> Fourth, the contractual parties must have known the usage, although this is presumed where the practice has been proved to be notorious.<sup>34</sup> Therefore, parties in a particular market are automatically bound by its usage if it is treated as notorious.<sup>35</sup> Fifth, is a what we referred to above as the practice having normative force. This is sometimes referred to as the practice being compulsory. This may mean the practice is treated as, and assumed to be, a legal obligation. This excludes matters of mere personal preference or discretion, and is not fulfilled where the practice is loose and variable,<sup>36</sup> or where the practice arises from a mere act of courtesy and accommodation.<sup>37</sup> Lastly, a practice must pass the test of reasonableness where the issue of reasonable is raised. A trade usage is unenforceable where it is proved - or the court finds without evidence being brought - that the usage is unreasonable<sup>38</sup> or illegal.<sup>39</sup>

Trade usage is not generally recognised as a source of law under English law, and it is asserted by some authors that trade usage cannot contradict or replace the doctrines of common law.<sup>40</sup> This is, as noted above, a contrast with custom which can contradict and replace the doctrines of common law. Trade usage is not an independent source of obligations. It merely operates through the binding force of the contract in which it is incorporated.<sup>41</sup> It is, however, presumed that parties tacitly intend to implement the usage of a particular market that relates to the subject matter of their contract.<sup>42</sup> Consequently, evidence of trade usage is admissible to give meanings or to function as incorporated terms to the unexpressed incidents which are associated with the contract, and they are generally regarded in an appropriate market as forming a part of the contract,<sup>43</sup> provided that the trade usage does not conflict with any express contractual terms nor make such terms inconsistent with one another.<sup>44</sup>

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<sup>30</sup> *R v Stoke-upon-Trent Inhabitants* (1843) 5 QB 303 at 307; *Re Goetz, Jonas & Co, ex p Trustee* [1898] 1 QB 787 at 795, CA, per AL Smith LJ; *Brown v IRC* [1965] AC 244, [1964] 3 All ER 119; *Halsbury's Laws of England*, (5edn, 2012), 32 para 57.

<sup>31</sup> *Shipley v Pittsburgh & L.E.R Co*, 83 F. Supp 722 at 750.

<sup>32</sup> *Sewell v Corp* (1824) 1 C & P 392 at 393; *Devonald v Rosser & Sons* [1906] 2 KB 728 at 743, CA, per Farwell LJ; *Cooper v Strauss* (1898) 14 TLR 233; *Re Walkers, Winser and Hamm and Shaw, Son & Co* [1904] 2 KB 152 at 159; *Daun v City of London Brewery Co* (1869) LR 8 Eq 155; *Harker v Edwards* (1887) 57 LJQB 147 at 148, CA, per Lord Esher MR; *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 SC 134 at 138, HL, per Lord Buckmaster LC, and at 140 per Lord Shaw; *Sagar v H Ridehalgh & Son Ltd* [1931] 1 Ch 310, CA; *Halsbury's Laws of England*, (5edn, 2012), 32 para 58.

<sup>33</sup> David Bederman, *Custom as a source of law*, (2010) at 83 Cambridge University Press.

<sup>34</sup> *Wood v Wood* (1823) 1 C & P 59; *Plaice v Allcock* (1866) 4 F & F 1074; *Newall v Royal Exchange Shipping Co* (1885) 33 WR 868, CA; *Bettany v Eastern Morning and Hull News Co Ltd* (1900) 16 TLR 401; *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 SC 134, HL; *Lord Forres v Scottish Flax Co Ltd* [1943] 2 All ER 366, CA; see also David Bederman, *Custom as a source of law*, (2010) at 83 Cambridge University Press.

<sup>35</sup> *Bayliffe v Butterworth* (1847) 1 Exch. 425.

<sup>36</sup> David Bederman, *Custom as a source of law*, (2010) at 83 Cambridge University Press.

