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Commercial Norms, Commercial Codes, and International Commercial Arbitration

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ABSTRACT

This Article examines whether the incorporation of commercial norms into commercial codes is an appropriate law-making strategy. Most commercial codes, including the Uniform Commercial Code, regard common business practices as an important source for courts to consider when resolving contract disputes. Yet some scholars criticize this incorporation strategy, arguing that reliance on commercial norms is often inappropriate and may distort the true nature of the parties' agreement. Reliance on commercial norms does restrict the ability of contracting parties to allocate part of their agreement to extra-legal means of enforcement. Nevertheless, this Article asserts that those costs may be outweighed by the benefits of incorporating commercial norms into commercial codes.

The Article looks to international commercial arbitration as a source of evidence for evaluating the appropriate role of commercial norms in resolving contract disputes. This evidence is helpful to answering the question whether the costs of relying on commercial norms outweigh the benefits because international arbitration is consensual, resembles adjudication in public courts in important ways, and is a highly competitive business. The author finds that, generally, international commercial arbitration relies on commercial

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norms to resolve such contract disputes. Although the evidence presented is not conclusive, it does suggest that the benefits of reliance on trade usages (but not prior dealings between the parties) exceed the costs from any distortion of the parties' agreement.

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I. INTRODUCTION

Modern commercial codes treat common business practices—as reflected in usages of the trade as a whole and in the prior dealings of the parties to the contract—as an important source to which courts can turn in resolving disputes about the parties' obligations under their agreement. Article 2 of the Uniform Commercial Code (UCC) provides that usages of trade, courses of dealing, and courses of performance "give particular meaning to and supplement or qualify terms of an agreement."[1] The rationale of the drafters of Article 2 was that such norms of commercial behavior are an important source of rules governing the parties' behavior and that a commercial code should incorporate those norms when available.[2] The Convention on Contracts for the International Sale of Goods (CISG) similarly provides that the "parties are bound by any usage to which they have agreed and by any practices which they have established between themselves," including any "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."[3]

Whether incorporation of commercial norms into commercial codes is an appropriate law-making strategy has become the subject of much scholarly debate.[4] Criticizing the incorporation

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1. U.C.C. § 1-205(3) (1995); *see also id.* § 2-208.

2. By norms, I mean "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both." Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997). *See also* Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377, n.1 (1997) (using "norm" to mean "common pattern of commercial behavior"). For examples of the growing literature on norms and the law, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Symposium, *The Nature and Sources, Formal and Informal, of Law*, 82 CORNELL L. REV. 947 (1997); Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 537 (1998); Symposium, *Law and Society & Law and Economics: Common Ground, Irreconcilable Differences, New Directions*, 1997 WIS. L. REV. 375; Symposium, *Law, Economics, & Norms*, 144 U. PA. L. REV. 1643 (1996); Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215 (1994); Kraus, *supra*; McAdams, *supra*; Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365 (1997).

3. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, art. 9, U.N. Doc. A/CONF.97/18 (1981) [hereinafter CISG].

4. *See, e.g.*, Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) [hereinafter Bernstein, *Merchant Law*]; Lisa Bernstein, *Private Commercial Law*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 108 (Peter Newman

strategy is Professor Lisa Bernstein, who argues that commercial norms may reflect practices that seek to preserve the relationship of the parties ("relationship-preserving norms") rather than the norms the parties themselves would choose when their relationship essentially is at an end ("end-game norms").[5] The costs from such an inappropriate reliance on commercial norms, Bernstein argues, may outweigh the informational value of norms to generalist judges in understanding the parties' agreement. She finds evidence in support of her thesis in the treatment of trade usages and parties' dealings by arbitrators resolving disputes under the auspices of the National Grain and Feed Association (NGFA). NGFA arbitrators, Bernstein concludes, use a much more formalistic approach to resolving contract disputes than do judges applying modern commercial laws. This more formalistic approach gives clear precedence to the parties' contract terms and to the trade rules of the association over uncodified trade practices and dealings of the parties.[6] Bernstein acknowledges, however, that there may be "certain aspects of grain and feed transactions and the institutional environment created by NGFA that make a formalistic adjudicative approach particularly well-suited" to that setting.[7]

This article offers an empirical rejoinder to Professor Bernstein's criticism. It looks to international commercial arbitration, rather than trade association arbitration, as a source of evidence for evaluating the appropriate role of commercial norms in resolving contract disputes. International commercial arbitration provides a useful setting for such an examination for several reasons. First, international commercial arbitration is consensual. The parties initially must agree to arbitrate at all; they must also agree on any institutional rules to apply, the method by which arbitrators are chosen, and the situs of the arbitration. When parties agree to arbitrate using certain rules,

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ed., 1998) [hereinafter Bernstein, *Private Commercial Law*]; Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999) [hereinafter Bernstein, *Questionable Empirical Basis*]; Richard Craswell, *Do Trade Customs Exist?*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW (Jody Kraus & Steven Walt eds., forthcoming 2000); Clayton P. Gillette, *Harmony and Stasis in Trade Usages for International Sales*, 39 VA. J. INT'L L. 707 (1999); Jody S. Kraus & Steven D. Walt, *In Defense of the Incorporation Strategy*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW (Jody Kraus & Steven Walt eds., forthcoming 2000) [hereinafter Kraus & Walt]; Kraus, *supra* note 2; *see also* Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999) (especially the papers on "Formalism in Commercial Law").

5. Bernstein, *Merchant Law*, *supra* note 4, at 1796-1802.

6. *See id.* at 1775-82.

7. *Id.* at 1815.

with particular arbitrators, and at particular sites, presumably it is because such dispute resolution makes them better off than they would be using alternative arrangements. Second, international commercial arbitration is a highly competitive business. Arbitral institutions, such as the International Chamber of Commerce (ICC), compete with each other for the administrative fees paid by parties who arbitrate under their auspices. Countries compete to be the arbitral situs chosen by the parties and reap the economic benefits that result from such a choice. Arbitrators compete to be selected by the parties to resolve their disputes. This competition is facilitated by international lawyers who select those rules, laws, and arbitrators that ex ante benefit their clients. Third, international commercial arbitration is more like court adjudication than is the NGFA arbitration studied by Professor Bernstein. For example, the decisionmakers in international arbitration hearings are likely to be more like the generalist judges in national courts than are the specialist arbitrators in trade association arbitrations. The informational value of trade usages and parties' dealings will likely be higher to these generalists, who, while experienced in deciding international disputes, may not be experts in the particular industry involved.

Examining international arbitration rules and awards reveals an approach to trade usage more like the approach taken by the drafters of the UCC and the CISG than the formalistic approach of the NGFA arbitrators. The Arbitration Rules of the ICC, for example, provide that "[i]n all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages."[8] The rules of many leading international arbitral institutions are similar.[9] The institutional rules do not, however, direct the arbitrators to consider in a like manner the parties' prior dealings. Similarly, international arbitration statutes, which are a product of interjurisdictional competition for arbitration business, increasingly require arbitrators to consider trade usages, although not course of dealing or course of performance, when resolving disputes. Finally, arbitration awards rely on trade usages and considerations of good faith. Indeed, the awards rely on good faith to such an extent that a number of commentators have identified a duty of good faith in contract performance as a central principle of international contract law reflected in international arbitration awards.[10] The

8. RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE art. 17(2) (1998).

9. *See infra* notes 161-84 and accompanying text.

10. *See infra* notes 224-26 and accompanying text.

evidence again is far less strong for prior dealings between the parties.

In sum, the general approach taken in international commercial arbitration is to rely on commercial norms—at least as reflected in trade usages—to resolve contract disputes. This evidence, while far from conclusive, suggests that when contract disputes are resolved by generalist judges (or arbitrators), the informational benefits of relying on trade usages (although apparently not prior dealings between the parties) exceed the costs identified by Bernstein. Thus, the evidence presented here supports the incorporation strategy followed by the UCC and the CISG as to trade usages, but the evidence does not support the incorporation strategy as to prior dealings between the parties.

II. COMMERCIAL NORMS AND CONTRACT DISPUTES

A. *Incorporating Commercial Norms into Commercial Law*

Modern commercial codes require judges to rely on norms of commercial behavior in at least two ways in resolving contract disputes. First, codes expressly provide that the parties' agreement includes relevant usages of trade, courses of dealing, and courses of performance.[11] Under such code provisions, judges look directly to what is customary in the trade or between the parties in adjudicating any dispute.[12] Second, codes impose general requirements of good faith, reasonableness, and the like.[13] To determine whether a party has acted in good faith or reasonably, commercial codes direct judges to look at commercial norms as a baseline.[14] Drafters of commercial codes explain their reliance on commercial norms as an attempt to bring commercial law more in line with commercial practice. As explained by the drafters of the UCC, "the *practices* of businessmen and business houses are important factors in construing their contracts and actions and in determining their rights and liabilities . . . . [M]any of the changes effected by the Code are designed to adapt rules of law to the way that business is actually carried on."[15]

The following two sections briefly describe how the UCC and the CISG incorporate commercial norms into commercial law.[16]

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11. *See, e.g.*, U.C.C. §§ 1-205, 2-208.
12. *See id.* § 1-205 cmt. 1.
13. *See, e.g., id.* § 1-203 and cmt.
14. *See id.*
15. Walter D. Malcolm, *The Proposed Commercial Code*, 6 BUS. LAW. 113, 126 (1951) (quoting Report of the Committee on the Proposed Commercial Code).
16. For descriptions of how other national laws deal with trade customs and usages, see FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA 135-

1. Article 2 of the Uniform Commercial Code

Article 2 of the UCC has been adopted by all of the fifty states except Louisiana. It applies to "transactions in goods."[17] The UCC distinguishes between usage of trade, course of dealing, and course of performance, all of which can reflect commercial norms. A "usage of trade" is "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."[18] A "course of dealing" is "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."[19] In other words, "course of dealing" is how the parties dealt with each other under previous contracts. A "course of performance" is how the parties dealt with each other under the present contract; it requires that a contract "involve[] repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other" and that the other "accept[] or acquiesce[] in [the performance] without objection."[20]

The UCC provides that a course of dealing or a "usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement."[21] Similarly, a course of performance by the parties "shall be relevant to determine the meaning of the agreement."[22] Indeed, the UCC defines the parties' agreement to include not only "the bargain of the parties in fact as found in their language" but also their bargain "by implication" as found in "other circumstances including course of dealing or usage of trade or course of performance."[23] The existence of a complete written contract does not preclude a usage of trade, course of dealing, or course of

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58 (1992); CLIVE M. SCHMITTHOFF, INTERNATIONAL TRADE USAGES 9-24 (Institute of Int'l Business Law and Practice Newsletter, International Chamber of Commerce, 1987).

17. U.C.C. § 2-102.

18. *Id.* § 1-205(2).

19. *Id.* § 1-205(1).

20. *Id.* § 2-208(1).

21. *Id.* § 1-205(3). For economic analyses of the UCC provision, see Elizabeth Warren, *Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule*, 42 U. PITT. L. REV. 515 (1981); Jim C. Chen, *Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant*, 27 TEX. INT'L L.J. 91, 123-26 (1992).

22. U.C.C. § 2-208(1).

23. *Id.* § 1-201(3).

performance from explaining or supplementing the parties' writing.[24] When there is a conflict between the terms of the written contract and these other sources of contract terms, the court is directed to construe them to avoid the conflict.[25] If it cannot do so, the express terms prevail.[26] The Official Comments to Article 2, however, indicate that "the course of prior dealings between the parties and the usages of trade" have to be "carefully negated" by the contracting parties; otherwise, they have become "an element of the meaning of the words used."[27]

Other provisions of the UCC permit or require courts to examine commercial practices in resolving contract disputes. Section 1-203 provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement";[28] "good faith" is defined for "merchants"[29] as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[30] In addition, a party's course of performance can result in "waiver or modification of any term inconsistent with such course of performance."[31] Professor Bernstein concludes that, despite the priority formally given by the UCC to the terms of the contract, "[i]n practice, . . . courts, in a variety of doctrinal guises that are either explicitly or implicitly authorized by the Code, often allow these considerations to vary or trump the express terms of a written contract."[32]

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24. *See id.* § 2-202(a).
25. *See id.* §§ 1-205(4), 2-208(2).
26. *See id.* §§ 1-205(4), 2-208(2).
27. *Id.* § 2-202 cmt. 2.
28. *Id.* § 1-203.
29. A "merchant" is

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

Id. § 2-104(1).

30. *Id.* § 2-103(1)(b).
31. *Id.* § 2-208(3).
32. Bernstein, *Merchant Law*, *supra* note 4, at 1783-84. Bernstein notes that "some courts give greater emphasis to the contract's written terms," but she finds these decisions to be "in tension with the Code's underlying adjudicative approach, its definition of agreement, its broad 'duty of good faith,' and its lax version of the parol evidence rule, which permits these considerations to be introduced to explain or supplement even a complete and integrated writing." *Id.* at 1787. *See also* Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 789-92 (1999)(discussing how the UCC accords past practices priority over explicit terms). *But see* Mark Garavaglia, *In Search of the Proper Law in Transnational Commercial Disputes*, 12 N.Y.L. SCH. J. INT'L & COMP. L. 29, 95-96 (1991) ("In rendering decisions based on the present

2. The Convention on Contracts for the International Sale of Goods

In 1980, the Convention on Contracts for the International Sale of Goods was issued for signature. The CISG became effective on January 1, 1988 and has been ratified by many leading trading countries.[33] It applies to non-consumer "contracts of sale of goods between parties whose places of business are in different States" when those states have ratified the Convention.[34] Parties to international sales contracts can opt out of the rules of the CISG altogether, or they can vary most of its provisions by contract.[35]

The provisions of the CISG on usages of trade and the parties' dealings are "much less detailed than the Code" but contain "obvious parallels."[36] Article 9(1) of the CISG provides

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Code, the modern courts have failed to reference trade usages that exist among today's merchants.").