<sup>37</sup> David Bederman, *Custom as a source of law*, (2010) at 83 Cambridge University Press.

<sup>38</sup> *Olympia Co v Produce Co* [1917] 1 K B 320, CA.

<sup>39</sup> Contrary to the public policy or in conflict with a statute.

<sup>40</sup> *Halsbury's Laws of England*, (5edn, 2012), 32 para 61.

<sup>41</sup> *Halsbury's Laws of England*, (5edn, 2012), 32 paras 50 and 53.

<sup>42</sup> *Hutton v Warren* (1836) 1 M. & W. 466; *Dashwood v Magniac* [1891] 3 Ch. 306, CA; *Produce Brokers Co v Olympia Co* [1916] A.C. 314; *Liverpool City Council v Irwin* [1977] A.C. 239, 253; *Baker v Black Sea & Baltic General Insurance Co Ltd* [1998] 1 W.L.R. 974, 982.

<sup>43</sup> *Moult v Halliday* [1898] 1 QB 125 at 129.

<sup>44</sup> *Palgrave Brown & Son v Owners of S S Turid*, ([1922] All ER Rep 489 at 494-496; [1922] 1 AC 397 at 406, 408.

Custom, on the other hand, is a source of law. It applies as local law even where it is in contrary to the Common law.<sup>45</sup> Custom to operate as law must be established as having existed from time immemorial,<sup>46</sup> it must be certain, consistent,<sup>47</sup> and local,<sup>48</sup> finally it must pass the test of reasonableness.<sup>49</sup>

However, it seems this neat distinction between custom and trade usage is not a complete and accurate description of the law. It is submitted below that unchangeable trade usage may have the force of law. That it can function independently from any contract as a source of obligations, and that it is able to displace the Common law.<sup>50</sup> It may be that the traditional legal treatments of custom should be amended, treating the custom of some markets as local not in a geographical sense but in terms of a limited community of market participants. One would also have to relax the requirement of a custom having existed since time immemorial when applied to commercial markets, as the restriction was originally linked to a writ concerned with title to land. Alternatively, the terms of art can be left as sanctioned by tradition, and an “unchangeable” type of trade usage can be recognised as potentially having the same legal consequences as custom in appropriate circumstances.

A distinction between trade usage and custom is not unique to the common law of England and Wales. In the USA trade usage lacks the force of law but it has a function in interpreting or supplementing contractual terms.<sup>51</sup> Trade usage does not function in the same way as terms implied by the court for business efficacy. The parties are assumed to know the usage, and intend for it to apply to their contract unless they provide otherwise. The position is similar in Germany. Trade usage under French, Italian and Swiss laws is used in the interpretation of contracts and functions as implied terms of the contract subject to the proof of the actual knowledge of the parties of the trade usage.<sup>52</sup>

Custom in all of the aforementioned legal systems – except the USA - is distinguished from trade usage. Custom has the force of law, it must be longstanding, and it must be regarded by the parties as legal binding.<sup>53</sup>

Thus, it can be seen that the distinction between a set of practices that operate as trade usage and are effective through contracts, and a set of practices regarded as binding on the parties as custom, is familiar across common law and civilian jurisdictions. We adopt this distinction here, but not uncritically. As noted above we challenge the generally accepted demarcation of the distinction in the English common law. More generally, we feel the rigidity of the distinction, especially when it is linked to the dominance of the law of custom by land law, can be mischievous in the area of transnational commercial law. We suggest that the unchangeable trade usages of historically established commercial transactions should be either recognised as custom, or treated as a third category

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<sup>45</sup> *Halsbury Laws of England*, (5edn, 2012), 32 para 1.

<sup>46</sup> *Plumer v Leicester* (1329) 97 Selden Soc 45 at 46.

<sup>47</sup> *Halsbury's Laws of England*, (5edn, 2012), 32 para 3.