33. The following countries have adopted the CISG: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Hungary, Iraq, Italy, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, the Netherlands, New Zealand, Norway, Peru, Poland, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, the United States, Uruguay, Uzbekistan, Yugoslavia, Zambia. *See* International Trade Law Branch, United Nations Office of Legal Affairs, United Nations Commission on International Trade Law (UNCITRAL), *Status of Conventions and Model Laws* 6-7 (last updated Dec. 14, 1999) *available in original form at* <http://www.uncitral.org/english/status/ status.pdf> [hereinafter UNCITRAL, *Status of Conventions and Model Laws*].

34. CISG, *supra* note 3, art. 1(1)(a). It also applies when only one of the parties has its place of business in a ratifying state, if a conflict-of-laws analysis points to that state's law as governing the contract. *See id.* art. 1(1)(b). The United States declared when it ratified the CISG that it would not follow this provision. *See* UNCITRAL, *Status of Conventions and Model Laws*, *supra* note 33, at 8 n.7.

35. CISG, *supra* note 3, art. 6.

36. E. Allan Farnsworth, *Unification of Sales Law: Usage and Course of Dealing, in* UNIFICATION AND COMPARATIVE LAW IN THEORY AND PRACTICE 81, 82 (1984); *see also* Isaak I. Dore & James E. DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT'L L. J. 49, 56 (1982) (noting the "basic similarity between the Convention's standard [on usages of trade] and that of the U.C.C."). *But see* Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021, 1029-31 (1996) (UCC and CISG concepts of trade usage "cannot be analogized to each other" because different countries will interpret concepts differently). For a description of the contentious drafting history of the CISG provision on trade usages, see Stephen Bainbridge, Note, *Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions*, 24 VA. J. INT'L L. 619, 634-45 (1984).

that "[t]he parties are bound by any usage to which they have agreed and by any practices which they have established between themselves."[37] Bianca and Bonell explain that "[e]xcept for the case in which a party expressly excludes their application for the future, courses of dealing are automatically applicable not only to supplement the terms of the contractual agreement but also . . . to help to determine the parties' intent."[38]

In addition to being bound by usages to which they agree and by their prior dealings, parties also 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.[39]

The usage need not be an international one, but can be a local one so long as it is "widely known to, and regularly observed by" parties involved in international trade.[40] As the CISG provides, such usages are impliedly applicable unless the parties have "otherwise agreed."[41] Unlike the UCC, the CISG does not require "careful negation" of usages of trade,[42] nor does it include an express hierarchy of authorities.[43] Nonetheless, the Convention does make clear that in interpreting contracts, "due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."[44]

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37. CISG, *supra* note 3, art. 9(1).

38. Michael Joachim Bonell, *Usages and Practices, in* C.M. BIANCA ET AL., COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 103, 106 (1987); *see also* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 175 (2d ed. 1991) ("'Practices' are established by a course of conduct that creates an expectation that this conduct will be continued.").

39. CISG, *supra* note 3, art. 9(2).

40. Text of Draft Convention on Contracts for the International Sale of Goods Approved by the United Nations Commission on International Trade Law art. 8, U.N. Doc. A/Conf.97/5 (1979); *see also* Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, U.N. Doc. A/CONF.97/5 art. 8, cmt. 3 (1979) ("The trade may be restricted to a certain product, region or set of trading partners"); HONNOLD, *supra* note 38, at 178. *But see* Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (*Lex Mercatoria*)*, 19 HARV. INT'L L.J. 221, 271-72 (1978) ("a sensible local custom . . . may be thought by some to fall outside the UNCITRAL provision because it is in conflict with the usual practice elsewhere").

41. CISG, *supra* note 3, art. 9(2).

42. Bainbridge, *supra* note 36, at 661.

43. *See* Dore & DeFranco, *supra* note 36, at 59.

44. CISG, *supra* note 3, art. 8(3).

Unlike the UCC, the Convention does not contain a general duty of good faith and fair dealing.[45] It addresses good faith only as an interpretative principle: Article 7(1) states that "[i]n the interpretation of this Convention, 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."[46] This provision was adopted as a compromise between those who favored a general duty of good faith and those who opposed such a duty because of the uncertainty of its application.[47] The CISG does frequently evaluate parties' behavior under a standard of "reasonableness,"[48] which, according to Honnold, "can appropriately be determined by ascertaining what is normal and acceptable in the relevant trade."[49]

B. *The Informal Norms Critique of the Incorporation Strategy*[50]

Professor Bernstein has strongly criticized the reliance of commercial codes on commercial norms in resolving contract disputes.[51] Because of the relational nature of many contracts, parties frequently act in ways that differ from their express contract terms.[52] For example, "transactors accept late payment, vary quantity terms, assume new obligations, waive covenants, and adjust prices in ways that their written contracts do not require."[53] Indeed, for any number of reasons, Bernstein explains, parties may purposefully allocate certain aspects of their relationship to the nonlegal realm (through their business practices or informal norms), reserving others for legal enforcement (through their express contract terms) in the

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45. *See* Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT'L L. 111, 145 (1997).

46. CISG, *supra* note 3, art. 7(1).

47. *See* HONNOLD, *supra* note 38, at 146.

48. *See* CISG, *supra* note 3, arts. 8(2), 16(2)(b), 18(2), 34, 35(2)(b), 37, 38(3), 39(1), 48(1), 48(2), 49(2), 60(a), 63(1), 72(2), 75, 76(2), 79(1), 79(4), 85, 86(1), 86(2), 88(1), 88(2).

49. HONNOLD, *supra* note 38, at 148.

50. *See* Kraus & Walt, *supra* note 4, at 22.

51. *See generally* Bernstein, *Merchant Law*, *supra* note 4.

52. *See generally* Ian R. MacNeil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978); *see also* Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

53. Bernstein, *Merchant Law*, *supra* note 4, at 1787-88.

courts.[54] When courts rely on commercial norms to resolve contract disputes, those norms may be relationship-preserving norms—norms parties follow when they seek to keep their relationships together—rather than end-game norms—the norms the parties have chosen to resolve their dispute when their relationship is at an end.[55] By treating commercial practices as part of the parties' agreement, Bernstein argues, modern commercial codes preclude the parties from relying on strictly extralegal enforcement of certain aspects of their agreement[56] and thereby impose efficiency losses on the contracting parties.[57]

At the same time, Professor Bernstein acknowledges that commercial norms may be beneficial sources of information for generalist judges who are seeking to divine what rules the parties chose at all. She states that "[w]hen a generalist court resolves disputes between merchants, its interpretative decisions are likely to come closer to the transactors' expectations if it looks to trade usage to 'give particular meaning . . . to [contract] terms.'"[58]

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54. *See id.* at 1788-94; *see also* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 130-53 (1992).

55. *See* Bernstein, *Merchant Law*, *supra* note 4, at 1796-1802.

56. An example of extralegal enforcement would be refusing to deal (or threatening to do so) with the other party in the future. *See id.* at 1788.

57. *See id.* at 1794-95, 1808-15. Bernstein explains further:

> [B]ecause the risk of adjudicative error is greater when courts enforce extralegal provisions than it is when they enforce written provisions, the Code's approach may induce transactors to include written provisions memorializing the terms of agreements that they would prefer to be extralegal. Alternatively, if the cost of memorializing the desired extralegal agreement in the written contract would be prohibitively high, perhaps because the extralegal agreement seeks to condition on observable but unverifiable information or because the relational cost of negotiating the relevant language would be significant, the Code's approach may lead transactors to forgo both the explicit contractual provisions and the extralegal agreement, thereby decreasing the total value of the transaction. Conversely, because the Code's search for the transactor's "bargain in fact" and its contextualized interpretive approach often weaken the force of a contract's written provisions, there may be provisions or types of provisions that transactors would find it worthwhile to negotiate and draft if they would be enforced as written that they would not find it worthwhile to negotiate and draft if they thought a court would interpret the provisions "in context."

Id. at 1795 (footnotes omitted). For a general discussion of possible harmful effects from enforcing norms with legal sanctions, see RICHARD EPSTEIN, PRINCIPLES OF A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD 41-70 (1998).

58. Bernstein, *Merchant Law*, *supra* note 4, at 1806 (quoting U.C.C. § 1-205 cmt. 4). Professor Bernstein has subsequently argued that this informational benefit may be slight:

Whether the marginal benefits of resolving disputes on the basis of commercial norms outweigh the costs Bernstein has identified ultimately is an empirical question[59] that may have different answers in different commercial contexts.

As her source of empirical evidence, Professor Bernstein examines arbitration decisions of the National Grain and Feed Association (NGFA), a trade association in the United States comprising individuals and firms who actively participate in grain and feed markets. Disputes among NGFA members are resolved by arbitration panels consisting of other trade association members.[60] After examining arbitration decisions and interviewing participants in the industry, she concludes that NGFA arbitrators "take a formalistic approach to adjudication," strictly applying contract provisions and written trade rules to the exclusion of unwritten practices in the industry or dealings between the parties.[61] More specifically, she finds that arbitrators adhere to the letter of trade rules and refuse to look at their underlying purposes.[62] The NGFA trade rules impose no general duty of good faith and fair dealing, and NGFA arbitrators never decide cases—explicitly at least—on the basis of a violation of any good faith duty.[63] She also finds that NGFA arbitrators strictly follow a hierarchy of authorities, which ranks both contract terms and written trade rules ahead of uncodified trade practices. Finally, Bernstein finds that arbitrators look to uncodified trade practices only when both the contract and the written trade rules are silent, and even then arbitrators frequently criticize the parties for failing to write a better contract.[64] Prior dealings between the parties (*i.e.*, course of performance and course of dealing) are even less important in NGFA arbitral decisionmaking; they are not included in the hierarchy of authorities and are rarely the explicit basis for the

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> [R]ecognizing that the customs often evolve to govern situations where transactors trust one another and want to continue dealing, but that cases arise when the very trust that makes the custom workable has broken down, suggests that there is no reason to suppose that customs will provide useful information about what contracting parties would have agreed to had they included a provision stating how the matter at issue was to be dealt with if third-party adjudication were required.

Bernstein, *Questionable Empirical Basis*, *supra* note 4, at 779.

59. *See* David Charny, *Illusions of Spontaneous Order: "Norms" in Contractual Relationships*, 144 U. PA. L. REV. 1841, 1855-56 (1996).

60. *See* Bernstein, *Merchant Law*, *supra* note 4, at 1771-72.

61. *Id.* at 1775.

62. *See id.*

63. *See id.* at 1776.

64. *See id.* at 1775-80.

arbitrators' decision.[65] Arbitrators do rely on both uncodified trade practices and the parties' prior dealings in evaluating the credibility of evidence and occasionally as an alternative ground for decision, and arbitrators "likely" implicitly consider such evidence in interpreting contractual provisions.[66] Nonetheless, in general, Bernstein concludes, "despite the industry-specific expertise and business acumen of NGFA arbitrators, in practice they give far less weight to these indicia of immanent business norms than do generalist courts applying the [Uniform Commercial] Code."[67]

Professor Bernstein acknowledges, however, that NGFA arbitration differs in potentially important ways from decisionmaking by judges deciding cases under the UCC and the CISG.[68] Among the possible differences are the following: (1) contracts in the feed and grain industry tend to be complete and well-specified, because the contingencies facing the parties are well known, "[u]nlike many types of contracting relationships governed by the Code, in which the written contract does not completely define the relationship between the transactors";[69] (2) the transactions at issue in NGFA arbitrations are standardized with only small amounts at stake; (3) the codified trade rules are "narrowly tailored to the industry's needs" so that the "marginal benefit of NGFA arbitrators looking to unwritten usage in an effort to tailor the meaning of a contractual provision or trade rule is far less than the marginal benefit of a court looking to these considerations to tailor a vague Code default rule or interpret an

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65. *See id.* at 1781-82; *see also* Bernstein, *Private Commercial Law*, *supra* note 4, at 109 ("Merchant tribunals have rejected the fundamental premise of the Code's adjudicative approach, the idea that courts should seek to discover immanent business norms reflected in merchant practice and merchant relationships and use them to decide cases.").

66. *See* Bernstein, *Merchant Law*, *supra* note 4, at 1779-80, 1782.

67. *Id.* at 1771.

68. Professors Kraus and Walt conclude that "[t]he NGFA study . . . establishes only that the NGFA provides a superior regime *for the members of the NGFA*." Kraus & Walt, *supra* note 4, at 31. They explain that

> [o]f course, an NGFA-like regime that combined custom-tailored, pre-defined terms with strict construction adjudication would optimize contractual interpretation for [a group of contracting parties who shared a narrow set of commercial understandings, needs, and practices]. But the whole point of the incorporation strategy is to accommodate the impossibility of ex ante customization in a sales law designed to govern an extraordinarily heterogeneous population of contractors.

Id. at 31-32. With such "generalist commercial statutes," they argue, "an incorporation strategy optimally minimizes the sum of interpretative error and specification costs [the costs parties incur in specifying their most preferred contract terms, *id.* at 8] associated with contract interpretation." *Id.* at 44.

69. Bernstein, *Merchant Law*, *supra* note 4, at 1816.

ambiguous contractual provision";[70] and (4) NGFA arbitrators are participants in the industry, who have greater expertise than generalist judges and who face greater perceptions of possible bias in their decisionmaking, which may make formalistic decisionmaking more appropriate in that context.[71]

III. INTERNATIONAL COMMERCIAL ARBITRATION AS A SOURCE OF EVIDENCE ON COMMERCIAL NORMS AND CONTRACT DISPUTES

This section argues that international commercial arbitration can provide valuable evidence about the costs and benefits of using commercial norms to resolve contract disputes. International arbitration serves as a ready substitute for national court systems in international contracts and is more like litigation in public courts than the trade association arbitrations examined by Professor Bernstein. Moreover, because international commercial arbitration is a highly competitive industry, the product of this competition—as reflected in arbitration rules, statutes, and awards—will tend to be rules that ex ante make the parties better off than alternative sets of rules. Accordingly, examining the role played by commercial norms in international arbitrations will help in evaluating the role those norms should play in resolving contract disputes in public courts. If the costs of reliance on commercial norms exceed the benefits, as Professor Bernstein argues, one would expect that commercial norms would not be used to resolve contract disputes in international commercial arbitration. If the benefits exceed the costs, commercial norms likely would play an important role in resolving contract disputes in international arbitration.

International commercial arbitration is not without limitations as a source of evidence on the use of commercial norms in resolving contract disputes. The available data are limited, in large part because arbitration proceedings are confidential. In addition, evaluating that evidence is difficult because of significant overlaps between rules, statutes, and the arbitrators' ultimate awards and because of the presence of model rules and laws in the area. Finally, international commercial arbitration by definition involves international contracts and international disputes, which makes any insights

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70. *Id.* at 1818.

71. Bernstein ultimately concludes that, rather than imposing a formalistic adjudicatory approach on the UCC, a more appropriate response would be to amend the Code "to include a 'safe harbor' provision that would give merchant-transactors a simple and reliable way to either opt out of the Code's adjudicative approach or selectively opt out of its usage of trade, course of performance, or course of dealing provisions." *Id.* at 1820-21.

derived from the evidence of uncertain value for the largely domestic disputes addressed by national commercial laws.[72] Nonetheless, even with these limitations, the evidence that can be gleaned from international commercial arbitration still should be useful in evaluating the incorporation of commercial norms into commercial codes.

A. *The Practice of International Commercial Arbitration*

International commercial arbitration is the accepted way of resolving international business disputes.[73] As stated by one international lawyer, "[i]n today's world the dispute resolution mechanism will invariably be arbitration."[74] One estimate is that ninety percent of all international contracts contain arbitration clauses.[75] "International commercial arbitration" is a broad designation that could include the activities of a multitude of trade associations in adjudicating disputes between parties from different countries.[76] In accord with common usage, this article does not use the phrase so broadly.[77] Instead, by international commercial arbitration this article refers to non-specialized arbitration between private parties involved in international commercial transactions.

International commercial arbitration provides a closer analogue to court litigation than does the trade association arbitration examined by Professor Bernstein. International arbitration proceedings are a close substitute for proceedings in public court systems.[78] The principal reason parties choose to

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72. This weakness, of course, would not affect the CISG, which applies only to international transactions.

73. *See* Gerald Aksen, *Arbitration and Other Means of Dispute Settlement, in* INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD 287, 287 (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990); *see also* Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration, in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257, 293 (Pieter Sanders ed., 1987) ("International arbitration is now known to be *'the'* ordinary and normal method of settling disputes of international trade").

74. *See* Aksen, *supra* note 73, at 287.

75. *See* KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 8 n.62 (1993) (citing ALBERT JAN VAN DEN BERG ET AL., ARBITRAGERECHT 134 (1988)).

76. *See* CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 45 (1996).

77. *See, e.g., id.* ("although [specialized arbitrations] doubtlessly are international, commercial, and arbitrations, they are commonly not covered by the general literature on international commercial arbitration."); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 52-53 (2d ed. 1991).

78. *See* Charles N. Brower, *Introduction* to INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? ix-x (Richard B. Lillich

arbitrate international commercial disputes is because neither party is comfortable litigating in the public courts of the other's home country.[79] Although in particular cases arbitration may have other advantages—such as flexibility, speed, finality, arbitrator expertise, and the preservation of the parties' relationship[80]—as a general matter it is the desire to avoid "hometown justice" that is decisive.[81] Charles N. Brower, an international lawyer and arbitrator, has made this point as follows:

> By and large, parties to international transactions choose to arbitrate eventual disputes *not* because arbitration is simpler than litigation, *not* because it is cheaper, *not* because it is "final and binding" and therefore substantially unreviewable, and *not* because arbitrators may have greater relevant expertise than national judges, although any one of those factors may be of interest; they arbitrate simply because neither will suffer its rights and obligations to be determined by the courts of the other party's state of nationality. International arbitration thus is in large measure a substitute for national court litigation.[82]

A secondary reason parties choose to arbitrate international disputes is that arbitration awards are easier to enforce than court judgments.[83] Several international treaties, the most important of which is the New York Convention,[84] create a legal

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& Charles N. Brower eds., 1994) [hereinafter INTERNATIONAL ARBITRATION IN THE 21ST CENTURY].

79. *See* Aksen, *supra* note 73, at 287-88.

80. Although it is difficult to be sure from the truncated facts reported in the awards, most of the parties involved in the international arbitrations studied in this article appear to be at the end of their contractual relationships. This is consistent with Professor Bernstein's finding that even in the trade association context, "traders who arbitrated against one another often viewed their relationship as being at an absolute end-game." Bernstein, *Merchant Law*, *supra* note 4, at 1797 n.104. The companies employing the traders, by comparison, "viewed themselves as being in an end-game round—they were willing to deal with one another again in the future, but the plaintiff-company nevertheless fought hard for the application of [end-game norms]." *Id.*; *see also* Bernstein, *Questionable Empirical Basis*, *supra* note 4, at 766 n.210 (presenting "evidence that in some merchant tribunals most cases are end-game disputes").

81. *See* William W. Park, *Arbitration Avoids 'Hometown Justice' Overseas*, NAT'L L.J., May 4, 1998, at C18.

82. Brower, *supra* note 78, at x.

83. In a survey of persons involved in international arbitration, 72% of respondents identified the neutrality of the forum as "highly relevant" in deciding whether to choose arbitration and 64% identified the enforceability of awards as highly relevant. The next two most popular reasons were that the forum has expertise (36%) and that there is no appeal (37%). *See* BÜHRING-UHLE, *supra* note 76, at app. 1 at 395.

84. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention].

framework through which international arbitration awards can readily be enforced throughout much of the world.

Procedurally, international commercial arbitration is becoming more and more like public court litigation, particularly public court litigation as practiced in the United States. Numerous commentators have identified—and some have decried—this so-called "judicialization" of arbitration.[85] Yves Dezalay and Bryant Garth explain:

> The legitimacy of international commercial arbitration is no longer built on the fact that arbitration is informal and close to the needs of business; rather legitimacy now comes more from a recognition that arbitration is *formal* and close to the kind of resolution that would be produced through litigation—more precisely, through the negotiation that takes place in the context of U.S.-style litigation.[86]

For present purposes it is irrelevant whether the "judicialization" of arbitration is good or bad for the parties to arbitration, although if the parties were dissatisfied presumably they could choose less "judicial" forms of dispute resolution. Instead, the judicialization of arbitration is relevant here because it reinforces the similarities between international commercial arbitration and public court litigation. By comparison, in this regard both court litigation and international arbitration differ from more specialized trade association arbitration, which tends to be less formal in its procedures.[87]

Arbitrators in international commercial arbitrations, like public court judges, tend to be generalists in substantive legal knowledge but specialists in legal procedure.[88] International arbitrators are ordinarily lawyers or academics rather than persons engaged in the same business as the parties to the arbitration.[89] Jacques Werner has stated:

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85. *See* Thomas E. Carbonneau, *National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard, or Manifest Error*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, *supra* note 78, at 115, 117; Arthur W. Rovine, *Fast-Track Arbitration: A Step Away from Judicialization of International Arbitration*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, *supra* note 78, at 45, 47 ("the trend toward judicialization, while uneven, is likely to continue," although recent examples of fast-track arbitration are contrary to trend); *International Arbitration*, 1996 PROC. AM. SOC'Y INT'L L. 244, 252-53 (remarks of Andreas Lowenfeld) ("arbitration has become more legalistic. There is more motion practice, there are more disputes within disputes").

86. Yves Dezalay & Bryant Garth, *Fussing about the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 L. & SOC. INQUIRY 285, 299 (1996).

87. *See* REDFERN & HUNTER, *supra* note 77, at 52-53; *see also* Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 846 (1961).

88. *See* Jacques Werner, *The Trade Explosion and Some Likely Effects on International Arbitration*, J. INT'L ARB., June 1997, at 5, 11.

89. *See id.* at 10.

> Historically, arbitration was justice by peers, namely by those actively engaged in the same trade as the disputing parties, and who consequently did not need to be tutored in the technicalities of the dispute in order to understand the case. . . .
> . . .
> Arbitration by peers has, however, been practically killed [off] within the broad world of general international commercial arbitration. . . .
> Arbitral justice in international commercial cases is almost always rendered by business lawyers in private practice, and sometimes by academics.[90]

Again, this is in contrast to trade association arbitrations, in which arbitrators frequently are not lawyers and generally do have substantial expertise in the industry involved.[91] Because one of the main benefits of incorporating commercial norms into commercial codes is an informational one—it may assist generalist judges in better understanding the parties' agreement—the fact that international arbitrators (unlike trade association arbitrators) tend not to have specialized knowledge of the industry is an especially important similarity to public court litigation.

International commercial arbitrators decide a wide range of cases and subject matters. In this respect they are like public court judges and unlike the trade association arbitrators studied by Professor Bernstein, who deal with largely standardized transactions.[92] International commercial arbitrations also involve higher stakes than the trade association arbitrations in Professor Bernstein's study. The ICC reported that 12.4 percent of its arbitrations in 1996 involved amounts in dispute of over ten million dollars.[93] By comparison, the largest award by a NGFA tribunal between 1975 and 1990 was just over $138,000.[94] Accordingly, the consequences of error by the international arbitrator are likely to be more like those in public court litigation than in NGFA arbitration, which Professor Bernstein acknowledges "will often be small relative to the assets of the parties."[95] For all of these reasons, international commercial arbitration should be a better source of evidence on the use of commercial norms in resolving contract disputes than the trade association arbitrations examined by Professor Bernstein.

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90. *Id.* at 10-11.

91. *See* REDFERN & HUNTER, *supra* note 77, at 52; Mentschikoff, *supra* note 87, at 859-60. Certainly, parties involved in international arbitrations may choose arbitrators who are specialists. My point is that international arbitrators are less likely to be specialists than are trade association arbitrators.

92. *See* Bernstein, *Merchant Law*, *supra* note 4, at 1818.

93. *See* ICC INT'L COURT OF ARB. BULL., May 1997, at 8.

94. *See* Bernstein, *Merchant Law*, *supra* note 4, at 1817 & n.157.

95. *Id.* at 1817.

B. *Competition in International Commercial Arbitration*

International commercial arbitration is a highly competitive business. As stated by Jacques Werner, "Being today recognized for what it is, namely a service industry, international arbitration has become a field of intense competition: competition between the arbitration sites, between the arbitral institutions, between counsel, between arbitrators, and even between the periodicals on international arbitration."[96] Administering institutions compete fiercely as to the fees they charge for their services as well as to the procedures followed in the arbitrations they administer.[97] Countries (like American states in corporate law) compete to be selected the situs for international commercial arbitrations and to obtain the financial benefits that follow.[98] Arbitrators compete with other arbitrators to be selected to serve in a particular case; unlike public judges, who ordinarily get paid a fixed salary regardless of how many cases they decide or how they decide those cases, arbitrators get paid only when they are chosen.[99] International lawyers facilitate this competition by reducing the costs of finding and adopting alternative arbitral schemes.[100] Accordingly, if institutional rules or international arbitration laws require arbitrators to follow commercial norms in deciding disputes or if many arbitrators in fact decide disputes using such norms, that provides strong evidence that such rules ex ante benefit the parties involved.[101]

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96. Jacques Werner, *Competition Within the Arbitration Industry*, J. INT'L ARB., June 1985, at 5, 5; *see also* Jacques Werner, *International Commercial Arbitrators: From Merchant to Academic to Skilled Professional*, DISP. RESOL. MAG., Spring 1998, at 22, 22 ("international commercial arbitration is a market"); Larry Smith & Lori Tripoli, *Privatized International Dispute Settlement . . . Competing Arbitration Centers Mean User-Friendly Resolutions Worldwide*, INSIDE LITIG., May 1998, at 1, 1 ("the same free market zeal that has transformed the global economy is transforming global litigation and dispute resolution").