<sup>48</sup> *Linn-Regis Corpn v Taylor* (1684) 3 Lev 160; *Wilkes v Broadbent* (1745) 2 Stra 1224; *Millar v Taylor* (1769) 4 Burr 2303 at 2368; *Clarkson v Woodhouse* (1782) 5 Term Rep 412n; *Egerton v Harding* [1975] QB 62 at 68, [1974] 3 All ER 689 at 691.

<sup>49</sup> *Olympia Co v Produce Co* [1917] 1 K B 320, CA.

<sup>50</sup> The obligation to make payment under documentary credits: *Hamzeh Malas Sons v. British Imex Industries Ltd* [1958] 2 QB 127, 129.

<sup>51</sup> Section 1-205 (3) of UCC

<sup>52</sup> Filip Ly, *International Business Law and Lex Mercatoria*, (1992) North Holland, 137-158.

<sup>53</sup> Filip Ly, *International Business Law and Lex Mercatoria*, (1992) North Holland, 137-158.

located between the traditionally hermetically sealed categories of trade usage and custom.

By “unchangeable” international trade usage we mean those constitutive or fundamental principles<sup>54</sup> that are necessary to give sense to the commercial transaction, so that the non-recognition of any of these principles threatens the viability of the commercial transaction. We call such a trade usage unchangeable because it is associated with the existence of the underlying commercial transaction. Such an unchanging trade usages are effectively already recognised as law by both merchants and courts; they are the corpus of the new *lex mercatoria*. We try to sustain these assertions through a review of the law governing documentary credits.

One unchangeable principle of documentary credits is that the bank which issues the credit is under an irrevocable obligation to make payment to the seller who presents the required documents. Indeed, the legal and commercial institution of the documentary credit is founded upon and explained by this irrevocable obligation of the issuing bank to make payment. If the bank were not obliged to make payment then sellers would not accept the documentary credit as a form of payment, because it would not be a secure method of payment. This rule is enforceable under English law even though it violates the requirement that consideration be reciprocal at Common law. Jenkins LJ stated the position in *Hamzeh Malas Sons v. British Imex Industries Ltd*:<sup>55</sup>

“An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice”.

It is this example that seems to demand a reformulation of the distinction between trade usage and custom at common law. Here the “commercial system” is recognised as being capable of displacing the doctrines of common law. The result must be correct, but the explanations of the result are inadequate whilst the traditional distinctions between custom and trade usage stand.

A further example of an unchangeable trade practice is the principle of strict compliance in documentary credits. This principle insists that the documents presented as a condition of payment must strictly be in compliance with the terms of the credit. The law was stated by Viscount Sumner in *Equitable Trust Co of New York v. Dawson Partners Ltd*:<sup>56</sup>

“It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorized to accept are in the matter of the accompanying documents strictly observed”.

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<sup>54</sup> Principles are distinct from rules in terms that the former represent the underlying purposes and policy of a legal order, on the other hand rules are more specific and technical that enjoy far more formal realisability: Kennedy, *Form and Substance in Private Law Adjudication*, [1976] 89 Harvard Law Review 1685.

<sup>55</sup> [1958] 2 QB 127, 129.

<sup>56</sup> (1926) 27 LI L Rep 49, 52; *Gian Singh & Co Ltd v. Banque de l'Indonchine* [1974] 1 W.L.R. 1234, 1240:

“This oft-cited passage has never been questioned or improved upon” per Lord Diplock. *English, Scottish and Australian Bank Ltd v. Bank of South Africa* (1922) 13 LI L Rep 21, 24.

Accordingly, it was not only that this unchangeable trade usage fulfilled the common requirements for trade usage, this was recognised by both the parties, it was “common ground”. Further, there was a “common sense” that the documentary credit could not be workable if this unchangeable trade usage did not exist. It is this constitutive feature of the principle of strict compliance that renders this trade usage unchangeable. The buyer would be entirely vulnerable if the principle of strict compliance did not apply because the sole means available to the buyer for self protection, the requirement of documents evidencing due shipment, would be useless in the absence of the principle.

A third unchangeable principle derived from trade usage is the principle of autonomy in documentary credits: the requirement that the documentary credit contract is independent from any underlying sale contract, and from the actual facts. It was described by Lord Diplock in *United City Merchants (Investments) Ltd v. Royal Bank of Canada*<sup>57</sup> as a “trite law” that this principle applies, he further elucidated:

“The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment.”<sup>58</sup>

The House of Lords in this case relied on both logic and trade usage to recognise that the trade usage is fundamental, the “whole commercial purpose”, and thus it is *lex mercatoria*. The unchangeable trade usage that recognises the autonomy of documentary credits is broader than what is stipulated in the UCP.<sup>59</sup> Thus, the universal recognition in the use of documentary credits: that each contract of the documentary credit is independent from each other; was not stipulated in the UCP.<sup>60</sup> It arose from the trade usage that constituted the documentary credit existing before the UCP came into existence, and is not undermined in practice by the failure of the ICC to declare it as a principle in the UCP.

These three examples of principles derived from trade usage that should be regarded as unchangeable should simply be recognised as capable of having the effects of custom in English common law. English courts struggle to recognise commercial custom when dealing with unchangeable trade usage because custom must be local (and run from time immemorial) under English law. Such a requirement, devised for and appropriate to customs governing land, contradicts the universal nature of trade usage. The practicality of an approach to commercial law that recognises some trade usage as unchangeable and therefore capable of acting as a source of law is shown by French law. French law uses the term “commercial custom” to describe unchangeable trade usage, since custom is not required to be local under French law.<sup>61</sup> Since the unchangeable trade usage is capable of acting as a source of law it can judicially be noticed, and there is no need for it to be proved by expert evidence.<sup>62</sup>

Obviously, if such a source of law is recognised we need to demarcate such principles from mere trade usage. Changeable trade usage is that usage absence of which does not

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<sup>57</sup> [1983] 1 AC 168, 182.

<sup>58</sup> *United City Merchants (Investments) Ltd v. Royal Bank of Canada* [1983] 1 AC 168, 183.

<sup>59</sup> Articles 4 and 5 UCP 600.

<sup>60</sup> It is also not implemented in UCP 600.

<sup>61</sup> Filip Ly, *International Business Law and Lex Mercatoria*, (1992) North Holland, 137-158.

<sup>62</sup> *Hamzeh Malas Sons v. British Imex Industries Ltd* [1958] 2 QB 127.

threaten the existence of the underlying commercial institution. It may still be recognised as “soft” law amongst merchants, in terms that make it morally binding, and that render those who do not respect it subject to moral opprobrium in the relevant business community. The harshest of such non-legal sanctions would be expulsion from the community.<sup>63</sup> Changeable trade usage operates in a manner that depends on domestic laws, operates as an interpretive aid when construing contractual terms or as implied terms of the contract.

The growth in international trade in the late twentieth and early twenty first century combined with rapid developments in technology generated rapid and continuous developments in trade practices and market regulations. We may anticipate that this market and regulatory instability will continue into the future. This context has generated some privatisation of transnational law-making as a pragmatic approach to fulfilling urgent need for responses to the changes.<sup>64</sup> International trade usage is part of this process of response to commercial, regulatory, and technological change. This context explains the existence and necessity for contemporary changeable trade usages, and explains the fact that trade usage changes over short time periods. The changeable nature of such trade usage demands such a usage be proved if relevant in litigation, to ensure that the usage is not out of date. The status of documents as original documents in documentary credits that was discussed above presents a good example. The requirements governing originality in the 1993 text of the UCP 500 became out of date following the rapid technical development and commercial adoption of computer generated documents. The power of international acclamation in the modern context enhances the normative force of international trade usage. In the context of the terms of article 20 UCP 500, as incorporated into contracts establishing documentary credits, the interpretive role of changeable usage replaced the clear language of the express terms.<sup>65</sup>