97. *See infra* notes 102-14 and accompanying text.

98. *See infra* notes 115-33 and accompanying text.

99. *See infra* notes 134-41 and accompanying text.

100. *See infra* notes 142-45 and accompanying text.

101. I do not, and need not, claim that the commercial norms reflected in trade usages and prior dealings necessarily are efficient ones. Some commentators are skeptical whether norms are likely to be efficient. *See, e.g.*, Bernstein, *Questionable Empirical Basis*, *supra* note 4, at 754-57; Eric Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996); Kraus, *supra* note 2, at 409-19; Richard H. McAdams, *Comment: Accounting for Norms*, 1997 WIS. L. REV. 625, 635; McAdams, *supra* note 2. Instead, the relevant policy question is whether commercial norms are superior to alternative sources of default rules. *See* Kraus & Walt, *supra* note 4; Gillette, *supra* note 4, at 741. The evidence presented later suggests that parties to international contracts act as though they are. *See infra* notes 157-201 and accompanying text.

1. Competition Among Arbitral Institutions

Virtually every major trading city has at least one—if not several—institutions that, for a fee, will provide services to parties that wish to avoid each other's home courts. The number of arbitral institutions has increased dramatically in the past several decades.[102] Institutions provide a variety of services to the arbitrating parties. First, the arbitral institution provides a standard set of procedural rules to govern the arbitration.[103] Parties who specify in an arbitration clause a particular institution thereby adopt its rules as a standard form subject to any changes agreed to by the parties.[104] Second, the arbitral institution serves as an "appointing authority" that provides

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Indeed, much of the discussion of the efficiency of norms versus alternative sources of default rules (such as model statutes) applies to the rules governing the use of trade usages in international commercial arbitration. Arguments that commercial norms or standard contract terms may not be efficient because of network effects and learning benefits, *compare, e.g.*, Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997) *and* Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995) *with* Gillette, *supra* note 4, may apply to international arbitration rules governing trade usages as well. Alternative sources of international arbitration rules, such as UNCITRAL, have been criticized as private legislatures subject to similar interest group influences as public legislatures. Paul B. Stephen, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 756-61 (1999); Paul B. Stephen, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 700-02 (1996-97); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994). The CISG trade usage provision, in particular, was the subject of a well-documented dispute between more-developed countries and socialist and less-developed countries, with the latter two groups fearing that existing trade usages unduly favored the more developed countries. *See* Chen, *supra* note 21, at 104-05; CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC & INTERNATIONAL 94-95 (1999). Conceivably, such differing viewpoints on trade usages may have influenced the drafters of the UNCITRAL Model Rules and Model Law as well.

This article does not purport to resolve all of these issues. Instead, it simply argues that, given the similarities between international arbitration and public court litigation and the competitiveness of the international arbitration market, evidence on the role of trade usages in international commercial arbitration is relevant to the debate. If the evidence shows that trade usages play an important role in international arbitration, it at least suggests that incorporation of trade usages into commercial codes is superior to other sources of default rules for resolving contract disputes.

102. *See* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 6 & n.2 (1996); Robert Clow & Patrick Stewart, *International Arbitration: Storming the Citadels*, INT'L FIN. L. REV., Mar. 1990, at 10; Smith & Tripoli, *supra* note 96, at 1.

103. *See* DEZALAY & GARTH, *supra* note 102, at 5.

104. *See id.*

backup arbitrator selection services for the parties if they cannot agree.[105] Third, the arbitral institution may provide various administrative services to the parties, such as serving as the clearinghouse through which their filings are processed.

These institutions compete fiercely in seeking to attract arbitration business.[106] The long-standing leader in the field is the International Chamber of Commerce (ICC), which is headquartered in Paris. The ICC once had a "quasi-monopoly position"; although it remains the most prominent institution, the ICC's market share has declined in the face of increased competition from new and existing arbitral institutions.[107] In response to this competition, the ICC has reduced the fees it charges for its services[108] and amended its rules to make them more attractive to potential contracting parties.[109] Other leading international arbitration institutions include the American Arbitration Association, the London Court of International Arbitration, the Stockholm Chamber of Commerce, the Federal Economic Chamber in Vienna, and the China International Economic and Trade Arbitration Commission (CIETAC).[110]

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105. *See id.* at 6.

106. Although many international arbitration institutions are organized as not-for-profit entities, and thus have somewhat different incentives than for-profit entities, *see* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 14.2, at 430 (5th ed. 1998), they nonetheless compete with each other in the market for international commercial arbitration services.

107. *See* DEZALAY & GARTH, *supra* note 102, at 45; Smith & Tripoli, *supra* note 96, at 2.

108. *See* DEZALAY & GARTH, *supra* note 102, at 44; *International Arbitration*, 1996 PROC. AM. SOC'Y INT'L L. 244, 249 (remarks of Gerald Aksen):

> Years ago, the ICC used to charge fees with an unlimited amount. Today those fees are capped, so that you can no longer pay more than $50,000, or $25,000, per party, even if you have a billion-dollar case. That was probably brought about by competition. . . . The AAA lowered its fees. Why? Because of competition.

109. *See* Smith & Tripoli, *supra* note 96, at 2 ("Clearly the motive [for ICC rules revisions] was competitive. Simply enough, the ICC has opted for less restrictive procedures because other 'arbitration sites are taking business from them,' according to [Bernard] LeSage [, a partner at Buchalter, Nemer, Fields & Younger in Los Angeles]. 'It's losing market share.'"); Stephen R. Bond & Christopher R. Seppala, *The New (1998) Rules of Arbitration of the International Chamber of Commerce*, MEALEY'S INT'L ARB. REPORTS, May 1997 (explaining that "[t]he ICC revises its Rules of Arbitration from time to time so as to adapt them to the current needs of the international business community" and summarizing 1998 changes). *See generally* W. LAURENCE CRAIG ET AL., ANNOTATED GUIDE TO THE 1998 ARBITRATION RULES WITH COMMENTARY, 27-185 (1998) (text of new ICC rules with commentary).

110. *See* Clow & Stewart, *supra* note 102, at 11-12; James H. Carter, *International Commercial Dispute Resolution*, DISP. RESOL. J., Apr.– Sept. 1996, at 95, 95 & 99 n.2.

Because of the consensual nature of international arbitration, parties are likely to agree to arbitrate under the rules of a particular institution if that best serves their interests, subject to the informational costs of evaluating alternative arrangements.[111] If parties ex ante were better off litigating under different institutional rules—including any rule addressing commercial norms—they would, all else being equal, name another administering institution in their arbitration clauses.[112] Indeed, institutions consult widely with users of the rules so that the rules as promulgated best meet the needs of their customers.[113] To the extent institutional rules persist, it is

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111. *See Comparative Analysis of International Dispute Resolution Institutions*, 1991 PROC. AM. SOC'Y INT'L L. 64, 67 (remarks of David D. Caron) ("This is not to imply that there exists a perfect market. A limiting factor is that consumer knowledge often is incomplete. Even for the knowledgeable consumer, there are so many variables to weight that it can be quite difficult to select the 'best' mechanism."); BERGER, *supra* note 75, at 7 ("Unfortunately, the multi-facetedness of the subject matter has created more confusion than transparency"). *But see* Bond & Seppala, *supra* note 109, at 90:

> However imperfectly the parties and their counsel assimilate information concerning the particularities of the relevant legal context of the various alternative sites, it seems clear that over the medium term a significant number of those concerned do form judgements based on an understanding of how these particularities affect their real interests, as opposed to the more ephemeral attractions of the locales.

112. *See* POSNER, *supra* note 106, § 4.7, at 127-28 (describing effect of competition on standard form contracts: "If one seller offers unattractive terms, a competing seller, wanting sales for himself, will offer more attractive terms. The process will continue until the terms are optimal.").

113. Howard M. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, *supra* note 78, at 3, 7 n.10 (AAA International Rules "have undergone searching scrutiny by international arbitrators, practitioners and arbitration administrators to ensure that they embody provisions which contemporary practice calls for and with which both American and foreign attorneys are comfortable") (*quoting* Michael F. Hoellering, *How to Draft an AAA Arbitration Clause* 5-6) (unpublished paper delivered at Eighth ICSID/ICC/AAA Joint Colloquium on International Arbitration, Washington, D.C., Nov. 11, 1991); American Arbitration Association Task Force on the International Rules, Commentary on the Proposed Revisions to the International Arbitration Rules of the American Arbitration Association (describing work of task force in developing revisions to AAA International Rules), *reprinted in* JACK J. COE, JR., INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT 587 app. 24 (1997); Discussion Draft—Arbitration Rules of the LCIA (explaining that "permanent subcommittee [of the London Court of International Arbitration] has kept [the arbitration rules] under constant review, considering difficulties and criticisms that have arisen"), *reprinted in* COE, *supra*, at 709 app. 33A.

evidence that they make the parties better off than alternative rules.[114]

2. Competition Among Arbitral Sites

Countries compete to be venues in which international arbitration hearings are held.[115] International arbitration hearings are very mobile. To enhance enforceability, the award must be made in a country that is party to the New York Convention;[116] otherwise, the parties are free to choose the situs where the arbitration will take place and the award will be made.[117] Prospective arbitration sites have a strong incentive to make their arbitration laws responsive to the demands of the consumers of arbitration services. As one American commentator stated, "[b]ecoming a venue for arbitration can be a very lucrative business and, especially in the international arena, is seen as a distinctly desirable objective."[118]

There is strong evidence of competition among international arbitration venues.[119] A number of countries in recent years

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114. *See* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 249-53 (1979) (examining implications of using "arbitral procedures as a standard of judicial efficiency").

115. *See* Kazuo Iwasaki, *Selection of Situs: Criteria and Priorities*, 2 ARB. INT'L 57, 57 (1986).

116. *See, e.g., id.* at 64-65. At present, over 120 countries are parties to the Convention. *See* UNCITRAL, *Status of Conventions and Model Laws*, *supra* note 33, at 9-14.

117. *See* Iwasaki, *supra* note 115, at 66-67 (explaining that parties to an arbitration want predictability and a speedy outcome).

118. TOM CARBONNEAU, CASES AND MATERIALS ON COMMERCIAL ARBITRATION 638 (1997). A proponent of the United Kingdom's Arbitration Act of 1979 contended that the amendments might bring in £500 million to the British economy, in counsel, arbitrator, and witness fees, hotel rates, and the like. *See* W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 467 (2d ed. 1990) (citing Lord Cullen of Ashborne). *But see* DEZALAY & GARTH, *supra* note 102, at 299 n. 21 (dismissing such estimates: "[t]he same individuals today admit that the estimates, widely reported by the press, were complete inventions"). One writer points out that "the total hotel costs for those involved in the proceedings (parties, arbitrators, counsel, secretaries, etc.) often exceed the overall costs of an arbitration thirty years ago." BERGER, *supra* note 75, at 6 n.54.

119. *See* BERGER, *supra* note 75, at 6 & n.55:

> Since the beginning of the eighties legislatures have begun to respond to the needs of international practice and have enacted new arbitration laws as 'marketing strategies,' intended to send a signaling effect to the international arbitration community of the userfriendliness of their legal environment and of the quality of services offered in these jurisdictions.

See also Filip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW. J. INT'L L. & BUS. 48, 48-49 (1991):

have amended their arbitration laws for the stated reason of making the country more attractive as a venue for international arbitrations.[120] Belgium has taken among the most radical steps by providing that in international arbitrations with no connection to Belgium other than that Belgium serves as the arbitral situs, Belgian courts may not vacate the award for any reason.[121] One of the principal reasons for this change was to make Belgium more attractive as a venue for international arbitrations.[122] In a study of ICC arbitrations, Stephen Bond has traced how parties responded to court decisions or laws unfavorable to arbitration by avoiding the situs, and, once the decision or law was changed, returned to that situs.[123]

> [M]ost changes [to arbitration laws] were to a large extent inspired by concerns of either maintaining a country's status as one hospitable to international commercial arbitration or of promoting a country with little arbitration tradition. This phenomenon of international regulatory competition was, *inter alia*, the result of efforts by domestic lobbies to initiate or encourage domestic legislators to look afresh at arbitration laws. Given its international context, regulatory competition definitely led to some deregulation or liberalization of arbitration law.

(footnotes omitted); Pieter Sanders, *Arbitration*, *in* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE, at 12-29 (Mauro Cappelletti ed., 1996) ("Modernization of arbitration laws is inspired by the desire to make arbitration more attractive to its users. A certain competition between countries to attract arbitration to be held in their country can be noted."); Werner, *International Commercial Arbitrators: From Merchant to Academic to Skilled Professional*, *supra* note 96, at 22.

120. For example, supporters of Ireland's recent enactment of the UNCITRAL Model Law cited the benefits to Ireland of becoming a more competitive venue for international commercial arbitration. *See* Press Release, O'Donoghue Publishes Bill Designed to Attract International Inward Investment to Ireland (Oct. 2, 1997) <www.irlgov.ie:80/justice/Press%20Releases/Press-97/pr-0210b.htm> ("the resolution of international business disputes through arbitration is a major economic and business activity on a worldwide scale. This Bill when passed into law will enable Ireland to claim its share of this economic activity" (quoting John O'Donoghue, Minister for Justice, Equality and Law Reform)); Debates of the Houses of the Oireachtas on Arbitration (International Commercial) Bill, 1997: Second Stage <www.irlgov.ie:80/debates/s14may98/ sect2.htm> ("The fact that Ireland has adopted a common international standard and has improved on it strengthens our ability to market for a substantial share of the global business in this area.") (remarks of Mrs. Taylor Quinn)); *id.* ("London, a relatively recent entrant to the market, is estimated to generate £100 million annually from this international arbitration business. . . . [W]e wish well people here who wish to proceed in this area.") (remarks of Miss M. Wallace)).

121. Belgian Judicial Code, art. 1717, *reprinted in* 11 Y.B. COMMERCIAL ARB. 369 (1986).

122. *See* Albert Jan van den Berg, *Annulment of Awards in International Arbitration*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, *supra* note 78, at 133, 141.

123. *See* Bond & Seppala, *supra* note 109, at 86-90.

Some arbitration commentators have been critical of this competition among arbitral sites.[124] An American commentator on arbitration has complained that "[m]any jurisdictions have flung their regulatory authority to the winds in order to climb upon the 'hospitable-jurisdiction-to arbitration' bandwagon and advertise their availability as venues to arbitration."[125] The competition among arbitral sites has been likened to the supposed "race-to-the-bottom" in corporate and environmental law.[126]

The analogy to competition for corporate charters in the United States is a useful and close one. Parties can choose a country as a situs for arbitration merely by so providing in their contract or by agreeing after a dispute has arisen. They need have no other connection with the situs, much as companies can incorporate in a state where they do no business. Although it is difficult to choose a new situs once a dispute has arisen (because both parties must agree),[127] in future contracts parties readily can select a different situs, much as companies can reincorporate in another state at minimal cost. International arbitration even has a rough equivalent to the corporate law "internal affairs doctrine." In countries that are party to the New York Convention, the arbitral situs, and no other country, can vacate an arbitration award.[128] The equivalence is not exact, however. Countries in which enforcement of an award is sought still have the authority to decide whether to enforce the award, although that authority is substantially limited in countries that are party

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124. Not all international arbitration commentators have been critical. *See, e.g.*, Michael F. Hoellering, *International Commercial Arbitration: A Peaceful Method of Dispute Settlement*, ARB. J., Dec. 1985, at 19, 21 (calling the "true competition" between arbitral venues "a healthy development, which should result in continuing improvement of the conditions for arbitration worldwide"); Aleksandar Goldštajn, *Choice of International Arbitrators, Arbitral Tribunals and Centres: Legal and Sociological Aspects*, *in* ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION 27, 29 (Petar Šarčević ed., 1989) ("endeavours of individual places and centres of international commercial arbitration to attract international clientele . . . should lead to improvements in national legislation and practices and consequently improve arbitration between domestic and foreign firms").

125. CARBONNEAU, *supra* note 118, at 639.

126. *See* BERGER, *supra* note 75, at 8-9 ("one must question whether the competition of national legislatures, initiated mainly through the economic interests, wishes and proposals of foreign practitioners, may not lead to a 'Delaware-effect' and hence to a standard of lawmaking which is unacceptable in view of the practical significance of the subject matter").

127. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY & MATERIALS 77 (1994) (stating that "[w]here the parties do not agree, changing the arbitral status from what was contractually designated is much less likely").

128. *See, e.g.*, International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, 745 F. Supp. 172 (S.D.N.Y. 1990).

to the New York Convention, which sets out limited and exclusive grounds for refusing to enforce international awards.[129]

Although the competition among countries to serve as arbitration venues resembles the competition for corporate charters, neither properly is characterized as a "race-to-the-bottom." As Ralph Winter, Roberta Romano, and others have explained, corporate managers are restrained from incorporating or reincorporating to the detriment of shareholders by competition in capital, product, and labor markets and by the market for corporate control.[130] Romano has concluded that "[t]he best available evidence indicates that, for the most part, the race is for the top and not the bottom in the production of corporate laws."[131] Indeed, Richard Revesz argues that, in the absence of interjurisdictional externalities—and perhaps divergent interests between agents and principals—"competition among the states for industry should not be expected to lead to a race that decreases social welfare; indeed, as in other areas, such competition can be expected to produce an efficient allocation of industrial activity among the states."[132] Given the consensual nature of arbitration, the costs resulting from the choice of arbitral forum will largely be borne by the contracting parties; in other words, there seem to be few or no interstate externalities. Although there might be some concern about attorneys (agents) not acting in the interests of their clients (principals) in selecting arbitral sites, that concern is not the focus of those who fear a "race-to-the-bottom" among arbitral venues. Moreover, competition in the market for legal services presumably will hold down such agency costs.[133] Accordingly, interjurisdictional competition among arbitral sites seems likely to improve the efficiency of the laws subject to such competition.

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129. *See* New York Convention, *supra* note 84, art. V; BORN, *supra* note 127, at 517-18.

130. *See, e.g.*, Ralph K. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977); Roberta Romano, *State Competition for Corporate Charters*, *in* THE NEW FEDERALISM: CAN THE STATES BE TRUSTED? 129 (John Ferejohn & Barry R. Weingast eds., 1997).

131. Romano, *supra* note 130, at 149.

132. Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211-12 (1992); *see also id.* at 1247-53.

133. *Cf.* Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 637 (1994) (describing development of market mechanisms that "mitigate the agency cost problems that exist between lawyers and their clients").

3. Competition Among Arbitrators

International arbitrators, too, compete to be selected by parties to resolve their disputes.[134] The number of persons seeking to serve as arbitrators has increased dramatically in recent years.[135] Unlike the choice of arbitral institution, and commonly the arbitral situs, parties ordinarily choose arbitrators after the dispute arises rather than before.[136] Under the most commonly used mechanism for arbitrator selection in international arbitration, each party appoints one arbitrator and the two party-appointed arbitrators then choose the third, presiding arbitrator.[137] In international arbitration, however, even party-appointed arbitrators must be free of significant connections with either party or else they are subject to challenge by the other side.[138]

The competition among arbitrators gives them different incentives than public court judges, who generally do not compete to attract litigation. Indeed, public court judges, who receive a fixed salary, have the incentive on the margin to decide cases so as to enhance their own leisure and prospects for advancement to a higher court, among other motivations.[139] Because arbitrators only get paid when they are selected by the parties to decide a case, they "have to attract business" and "so they are exposed to the same market pressures as anyone who

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134. *See* DEZALAY & GARTH, *supra* note 102, at 31; Werner, *International Commercial Arbitrators: From Merchant to Academic to Skilled Professional*, *supra* note 96, at 22.

135. *See* Werner, *International Commercial Arbitrators: From Merchant to Academic to Skilled Professional*, *supra* note 96, at 28 n.3. *See generally* PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, ROSTER OF INTERNATIONAL ARBITRATORS (1997).

136. *See* DEZALAY & GARTH, *supra* note 102, at 6.

137. *See* W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 541, 557-58 (1997); RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE art. 8(4) (1998).

138. *See* INTERNATIONAL BAR ASSOCIATION, RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS arts. 3-4; RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE arts. 7(1)-(3), 11; INTERNATIONAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION arts. 7-8.

139. *See* Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission?*, 7 J. L. ECON. & ORG. 183, 183-84 (1991); Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13, 13-14 (1992); Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 474-78 (1998); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 1-2, 13-15 (1993); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1383-84, 1487-93 (1998).

sells a service."[140] As a result, international arbitrators have strong incentives to make decisions that make both parties to the case, ex ante, better off. As Robert Cooter argues, "income-maximizing private judges make decisions which are Pareto efficient with respect to the litigants (pair-wise efficient)."[141] International arbitration awards thus will tend to reflect parties' preferred treatment of commercial norms in dispute resolution.

4. International Lawyers as "Transaction Cost Engineers"

Competition in the business of international commercial arbitration is heightened by international lawyers, who use their expertise on behalf of clients to help them pick beneficial methods of dispute resolution. Yves Dezalay and Bryant Garth explain that "[m]ultinational law firms accelerate this competition by their ability to forum shop—both in contractual negotiations and after disputes arise—among institutions, sets of rules, laws, and arbitrators."[142] Although even expert international lawyers lack perfect information about all available alternatives,[143] it nonetheless seems likely that the market for international arbitration services works reasonably well. The importance of lawyers in the competitive process is another illustration of what Ronald Gilson calls lawyers as "transaction cost engineers";[144] the lawyers create value for their clients by "design[ing] efficient systems to resolve conflict outside of court at low cost."[145]

C. *International Commercial Arbitration as a Source of Evidence: Predictions and Limitations*

As the previous sections have explained, international commercial arbitration more closely resembles litigation in public

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140. Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 107 (1983); *see also* GORDON TULLOCK, TRIALS ON TRIAL: THE PURE THEORY OF LEGAL PROCEDURE 122, 127-33 (1980); Robert D. Cooter & Daniel L. Rubinfeld, *Trial Courts: An Economic Perspective*, 24 L. & SOC'Y REV. 533, 545 (1990); Drahozal, *supra* note 139, at 501-02.

141. Cooter, *supra* note 140, at 107.

142. Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 L. & SOC'Y REV. 27, 45 (1995).

143. *See supra* note 111 and accompanying text.

144. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 243, 253-56 (1984). *See generally Symposium on Business Lawyering and Value Creation for Clients*, 74 OR. L. REV. 1 (1995).

145. Ronald J. Gilson & Robert H. Mnookin, *Foreward: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1, 8 (1995); *see also* Gillette, *supra* note 4, at 734 (attorneys can "become the equivalent of entrepreneurs who are able to recover the costs of new technology once they publicize its superiority to potential users," and thus may have incentive to promote legal innovations).

courts than trade association arbitration and is the product of a highly competitive industry. Accordingly, examining the role of commercial norms in resolving contract disputes in international arbitration should provide valuable evidence for evaluating the incorporation strategy followed by modern commercial codes. If the costs of relying on commercial norms to resolve contract disputes in fact exceed the benefits, such that incorporation of commercial norms into commercial codes is inappropriate, then one would expect to find in international commercial arbitration the sort of formalistic decisionmaking found by Professor Bernstein in trade association arbitrations. If the benefits to generalist decisionmakers exceed the costs, one would expect to find commercial norms used to resolve contract disputes in international arbitration.

International commercial arbitration is subject to several limitations as a setting in which to examine the role of commercial norms in resolving commercial disputes. First, data on the subject is not widely available. Arbitration awards ordinarily are confidential, and only a non-random sample is made public, usually without identifying the parties or the arbitrators involved.[146] Some of the published awards are so heavily edited that it is difficult to understand what actually happened. The rules of the various arbitration institutions are more widely available; however, data on the frequency with which those rules are utilized is poor. Almost no data is available on the extent to which the rules are incorporated into arbitration agreements. Some data is available on the number of disputes arbitrated under the rules of various institutions,[147] but even that data is unreliable.[148] Accordingly, the analysis that follows in Part IV is largely impressionistic.

Second, there can be a substantial degree of overlap between the provisions of institutional rules and arbitration statutes, the substantive laws applicable to the dispute, and the rationale of the arbitrators in making their award. If the institutional rules or the arbitration laws of the situs require the arbitrators to take

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146. *See, e.g.*, COE, *supra* note 113, at 87; Lord Justice Mustill, *The New* Lex Mercatoria: *The First Twenty-Five Years*, in LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE 149, 179-80 (Maarten Bos & Ian Brownlie eds., 1987).

147. Presumably, there is some relationship, perhaps even a close one, between the relative frequency with which parties agree to the use of an institution's rules in their arbitration agreement and the relative frequency with which disputes are arbitrated under those institutional rules. In other words, the more often parties identify the ICC, for example, as the administering institution in their arbitration agreements, the more often parties will actually arbitrate before the ICC when disputes arise.

148. *See, e.g.*, DEZALAY & GARTH, *supra* note 102, at 298 n.19; Dezalay & Garth, *supra* note 142, at 28 n.4.

usages of trade into account in their decision, that the arbitrators do so may say more about their adherence to the parties' agreement or to the governing law than whether they believe such consideration benefits the parties, and thus will get them selected more often in the future to be an arbitrator. At worst, however, this will result in some overlap as the evidence is considered. More troubling is that national laws and the CISG likewise provide that usages of trade and the parties' dealings should be considered in resolving contract disputes.[149] As a result, an arbitrator who considers commercial norms may be doing so because of the very legal requirements that this article is trying to evaluate.[150] Nonetheless, institutional rules and arbitration statutes that require arbitrators to consider trade usages do so regardless of the national law that will govern the dispute,[151] which suggests that the requirement is not one that results simply from national substantive contract laws.

Third, the analysis is complicated because of model arbitration rules and a model law on international arbitration promulgated by the United Nations Commission on International Trade Law (UNCITRAL).[152] The Model Rules and Model Law have been highly influential. The Model Rules frequently have been adopted by arbitration institutions, while the Model Law has been enacted by countries seeking to be arbitral sites, often with minimal changes from the original text.[153] Part IV of this article will discuss the effect of the Model Rules and the Model Law in more detail.[154]

Fourth, there may be aspects of international transactions—such as the very existence of differing national legal schemes—that make the use of commercial norms of greater value in that setting than in purely domestic disputes.[155] Or it may be that

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149. *See supra* notes 11-49 and accompanying text.