Changeable trade usage is a matter of fact that needs to be proved by expert evidence.<sup>66</sup> Just as the law would be improved by recognition of unchangeable trade usage as a source of law, so it would be improved by the clear *rejection* of changeable trade usage as a source of law. The English courts seem to have made such an error in their treatment of *de minimis* variations under documentary credits. In *Moralice (London) Ltd v. E D and F Man*<sup>67</sup> and *Soproma SpA v. Marine and Animal By Products Corp*<sup>68</sup> it was held that the *de minimis* rule, that would allow insignificant variation between contractual terms and contractual performance to be ignored, did not apply to documentary credits, due to the principle of strict compliance as established and settled in earlier cases.<sup>69</sup> The decisions did not rely upon matters of fact, depending on proof of trade usage, which could have been superseded by a proof of later usage.<sup>70</sup> Rather, the interpretation of law in both cases generated a legally binding precedent, which is inappropriately rigid, and did not accurately reflect the expectation of merchants. If we consider this issue in the light of our criteria for recognition of unchangeable trade usage it can be seen that such questions as a difference of 5% in the quantity of the goods, or

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<sup>63</sup> Roy Goode, *Rule, Practice, and pragmatism in transnational commercial law* [2005] International & Comparative Law Quarterly 539 at 549.

<sup>64</sup> Klaus Berger, *The Creeping Codification of the New Lex Mercatoria*, (2edn, 2010) 38-51 Wolters Kluwer.

<sup>65</sup> *Kredietbank Antwerp v Midland Bank Plc* [1999] Lloyd's Rep. Bank. 219.

<sup>66</sup> For instance: Civil Procedures Rules, Rule 35.3 in the UK.

<sup>67</sup> [1954] 2 Lloyd's Rep 526.

<sup>68</sup> [1966] 1 Lloyd's Rep 367.

<sup>69</sup> *Equitable Trust Co of New York v. Dawson Partners Ltd* (1926) 27 LI L Rep 49, 52; *English, Scottish and Australian Bank Ltd v. Bank of South Africa* (1922) 13 LI L Rep 21, 24.

<sup>70</sup> *Moult v Haliday* [1898] 1 Q.B. 125.

of a 0.5 C divergence in the temperature of meat, does not threaten the existence of documentary credits: both because buyers expect such differences and because such variance does not affect the security of documentary credits.

Recognition of changeable trade usage allows courts to give effect to novel trade usages, and to maintain the relevance and the efficiency of their legal systems for the international business community. Article 39 of UCP 500 and article 30 of UCP 600 have embraced the *de minimis* rule by tolerating 5% plus or minus from the quantity of the goods. This better reflect the needs of traders than the English law. Through incorporation of the UCP by the majority of documentary credits the law laid down by the English courts in relation to the *de minimis* rule has been effectively abandoned. Where the UCP are not expressly or impliedly incorporated the trade usage of recognising a *de minimis* rule cannot supersede the precedent. Thus, the inappropriate generation of a rule of law from changeable trade usage has led to a need for a reinterpretation of the precedent. Recognition of the inadequacy of the English law generates pressure for change, which in turn generates uncertainty for litigants in the English courts.

### **How Should Legal Researchers Approach the Existence of International Changeable Trade Usage?**

The procedural rules of legal orders rely on expert evidence to prove the existence of international changeable trade usage.<sup>71</sup> The required number of experts to establish the facts of trade usage is usually one or two experts. Such a number, from the perspective of social science, would not be sufficient to even represent the practice of a local business community.<sup>72</sup> In litigation inducing the best qualified expert in banking cases, often a senior employee of the bank, is difficult: both because this person usually needs the permission of her employer which is often withheld; and, the expert is anxious about the undesirable effect on her reputation if her evidence is rejected by the court.<sup>73</sup> Goode noted that usually there is a dispute in cases involving expert witnesses as to the meaning and the existence of un-codified trade usage. He concluded that bankers have different practices, according to their different interpretations of the law and contractual terms, as incorporated into their different practices.<sup>74</sup> Thus, Goode doubts if there truly is "international" trade usage on such issues.<sup>75</sup> This seem a little disingenuous, as we are generally aware that the practice of commissioning and using expert testimony serves not a disinterested interest in the *de facto* practice of the market, but the needs of the litigation. As Sedley LJ has observed extra-judicially:<sup>76</sup>