150. For example, the drafters of the UNCITRAL Model Law on International Commercial Arbitration at one point deleted any reference to trade usages from its provisions on the ground that, as explained by a leading commentator, it "was considered . . . redundant . . . since reference to trade usage frequently was required by the national law applicable to the dispute." HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 772 (1994).

151. *See infra* 161-201 and accompanying text.

152. UNCITRAL ARBITRATION RULES (1976); UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985).

153. *See infra* notes 193-201 and accompanying text.

154. The European Convention on International Commercial Arbitration also contains a provision addressing trade usages, *see infra* note 162, which certainly influenced the adoption of subsequent rules and laws as well.

155. *See* E. Loquin, *L'application de regles anationales dans l'arbitrage commercial international, in* L'APPORT DE LAW JURISPRUDENCE ARBITRALE, LES DOSSIERS DE L'INSTITUT DU DROIT ET DES PRATIQUES DES AFFAIRES INTERNATIONALES

international commerce is still in its early stages, and so reliance on commercial norms is more likely than in more mature national markets.[156] While these weaknesses do not seem relevant for evaluating the CISG's reliance on commercial norms, they may raise some questions about the applicability of this analysis to the UCC and other national commercial laws that require consideration of commercial norms in resolving contract disputes.

Despite these limitations, international commercial arbitration nonetheless provides a better source of evidence for evaluating the role of commercial norms in contract dispute resolution than does trade association arbitration. The next section describes what the evidence shows.

IV. COMMERCIAL NORMS IN INTERNATIONAL COMMERCIAL ARBITRATION

This section examines the extent to which the various institutions and individuals involved in international commercial arbitration rely on commercial norms in resolving contract disputes. If reliance on commercial norms provides informational or other benefits to generalist decisionmakers, then one would expect to find reliance on such norms of behavior in arbitral rules, statutes, and awards. In fact, reliance on both codified and uncodified trade usages is widespread in international arbitration. Institutional rules and an increasing number of international arbitration statutes frequently require arbitrators to consider or rely on trade usages.[157] International arbitrators rely on uncodified trade usages in deciding contract disputes; they also rely on principles such as good faith, which often require reference to trade practices. Overall, the evidence, which is subject to several caveats already discussed,[158] indicates a greater reliance on trade usages in international arbitration than Professor Bernstein found in trade association arbitration.[159]

98-99 (1986), *translated in Observations [on ICC Award No. 5832], in* SIGVARD JARVIN ET AL., COLLECTION OF ICC ARBITRAL AWARDS: 1986-1990, at 536 (1994) ("The needs of international trade give rise . . . to the creation of a-national rules which, taking account of the hazards and costs of international commercial operations, impose co-operation in good faith upon the parties whose scope exceeds that normally required by national law in internal operations").

156. *Cf.* Bernstein, *Questionable Empirical Basis*, *supra* note 4, at 753 n.173 (noting that in "early days of their operation . . . these merchant tribunals looked to custom more often").

157. *See infra* notes 161-200 and accompanying text.

158. *See supra* notes 146-56 and accompanying text.

159. The evidence available from international commercial arbitration generally does not permit determining the content of the trade usages at issue. The rules and statutes merely direct that trade usages be used; they do not specify what those trade usages are. Published arbitration awards often do not contain much description of the trade usage at issue. Thus, this article does not

Arbitral reliance on the parties' prior dealings, however, appears to be much less common than reliance on trade usages, which is consistent with Professor Bernstein's findings.[160]

A. *Commercial Norms in Institutional Rules*

Numerous international arbitration institutions require in their rules that arbitrators consider usages of trade in deciding contract disputes.[161] For example, Article 17(2) of the 1998 Rules of Arbitration of the International Chamber of Commerce requires that "[i]n all cases, the arbitrator shall take account of the provisions of the contract and the relevant trade usages."[162]

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address Professor Bernstein's subsequent empirical claim that "'usages of trade' and 'commercial standards,' as those terms are used by the Code, may not consistently exist, even in relatively close-knit merchant communities." Bernstein, *Questionable Empirical Basis*, *supra* note 4, at 715. For responses, see Gillette, *supra* note 4, at 710 n.10; Kraus & Walt, *supra* note 4, at 17-20.

160. *See* Bernstein, *Questionable Empirical Basis*, *supra* note 4, at 715.

161. Domestic arbitration rules generally are silent on the question of trade usages. *See, e.g.*, COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (1999). At least part of the explanation is that domestic arbitration rules generally do not address the rules of decision for arbitrators. At least in some countries, commentators have asserted that arbitrators in domestic arbitrations ordinarily attempt to make equitable rather than legal decisions, and so may well consider trade practices in making their award. *See* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 345:

> A Latin phrase sometimes employed to describe the spirit of much American commercial arbitration is *ex aequo et bono*—a resolution is sought that is equitable, minimizes harm to either party, and enables potential adversaries to maintain a valuable commercial relationship; the role of such an arbitrator is said in Europe to be that of an *amiable compositeur*.

See also Albert Jan van den Berg, *The Netherlands*, at 23-24, *in* 3 INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (Pieter Sanders & Albert Jan van den Berg eds., 1997) [hereinafter HANDBOOK] ("In domestic practice, an arbitral tribunal is almost always authorized by the parties to act as *amiable compositeur*. The [Netherlands Arbitration Institute] Rules, therefore, state in Article 45(1) that arbitrators decide as *amiable compositeurs* unless the parties by agreement instructed them to decide according to the rules of law.").

162. RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 8, art. 17(2). The ICC apparently drew the rule from Article VII(1) of the European Convention on International Commercial Arbitration, April 21, 1961, 484 U.N.T.S. 349 ("European Convention"), which provides as follows:

> The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. *In both cases the arbitrators shall take account of the terms of the contract and trade usages.*

The International Arbitration Rules of the American Arbitration Association provide that "[i]n arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract."[163] A third large international arbitration institution, the China International Economic and Trade Arbitration Commission (CIETAC), has a similar rule, which provides: "The arbitration tribunal shall independently and impartially make its award on the basis of the facts, in accordance with the law and the terms of the contracts, with reference to international practices and in compliance with the principle of fairness and reasonableness."[164] By comparison, none of the institutional rules studied address prior dealings between the parties as a basis for decision.

Table 1 categorizes a number of international arbitration institutions according to how their rules deal with trade usages.[165] Of the forty-four arbitral institutions listed, thirty-two require arbitrators to "take into account," have "regard to," or otherwise consider trade usages applicable or relevant to the dispute. The rules of the remaining twelve institutions are silent on the matter; they do not require arbitrators to consider trade usages, but they do not forbid them to do so either.

Id. art. 7(1) (emphasis added). The ICC amended its rules to add the rule on trade usages in 1975. *See* Giorgio Sacerdoti, *The New Arbitration Rules of ICC and UNCITRAL*, 11 J. WORLD TRADE L. 248, 262 (1977).

163. INTERNATIONAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION, art. 28(2) (1997).

164. CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, ARBITRATION RULES art. 53 (1998).

165. Table 1 does not reflect a random sample of arbitration institutions. Instead, it collects rules of arbitration institutions that are reprinted in prominent international arbitration sources or readily available on the Internet. Most of the "leading" international arbitration institutions are included in the listing, as well as many others. For sources of the rules, *see infra* Appendix I.

Table 1: Institutional Rules on Trade Usages

Rules Requiring Arbitrator to Consider Trade Usages

-American Arbitration Association
-Australian Centre for International Arbitration*
-British Columbia International Commercial Arbitration Centre*
-Cairo Regional Centre for International Commercial Arbitration*
-Chamber of Commerce and Industry of the Russian Federation*
-Chamber of Commerce, Industry and Agriculture of Panama*
-Chicago International Dispute Resolution Association*
-China International Economic and Trade Arbitration Commission (CIETAC)
-Commercial Arbitration & Mediation Center for the Americas
-CPR Institute for Dispute Resolution
-Croatian Chamber of Economy*
-Economic and Agricultural Chambers of the Czech Republic
-Estonian Chamber of Commerce and Industry
-Federal Economic Chamber (Vienna)
-G.C.C. Commercial Arbitration Centre
-German Institution of Arbitration*
-Hong Kong International Arbitration Center*
-Hungarian Chamber of Commerce
-Indian Society of Arbitrators
-Institute of Arbitrators & Mediators Australia*
-Inter-American Commercial Arbitration Commission*
-International Chamber of Commerce (ICC)
-Italian Association for Arbitration
-Kuala Lumpur Regional Centre for Arbitration*
-Latvian Chamber of Commerce and Industry*
-Milan Chamber of National and International Arbitration
-Ministry of Justice (Thailand), Arbitration Institute
-Netherlands Arbitration Institute
-Portugese Chamber of Commerce & Industry
-Spanish Court of Arbitration*
-Vietnam International Arbitration Center
-World Intellectual Property Organization

*Uses UNCITRAL Rule without modification.

Table 1: Institutional Rules on Trade Usages

Rules Silent on Trade Usages

-Belgian Centre for Arbitration & Mediation(CEPANI)
-Central Chamber of Commerce of Finland
-Chamber of Commerce and Industry of Geneva
-Danish Institute of Arbitration
-Euro-Arab Chambers of Commerce
-Institute of Arbitration (Belgium)
-Japan Commercial Arbitration Association
-Korean Commercial Arbitration Board
-London Court of International Arbitration
-Singapore International Arbitration Centre
-Stockholm Chamber of Commerce
-Zurich Chamber of Commerce

Among the institutions with rules requiring arbitrators to consider trade usages are most of the largest international arbitral institutions.[166] Table 2 lists the number of new requests for international arbitrations filed in 1992 with various arbitration institutions:[167]

Table 2: New Requests for International Arbitrations (1992)

ICC	337	Vienna	70
CIETAC	267	Stockholm	63
AAA	252	British Columbia	40
Hong Kong	185	Singapore	12
LCIA	72 (approx.)	Australia	6

Although these data can be difficult to interpret and are of uncertain reliability,[168] the numbers are generally consistent with

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166. The size of the arbitration institution is measured in terms of numbers of new requests for arbitration.

167. The principal source of these numbers is Gillis Wetter, *The Internationalisation of International Arbitration: Looking Ahead to the Next Ten Years*, *in* THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE 85, 95-100 (Martin Hunter et al. eds., 1995) (reporting requests for arbitration with AAA, Vancouver, Hong Kong, ICC, Oslo, Stockholm, and Vienna; the Zurich Chamber of Commerce declined to report any figures). Other sources are *Arbitration Notes: ACICA 1992 Caseload Hits 380*, MEALEY'S INT'L ARB. REP., Apr. 1993 (reporting Australian Centre for International Commercial Arbitration "handled" six international arbitrations in 1992); Michael J. Moser, *China's New International Arbitration Rules*, J. INT'L ARB., Sept. 1994, at 5, 6 (reporting 267 new cases filed with CIETAC in 1992). Updated data for some institutions are presented *infra* notes 169-73.

168. *See* DEZALAY & GARTH, *supra* note 102, at 298 n.19 ("The few published statistics . . . are subject to considerable caution. They mix many small matters

the perception of these institutions obtained from the international arbitration literature. That literature suggests that the ICC is still the predominant institution in the field.[169] Various Asian arbitration centers, particularly CIETAC,[170] are growing rapidly, although CIETAC arbitration is not as well accepted internationally.[171] The American Arbitration Association has a relatively large international caseload[172] and is followed by (in no particular order) the London Court of International Arbitration (LCIA), the Federal Economic Chamber in Vienna, and the Stockholm Chamber of Commerce.[173] Of the arbitral institutions listed in Table 2, only the LCIA, the Stockholm Chamber of Commerce, and the Singapore International Arbitration Centre do not have rules requiring

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with the very large ones. The statistics also serve the promotional purpose of attracting new clients by seeking to persuade them of past successes. We have called this 'making it by faking it.'"); Wetter, *supra* note 167, at 94 n.9:

> The ICC Court does not register requests for the appointment of an arbitrator as a case, but the Court receives less than ten such requests each year. By contrast, both the Hong Kong International Arbitral Centre and the SCC Institute register requests for the appointment of an arbitrator as cases. . . . Further, the distinction between domestic and international arbitrations is neither uniformly observed, nor in fact registered. For these and other reasons the statistics must be read with great caution.

169. The number of new requests for arbitration with the ICC has grown steadily since 1992, to 352 in 1993, 384 in 1995, and 433 in 1996. ICC INT'L CT. OF ARB. BULL., May 1997, at 6.

170. Many of the Asian international arbitration centers have grown rapidly since 1992. CIETAC reported 504 new filings in 1993; subsequent reports from other sources give the number of new filings at over 800 by 1994. *See* William K. Slate II, *International Arbitration: Do Institutions Make a Difference?*, 31 WAKE FOREST L. REV. 41, 50 (1996); Werner, *International Commercial Arbitrators: From Merchant to Academic to Skilled Professional*, supra note 96, at 24 ("With close to 1,000 new cases a year, CIETAC is by far the busiest international arbitration organization in the world and a real success story"). The Singapore International Arbitration Center reported 58 new filings in 1995, up from 13 in 1992. *See* Lawrence G.S. Boo, *Singapore*, at 3, *in* 3 HANDBOOK, *supra* note 161.

171. *See* Carter, *supra* note 110, at 99 n.2 (CIETAC "reports an even larger international case load [than the AAA], but many of these apparently are disputes between Chinese and Hong Kong parties. CIETAC arbitration is not in general use among non-Chinese parties").

172. In 1998, the American Arbitration Association reported 430 international case filings, up from 320 in 1997. American Arbitration Association, *AAA's 1998 Case Filings Reach All-Time High* <http://www.adr.org/drt/drt0499-1.html> (webpage no longer available, copy on file with author).

173. The number of cases filed with the Stockholm Chamber of Commerce was 110 in 1993, 100 in 1994, 97 in 1995, 100 in 1996, 110 in 1997, and 122 in 1998. *See* Arbitration Institute of the Stockholm Chamber of Commerce, *Statistics* (visited Jan. 19, 2000) <http://www.chamber.se/arbitration/english/institute/statisik.html>. Of the cases filed in 1998, 12 were under the UNCITRAL Rules, and 11 were ad hoc arbitrations. *See id.*

arbitrators to consider trade usages.[174] Even those institutions may in fact apply such a rule in some of the arbitrations they administer. For example, of the ninety-one arbitrations completed by the LCIA in the fifteen months following April 1992, ten were administered (at the parties' request) under the UNCITRAL Rules, which, unlike the LCIA's rules, do contain a provision on trade usages.[175]

The precise formulations of the rules on trade usages vary in important ways.[176] The UNCITRAL Rules and those rules following the UNCITRAL Rules, although requiring arbitrators to consider trade usages, make the terms of the contract controlling. UNCITRAL Rule 33(3) provides that the arbitrators "shall decide in accordance with the terms of the contract," and merely "take into account" the applicable trade usages.[177] Even that lesser role seems greater than the role accorded to uncodified trade usages by the NGFA arbitrators studied by Professor Bernstein, who do not decide cases on the basis of trade practices unless both the contract and codified trade rules are silent.[178] The ICC Rules, by contrast, apparently treat contract provisions and trade usages as coequal by stating that the tribunal "shall take account" of both.[179] Among other arbitration institutions with similar rules are the Italian Association for Arbitration, the Milan Chamber of National and International Arbitration, and the Netherlands Arbitration Institute.[180] Whether these rules are so applied in practice will be discussed later.[181] On their face, however, they suggest a very different approach to adjudication

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174. Table 2 does not include either the Chamber of Commerce and Industry of Geneva or the Zurich Chamber of Commerce because no data on case filings were available for those two institutions. The arbitral rules of both are silent on trade usages.

175. *See* Wetter, *supra* note 167, at 95.

176. For other variations, see REISMAN ET AL, *supra* note 137, at 256-59.

177. UNCITRAL ARBITRATION RULES, *supra* note 152, art. 33(3).

178. *See* Bernstein, *Merchant Law*, *supra* note 4, at 1777.

179. *See* Garavaglia, *supra* note 32, at 31 n.7, 42; Steven J. Stein & Daniel R. Wotman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685, 1714 n.184 (1983). *But see* Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16 INT'L LAW. 613, 642 (1982) ("One can find some stylistic differences [between the UNCITRAL and ICC rules], but they probably do not differ in the substance").

180. *See Italian Association for Arbitration, Rules for International Arbitration* art. 22(3), *reprinted in* 21 Y.B. COMMERCIAL ARB. 230, 240 (1996); *Milan Chamber of National and International Arbitration, International Arbitration Rules* art. 13, *reprinted in* 21 Y.B. COMMERCIAL ARB. 247, 255 (1996); *Netherlands Arbitration Institute, Arbitration Rules* art. 47, *reprinted in* 13 Y.B. COMMERCIAL ARB. 205, 224 (1988).

181. *See infra* notes 202-13 and accompanying text.

even from that taken by the UCC, which at least nominally provides that contract terms prevail over usages of trade.[182]

In addition, the phrase "usage of trade" as used in these institutional rules is ambiguous. The phrase certainly includes codified or uncodified commercial practices in various trades and industries. Some have suggested, however, that the phrase "usage of trade" also includes the *lex mercatoria*, which includes both international trade customs and general principles of law applicable to international trade.[183] For the purposes of this article, the ambiguity is largely immaterial, because under either reading the arbitrator is directed to consider commercial norms. It may explain, however, the reluctance of some arbitral institutions to include a provision addressing trade usages.

These arbitration rules are merely standard contract terms that the parties can and do incorporate by reference into their contracts. As such, the parties by agreement can change the rules, including, if they so desire, any rule requiring arbitrators to consider trade usages. The available evidence, however, indicates that they do not do so. In a study of arbitration agreements in cases administered by the ICC in 1987 and 1989, Stephen Bond reported no parties modifying in their arbitration agreements the ICC rule on trade usages.[184]

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182. *See supra* note 26 and accompanying text.

183. *See* Emmanuel Gaillard, *The UNCITRAL Model Law and Recent Statutes on International Arbitration in Europe and North America*, 2 ICSID REV. 424, 434 (1987) (noting "ambiguity surrounding the 'usages of the trade' concept" and that "[s]ome authors have argued that the concept encompasses *lex mercatoria*, i.e., rules of law, and not only the customary practices of the particular trade in question," but finding such a view "untenable"); *see also* Bernard Audit, *A National Codification of International Commercial Arbitration: The French Decree of May 12, 1981*, *in* RESOLVING TRANS-NATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION 117, 134 (Thomas E. Carbonneau ed., 1984) ("commercial usage has been said to differ from *lex mercatoria* in that it consists of 'practices' rather than rules properly speaking and is restricted to a given branch of trade (and sometimes to a given geographic area)"); Charles N. Brower, *Arbitrating Against Foreign Governments*, 6 J. TRANSNAT'L L. & POL'Y 189, 191 (1997) ("*lex mercatoria*, a concept reflected, *inter alia*, in Article 13(5) of the Rules of Conciliation and Arbitration of the International Chamber of Commerce, providing that '[i]n all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages'") (alteration in original); Croff, *supra* note 179, at 641 (referring to the "inclusion of lex mercatoria" in Article VII of the European Convention requiring arbitrators to "take account of . . . trade usages"); DiMatteo, *supra* note 45, at 146 ("A strong argument can be made that good faith is a universal trade usage or custom.").

184. *See* Stephen R. Bond, *How to Draft an Arbitration Clause (Revisited)*, ICC INT'L CT. OF ARB. BULL., Dec. 1990, at 14, 19, 21 (examining arbitration clauses in 237 arbitration cases submitted to ICC Court of Arbitration in 1987 and 215 submitted in 1989; none apparently changed rule on trade usages).

B. *Commercial Norms in Arbitration Statutes*

Prior to 1985, provisions in national arbitration statutes addressing the role of trade usages in resolving commercial disputes were rare.[185] Article 1496 of the 1981 French Code of Civil Procedure provided that, in international arbitrations, "[t]he arbitrator shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice, he shall decide according to the rules he deems appropriate. In all cases, he shall take into account trade usages."[186] Article 12 of the Djiboutian Code on international arbitration, adopted in 1984, contains similar language.[187] The vast majority of national laws on arbitration were silent on the issue.

Since 1985, however, that has changed dramatically. Beginning with the Netherlands Arbitration Act of 1986, twenty-eight countries have revised their arbitration laws to include provisions requiring arbitrators to consider trade usages. As shown in Table 3, twenty-nine of the fifty-eight arbitration statutes currently reported in the International Handbook on Commercial Arbitration contain such provisions.[188] Moreover, of the thirty-nine statutes revised after 1985, twenty-eight now require arbitrators to consider trade usages. The majority of arbitral statutes (eighteen of twenty-nine) that are silent on trade usages were revised prior to 1986.[189]

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185. *See* Yves Derains, *Possible Conflict of Laws Rules and the Rules Applicable to the Substance of the Dispute, in* INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, UNCITRAL'S PROJECT FOR A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 169, 174 (Pieter Sanders ed., 1984) (citing as the only two examples the French and Dijbouti laws discussed in the text); *see also* European Convention, *supra* note 162. Derains explains that "[t]he reason for this silence probably lies in the fact that the national laws have for a long time ignored the specific character of international arbitration and have refrained from recognizing it." Derains, *supra*, at 174.

186. The Arbitration Law of France, art. 1496, *reprinted in* 7 Y.B. COMMERCIAL ARB. 271, 280 (1982).

187. *See* Derains, *supra* note 185, at 174 ("In all cases, the arbitrators shall take into account contractual provisions and shall apply international trade usages").

188. *See infra* Appendix II.

189. At least one of those countries, South Africa, is considering enactment of the UNCITRAL Model Law. *See* South African Law Comm'n, *Report on an International Arbitration Act for South Africa* (July 1998) <http://www.law.wits.ac.za/salc/report/arbitration.pdf> (recommending that South Africa enact UNCITRAL Model Law).

Table 3: Arbitration Statutes on Trade Usages

Requires Consideration of Trade Usages (Non-UNCITRAL)	Follows UNCITRAL Model Law (1985)	Silent on Trade Usages
		Japan (1890)
		Greece (1971)
		Denmark (1972)
		Korea (1973)
		Israel (1974)
		South Africa (1978)
		Libya (1980)
		Malaysia (1980)
		Norway (1980)
France (1981)		Argentina (1981)
		Indonesia (1981)
		Luxembourg (1981)
		Sweden (1981)
		Turkey (1982)
		Austria (1983)
		Saudi Arabia (1983)
		Poland (1984)
		Belgium (1985)
The Netherlands (1986)	Canada (1986)	Portugal (1986)
	Cyprus (1987)	Switzerland (1987)
		Thailand (1987)
	Nigeria (1988)	Spain (1988)
	Australia (1989)	
	Scotland (1990)	United States (1990)
		Colombia (1991)
	Peru (1992)	Finland (1992)
Romania (1993)	Bermuda (1993)	
	Bulgaria (1993)	
	Mexico (1993)	
	Russian Federation (1993)	
	Tunisia (1993)	
China (1994)*	Bahrain (1994)	Czech Republic (1994)
Italy (1994)	Egypt (1994)	
	Hungary (1994)	
	Singapore (1994)	
	Ukraine (1994)	
	Kenya (1995)	Sri Lanka (1995)**
	India (1996)	England (1996)
	Malta (1996)	Brazil (1996) ***
	New Zealand (1996)	
	Zimbabwe (1996)	
	Hong Kong (1997)	
	Germany (1998)	
	Ireland (1998)	

*Requires disputes be resolved in "equitable and reasonable manner."
** Adopts UNCITRAL Model Law but changes trade usage provision.
*** Requires parties to agree.

There are at least two possible reasons for this change. First, competition among countries to serve as arbitral sites has accelerated.[190] Increasingly countries are adopting specialized international arbitration statutes to replace their previous statutes that, while applying to international arbitrations, were designed principally for domestic arbitrations.[191] It may be that this interjurisdictional competition has resulted in states adopting arbitration statutes that include provisions requiring arbitrators to consider trade usages. If so, that many, although certainly not all, of the new arbitration statutes contain such provisions supports the thesis of this article.

Second, in 1985 UNCITRAL promulgated its Model Law on International Commercial Arbitration, which significantly reduced the cost to countries of updating their arbitration statutes. Of the twenty-nine arbitration statutes listed in Table 3 as requiring arbitrators to consider trade usages, twenty-four are considered by UNCITRAL to have adopted the UNCITRAL Model Law, with some slight variations. Those countries that have adopted the UNCITRAL Model law generally have been countries without a significant history of serving as an international arbitration site.[192] This suggests that the ease of adoption played an important role in those countries' decisions to adopt the Model Law. It also counsels against drawing overly strong conclusions from inclusion in national arbitration statutes of a rule on trade usages.

The text of the arbitration statutes concerning trade usages varies in much the same way as the wording of arbitration rules does, as discussed earlier.[193] Article 28(4) of the UNCITRAL Model Law tracks the UNCITRAL Arbitration Rules: the arbitrator "shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."[194] Almost all of the countries that based their arbitration statutes on the UNCITRAL Model Law track this language. One exception is Egypt, whose statute requires the arbitrator to "decide in accordance" with both the contract and

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190. *See* DEZALAY & GARTH, *supra* note 102, at 6.

191. *See infra* Appendix II.

192. *See* De Ly, *supra* note 119, at 49 ("To a large extent, the Model Law is used by countries which have little tradition in the field of international commercial arbitration. The Model Law thus seems to fall back on its original purpose, to provide a tool for easy introduction or modernization of arbitration law . . . .").

193. *See supra* notes 176-82 and accompanying text.

194. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 152, art. 28(4).

the trade usages.[195] The Italian statute likewise seems to put contract language and trade usages on the same level.[196] The statutes of France and the Netherlands address only trade usages and require arbitrators to take them into account in all cases.[197] Sri Lanka modified the provision of the UNCITRAL Model Law to provide that "[t]he arbitral tribunal shall decide according to considerations of general justice and fairness or trade usages only if the parties have expressly authorised it do so."[198] Sri Lanka seems to have interpreted the Model Law as adopting a broad view of the meaning of trade usages (as incorporating the *lex mercatoria*) rather than a narrow one (of incorporating business practices).[199] Other countries, such as England, whose new statutes were influenced by the Model Law but do not include the provision on trade usages, seem to have had similar concerns.[200]

At best, the provisions of national arbitration laws provide uncertain support for using commercial norms to decide contract disputes. Many national laws require to varying degrees that arbitrators consider trade usages, but that requirement is by no means universal and certainly has been influenced by the UNCITRAL Model Law. None of the statutes contain any similar provision dealing with course of performance or course of dealing.