"... [T]he myth that the business of law is the ascertainment of truth. It is no such thing: the business of law is winning cases."

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<sup>71</sup>Civil Procedures Rules, Rule 35.3.

<sup>72</sup> Henn, Weinstein and Foard, *A Critical Introduction to Social Science*, (2edn 2012).

<sup>73</sup> Ellinger, *Expert Evidence in Banking Law*, [2008] J.I.B.R, 557 at 565.

<sup>74</sup> Roy Goode, *Usage and its reception in transnational commercial law* [1997] *International & Comparative Law Quarterly* 1 at 13.

<sup>75</sup> Roy Goode, *Usage and its reception in transnational commercial law* [1997] *International & Comparative Law Quarterly* 1 at 3.

<sup>76</sup> Stephen Sedley, *Declining the Brief, in Ashes and Sparks: Essays on Law and Justice* (2011) Cambridge University Press at 156.

It would be remarkable indeed if litigants consistently led expert evidence that undermined their own case. Where trade usage is important to an argument one can expect divergence in expert testimony.

The situation is not much better for codified practice, such as the UCP. Such codifications not only reflect the pre-existing usage, but try to fashion new usages<sup>77</sup> and amend current usage. Therefore, there is a need to establish which terms in the code are intended to reflect trade usage.<sup>78</sup> Also, we cannot be entirely sanguine as to the accuracy of those terms intended to reflect current usage, for example the practice of traders is likely to be only weakly reflected in the UCP given the dominance of bankers on the drafting group.<sup>79</sup> Thus, we cannot comfortably argue for the UCP as evidencing trade usage simply because it claims to do so. However, the UCP is widely incorporated into contracts, and its ubiquity offers an alternative ground on which to base its claim to reflect trade practice. The terms of the UCP form a major component of current trade practice through incorporation and deserve a *prima facie* recognition as evidence of trade usage on this ground.

Given the problematic nature of information generated as an incident to litigation or codification the existence of international changeable trade usage in a particular trade needs to be ascertained by empirical study, based on methodological approaches of social science. Ideally the aim of such empirical study in this context would be to establish *de facto* trade usage, usage that would satisfy the requirements of most legal orders for recognition of a practice as trade usage. This entails practice that is universal within the trade, notorious, and treated as compulsory by members of the relevant commercial community.<sup>80</sup> Such an empirical research seeks to ascertain whether such trade usage exists, and if so to describe the trade usage as a sociological fact, rather than being opinions of the individual experts or of the researchers, in the terms of social science the study aims to describe an event.<sup>81</sup> Success depends on many factors, such as the access and the nature of the inquiry. The main empirical methods proposed are field observations, interviews or questionnaires.

It is not plausible to argue that the existence of a trade usage must be acknowledged by every individual banker or trader in a trade sector, and in the same terms. Neither, is it reasonable to think that the international nature of trade usage entails that such trade usage must exist in every single state or legal order in the same form. However, since the existence of trade usage depends on acclamation, as discussed above, the establishment of trade usage is a fitting subject matter in the study of human behaviour. By this token claims such as generalizability, fittingness, comparability or translatability - attempts to seek general regularities in behaviour- are applicable.<sup>82</sup> In essence, the claim for such empirical study is that the results are *representative* of the trade usage of the issues in question. This, however, does not entail a claim for *applicability* that would warrant courts to apply the empirical results directly in litigation. As well as methodological problems this would remove an aspect of litigation from the control of the parties and the forum, and generate difficult procedural problems differing in each

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<sup>77</sup> Introduction of UCP 600.

<sup>78</sup> Roy Goode, *Rule, Practice, and pragmatism in transnational commercial law* (2005) International & Comparative Law Quarterly 539 at 550.

<sup>79</sup> Bacon, *Who speaks for the exporter*, [2006] 9 DCInsight.

<sup>80</sup> Roy Goode, *Rule, Practice, and pragmatism in transnational commercial law* [2005] International & Comparative Law Quarterly 539 at 551.

<sup>81</sup> 6 and Bellamy, *Principles of Methodology*, (2012) p.26.

<sup>82</sup> Hammersley, *Social Research, Philosophy, Politics and Practice*, (1993), p.p 2002-208, Sage, London.

forum,<sup>83</sup> regardless of any apparent defects from the point of view of establishing sociological fact.

Any claim that results are representative will inevitably require the right selection of the representative samples, that: "... *the sample is made up of the same kinds of people, in the same proportions, as the population*".<sup>84</sup> The sample for a trade usage should reflect the personnel of the institutions of the relevant sectors of a targeted country,<sup>85</sup> and ideally people who would be qualified experts as required by law.<sup>86</sup> For instance, in the context of documentary credits the relevant institutions would be banks, each of which is represented by one or two experts who have been working in the department administering documentary credits (or letters of credit according to local terminological usage) for at least two or more years, and who still have the contemporary banking knowledge. Securing representative cases for the trade usage of documentary credits is manageable and doable. However, there is a major problem in conducting an empirical study on the criterion of representative samples for all States involved in the use of documentary credits. If one tried to investigate a representative range of States: say between three and five European Nations; one or more States of the United States of America; two or three countries in South America; two sub-Saharan African countries; two or three East Asian countries, two countries in Middle East, and one country from Australasia; would be very costly, time consuming, and difficult in terms of access to appropriate individuals. In practical terms such a research programme is not doable, and we are better off relying upon the institutional resources of the ICC and the drafting group of the UCP. There is an alternative: the selection of a typical case<sup>87</sup> the results for which can justify a claim for translatability of the data to other States.

When the finance of international trade was subject to the dominating influence of a single hegemonic power the obvious candidate for such a typical case would have been the hegemonic power. However, in a situation of multiple centres of power the better candidate is a cosmopolitan State. By illustration, the country of Jordan is good candidate for a typical case to establish international changeable trade usage in documentary credits. Jordan has a hybrid legal system constituted by both Civil and Common laws.<sup>88</sup> The economy is based on capitalism and it has an open market. The country is considered to be a developing country.<sup>89</sup> The banking sector has interconnected links with other banking sectors around the world,<sup>90</sup> and it has a fairly extensive experience in dealing with documentary credits. Jordan represented the Middle East in the ICC in the revision of UCP 600.

One of the writers of this paper conducted an empirical study using the method of elite interviews,<sup>91</sup> interviewing individuals with particular expertise in the practice of documentary credits<sup>92</sup> in Jordan, to attempt to establish the trade usage on some issues

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<sup>83</sup> Civil Procedure Rules.

<sup>84</sup> Henn, Weinstein and Foard, *A Critical Introduction to Social Science*, (2edn 2012) p. 70.

<sup>85</sup> As understood from the literature view of social science: Bryman, *Social Science Methods*, (4edn, 2012) Ch 18; Kane, *Doing your Own Research: Basic Descriptive Research in the Social Science and Humanities* (1990).

<sup>86</sup> Civil Procedures Rules, Rule 35.

<sup>87</sup> For typicality in selection cases: Henn, Weinstein and Foard, *A Critical Introduction to Social Science*, (2edn 2012) p. 71.

<sup>88</sup> [www.lob.gov.jo](http://www.lob.gov.jo).

<sup>89</sup> [www.pm.gov.jo](http://www.pm.gov.jo).

<sup>90</sup> [www.cbj.gov.jo](http://www.cbj.gov.jo).

<sup>91</sup> Morris, *The Truth About Interviewing Elites*, [2009] *Politics* 29 (3) p.p 209-217.

<sup>92</sup> Burnham and others, *Research Methods in Politics*, (2004).

of interest in the law and practice of documentary credits. The interviews were conducted on July 2013 with six bankers, four of them representing the main four banks in Jordan (the Central Bank, the Arabic Bank, the Housing Bank for Trade and Finance, and Jordan Ahli Bank) and two of them representing the other banks in Jordan.

One of the issues explored was the period of time within which documents were examined for compliance with the terms of the documentary credit. The practice in five of the banks was found to be to examine the documents in two banking days. The bankers who represent these banks confirmed that they felt that as professional organisations they are obliged to examine the documents in this period, even though they think that they are legally protected providing they examine the documents within the period of five banking days, as set out in the UCP 600.<sup>93</sup> However, one of the main banks (Arabic bank) usually takes four to five banking days for the examination of the documents, as they have a large number of documents to process, a comparatively huge work load, and also because they approach the buyer before taking a final decision regarding the status of the documents as complying or non-complying. We can confidently say that the normal practice in Jordan is to examine the documents in two banking days. However, this practice is not universal and one major participant in the trade depends upon a longer time period being available. Finally, the universal perception is that banks are not legally required to examine in less than five banking days.

The question of whether such a trade practices and understandings are international in nature, is more tendentious. It is submitted that as Jordan is a "typical case" trade usage of that country is capable of being taken, to certain extent, as representative of international trade usage. We can turn to more familiar sources of evidence at this stage. The period for the examination of documents for compliance with the terms of the documentary credit in the UK was found to be two banking days, by the court in *Bankers Trust Co v State Bank of India*<sup>94</sup> on the basis of the expert evidence in that case. However, we need to reflect upon the variation revealed by the empirical study. If evidence on trade usage was given in good faith by an expert witness from Arabic bank under Jordanian law it would support a finding of four banking days as a usual trade practice in Jordan. Even at this early stage of analysis the empirical study is providing useful information for understanding the status, nature, and inherent limitations of expert evidence in litigation.

## Conclusion

Hopefully we have managed to support our aim of establishing that trade usage is a field that requires careful and critical reflection. Specifically we hope that the nature of the relationships between trade usage, the UCP, the practice of National courts or arbitrators, and the new *lex mercatoria* have been illuminated, and the temptation to fall back upon over-simplified characterisations has been resisted. Further, we hope that the need for a reassessment of the relationship between trade usage and custom in the doctrine and practice of English common law has been established, and that the general lines of such a reassessment should follow our proposed distinction between the

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<sup>93</sup> Sub- article 14 (b) UCP 600.

<sup>94</sup> [1991] 2 Lloyd's Rep 443.

unchangeable and the changeable aspects of trade practice. Finally, that the case for an empirical investigation of trade practice in Jordan has been made out.

The lessons of article 20 UCP 500 are not restricted to the technical issues of the practice of documentary credits, they illuminate important issues of the valid sources of law in both a National (English and Welsh common law) and transnational (UCP) law. The status of the UCP as a codification of trade usage and the importance of this role, even in a commercially sophisticated jurisdiction like England and Wales is well illustrated by the tale of the *de minimis* rule. The power of privatised, or self-regulatory transnational law, is intimately linked to the dynamic relationship, and on occasion tension between promulgation and acclamation. An awareness of the distinction between trade usage *de facto* and *de jure* is necessary if we are to advance our understanding of the functioning of international markets and legal structures. This paper is an attempt to advance this developing area of legal discourse and to reflect upon the potential value of empirical study in the field.