C. *Commercial Norms in Arbitral Awards*

International arbitrators likewise rely on commercial norms in making their awards. Although arbitrators often give precedence to contract provisions, in general they take a much less formalistic approach to adjudication than the trade association arbitrators examined by Professor Bernstein. This

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195. Law No. 27 for 1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters (Egypt), art. 39(3), *reprinted in* 2 HANDBOOK, *supra* note 161, at Egypt: Annex I-11.

196. *See* CODICE DI PROCEDURA CIVILE [C.P.C.] art. 834, *reprinted in* 2 HANDBOOK, *supra* note 161, at Italy: Annex I-8.

197. *See* CODE CIVIL [C.CIV.] art. 1496, *reprinted in* 2 HANDBOOK, *supra* note 161, at France: Annex I-9; Code of Civil Procedure art. 1054(4), *reprinted in* 3 HANDBOOK, *supra* note 161, at The Netherlands: Annex I-9. De Ly adds that "[t]he explanatory report to the [Dutch] arbitration bill confirmed explicitly that arbitrators in international cases may apply the *lex mercatoria*, provided that they have been authorized by the parties or failing choice of law by the parties." DE LY, *supra* note 16, at 250. This discussion refers not to the trade usages provision in the Dutch statute but to other provisions of the same article.

198. *See* Arbitration Act, No. 11 of 1995 art. 24(4), *reprinted in* 3 HANDBOOK, *supra* note 161, at Sri Lanka: Annex I-7.

199. *See supra* note 183 and accompanying text.

200. *See* Stewart R. Schackleton, *The Applicable Law in International Arbitration Under the New English Arbitration Act* 1996, 13 ARB. INT'L 375, 384-85 (1997).

section relies on two main sources for its conclusions. The first is impressionistic reports by participants in international arbitration proceedings (counsel and arbitrators) as to how international arbitrators decide cases. The second is arbitration awards themselves. Only a small, non-random sample of arbitration awards are actually published, however, and most of these awards are from ICC arbitrations. In addition, those awards are published only in a heavily edited form, such that it is difficult to tell how or to what extent the arbitrators actually relied on commercial norms in justifying their awards.[201] Thus, it is not possible to do the sort of all-inclusive examination of arbitration awards done by Professor Bernstein in her study of NGFA awards. Nonetheless, some general conclusions can be drawn from this evidence.

1. Trade Usages and Express Terms

Arbitrators in ICC arbitrations regularly cite to the ICC rule on trade usages,[202] which requires that "[i]n all cases, the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages."[203] As the arbitrator in ICC Award No. 4237 stated after citing the French arbitration statute and the ICC Rules, "[i]t goes without saying that the Arbitrator shall have regard to [the terms of the contract and the trade usages] to the extent that they do not deviate from the mandatory rules of the applicable law."[204]

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201. A further difficulty is that the stated reasons for the award may not be the actual reasons. *See* Bernstein, *Merchant Law*, *supra* note 4, at 1776 n.37.

202. *See, e.g.*, ICC Interim Award in Case No. 5314 of 1988, 20 Y.B. COMMERCIAL ARB. 35, 36, 39 (1995); ICC Final Award in Case No. 6527 of 1991, 18 Y.B. COMMERCIAL ARB. 44, 46 (1993); ICC Final Award in Case No. 5713 of 1989, 15 Y.B. COMMERCIAL ARB. 70, 71 (1990); ICC Final Award in Case No. 5485 of 18 Aug. 1987, 14 Y.B. COMMERCIAL ARB. 156, 161 (1989); ICC Award of Feb. 17, 1984, Case No. 4237, 10 Y.B. COMMERCIAL ARB. 52, 55 (1985); ICC Award of 1982, No. 2930, 9 Y.B. COMMERCIAL ARB. 105, 105 (1984); ICC Award of Feb. 16, 1983, No. 3493, 9 Y.B. COMMERCIAL ARB. 111, 117 (1984); ICC Award Made Oct. 3, 1980, Case No. 3540, 7 Y.B. COMMERCIAL ARB. 124, 128-29 (1982); ICC Award Made Nov. 29, 1980, Case No. 3380, 7 Y.B. COMMERCIAL ARB. 116, 119 (1982).

203. RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 8, art. 17(2).

204. ICC Award of Feb. 17, 1984, Case No. 4237, 10 Y.B. COMMERCIAL ARB. 52, 55 (1985); *see also* Harold J. Berman & Felix J. Dasser, *The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy*, *in* LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 53, 65 (Thomas E. Carbonneau ed., rev. ed. 1998) [hereinafter LEX MERCATORIA AND ARBITRATION] ("international arbitrators usually do not hesitate to refer to international commercial custom, including contract practices in international trade, as a basis of their award").

Nonetheless, when contract terms are clear, it may be that international arbitrators give precedence to contract terms over trade usages despite the wording of the institutional rule. Pieter Sanders has explained that in his experience in international arbitrations, "[a]rbitrators will let the contract, if it is clear, prevail."[205] As a result, Sanders concludes, the difference in wording between the ICC rule on trade usages and UNCITRAL Rule 33(3), which gives greater weight to the contract terms, "[i]n arbitral practice" may "hardly exist."[206] Arbitrators certainly indicate that the parties' contract is controlling, although only rarely does it seem to matter for the outcome of the proceeding.[207]

On the other hand, there is some indication in reported awards that international arbitrators will disregard express contract terms in light of trade usages.[208] In ICC Award No.

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205. Pieter Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 Y.B. COMMERCIAL ARB. 172, 211-12 (1977).

206. *Id.* at 212; *see also* ICC Partial Award Rendered in 1986 in Case 4840, *reprinted in* JARVIN ET AL., *supra* note 155 at 465, 472-73 (1993) ("the Tribunal rules that it will give precedence in this dispute to the rules the parties have established for their relationship, i.e. the terms of their contracts supplemented by the relevant trade usage applicable to the matter" (italics omitted)) (Jarvin commenting that "[t]he arbitrator's decision [in this award] on the applicable law is in conformity with modern practices in ICC arbitration cases").

207. *See* Mobil Oil Iran Inc. v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 3, 48 (1987):

> [T]he Claimants' references to good faith, trade usage and equity are clear indications that the present claim is not founded in law. . . . Good faith and equity do not necessarily create a duty for the other party which draws profit from such a situation to agree to amend the initial contract, at least if the contract as a whole remains profitable to both parties.

See also ICC Award Made in Case No. 2103 in 1972, 3 Y.B. COMMERCIAL ARB. 218, 218-19 (1978) (rejecting claim as "contrary to the will of the parties expressed in the contract . . . and to the customs and practice generally observed in commercial matters and particularly in international trade relations"; stating that the relevant contract provisions "are perfectly clear and explicit" and therefore "the unequivocally expressed will of the parties should be respected and . . . given their full and entire scope") (first alteration in original); ICC Final Award in Case 6829 of 1992, 19 Y.B. COMMERCIAL ARB. 167, 172 (1994):

> Cargo Handling Contract . . . has to be interpreted according to the relevant law of Luxembourg, the relevant trade usages and the general principles of law governing such contracts. . . . [I]t is the Tribunal's view (and in the end it has also been the parties' view) that the Cargo Handling Contract has to be interpreted according to its own terms, its language being the best evidence of the parties' intentions.

(second and third alterations in original).

208. *See* ICC Award Made Oct. 23, 1979, in Case No. 3316, 7 Y.B. COMMERCIAL ARB. 106, 109-10 (1982) (rejecting as unsupported by the evidence argument that, based on usage in "banking practice," "the word 'unconditional' should not be interpreted literally").

3820, the sole arbitrator looked behind the plain language of the contract on the basis of the underlying purpose of the provision and international trade practices.[209] A contract for the sale of food products provided that the buyer would open an irrevocable letter of credit in favor of the seller. The issuer of the credit, buyer's bank, agreed that it would authorize payment "provided goods have been received by opener."[210] The buyer ultimately refused to take receipt of the goods, and its bank refused payment. In an action against the bank, the arbitrator "acknowledged that, if read literally, the will of the credit opener would determine whether the beneficiary would be paid: by refusing the goods he could ensure that the condition 'goods received by opener' was not fulfilled."[211] But instead the arbitrator interpreted the credit "in accordance with the practices that apply on this subject in international trade" and rejected the plain language reading of the credit as "in conflict with the nature and the purpose of the documentary credit."[212] The arbitrator concluded that the phrase "'goods received by opener' also covers the situation that the opener could have received the goods if he had wanted to," which gave the language "a significance that is understandable and acceptable in commerce and trade."[213]

2. Trade Usages in Interpretation and Filling Gaps

When the contract is unclear or incomplete, international arbitrators rely on trade usages in a variety of ways. Arbitrators frequently consider both codified and uncodified trade usages in interpreting ambiguous or vague contract terms.[214] Arbitrators rely on codified trade usages in interpreting contract terms even when the parties have not expressly agreed that the codified

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209. ICC Award Made July 13, 1981, in Case No. 3820, 7 Y.B. COMMERCIAL ARB. 134 (1982).

210. *Id.* at 134.

211. *Id.* at 136.

212. *Id.* at 135, 136.

213. *Id.* at 136.

214. *See* Karl-Heinz Böckstiegel, *The Legal Rules Applicable in International Commercial Arbitration Involving States or State-controlled Enterprises, in* INTERNATIONAL CHAMBER OF COMMERCE, 60 YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE 117, 169 (1987) ("[trade customs] are not a separate 'applicable law,' but have to be taken into consideration by international arbitrators in interpreting contractual clauses"); JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 466 (1978):

> There are few awards which have been totally based on the amorphous standards of commercial usage and trade customs. More frequently customs and usages are looked to as support for an otherwise reached conclusion (i.e. to show the absence of any genuine conflict) or to facilitate determining what the parties actually meant in their agreement.

usages apply,[215] and they do not hesitate to rely on uncodified trade usages when they find those usages helpful.[216] Arbitrators also use trade practices to fill gaps in the parties' written contract.[217] For example, in ICC Final Award No. 4145, the arbitral tribunal "correct[ed] the Agreement of the parties by applying trade usages that are relevant" to determine an appropriate commission rate when changed circumstances invalidated the rate provided in the contract.[218] Arbitrators also rely on trade usages to evaluate the performance of the parties under their contract,[219] such as in determining whether a party's performance was reasonable or justified the other party in claiming breach.[220]

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215. BERGER, *supra* note 75, at 575 & n. 516 (citing ICC Awards No. 3130 and 3894); Ole Lando, *The Law Applicable to the Merits of the Dispute*, *in* ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 124, at 129, 146 n.92 (citing ICC Awards No. 3894 and 3281). I rely here and elsewhere on English-language descriptions of ICC awards published only in French.

216. Mustill, *supra* note 146, at 157 ("Nobody could deny that usage in [the sense of a generally followed practice] can be an important element in the assessment by a tribunal of the rights and duties created by the contract, either because in a codified or inexplicit form it is tacitly incorporated into the contract"); *see* Ad Hoc Partial Award on Liability of 12 September 1986, 15 Y.B. COMMERCIAL ARB. 11, 17 (1990) (looking to "common maritime usage" in interpreting contract language); ICC Preliminary Award in Case No. 5505 of 1987, 13 Y.B. COMMERCIAL ARB. 110, 114 (1988) (interpreting choice of law provision by deciding "[h]ow could that sentence be understood in good faith by a reasonable man active in the international trade" and looking to parties' usual practice in designating applicable law); ICC Award Made in Case 2637 in 1975, 2 Y.B. COMMERCIAL ARB. 153, 154 (1977) (explaining "common interpretation of trade terms concerning shipment sales").

217. *See* ICC Final Award in Case No. 5485 of 18 Aug. 1987, 14 Y.B. COMMERCIAL ARB. 156, 172 (1989) (relying on trade usages to determine "maximum distributable dividend" when contract was silent); Ad Hoc Award of May 29, 1979, 7 Y.B. COMMERCIAL ARB. 81, 82 (1982) (arbitrators acting as *amiables compositeurs* declined to use trade usage to fill contractual gap when party failed to prove such a usage existed).

218. ICC Final Award of 1986 in Case No. 4145, 12 Y.B. COMMERCIAL ARB. 97, 110 (1987).

219. *See* Böckstiegel, *supra* note 214, at 169 ("[trade customs] have to be taken into consideration by international arbitrators in . . . evaluating the performance of contractual parties"); LEW, *supra* note 214, at 466 ("In other cases customs and usages have been used as the applicable standard to certain specific aspects of a dispute.").

220. *See* ICC Final Award in Case No. 6527 of 1991, 18 Y.B. COMMERCIAL ARB. 44, 47-48 (1993) (relying on "practice" to define a reasonable time for opening a letter of credit when the contract had no "express stipulation as to the time for . . . opening"); ICC Final Award in Case No. 5713 of 1989, 15 Y.B. COMMERCIAL ARB. 70, 72 (1990) (relying on CISG as "reflect[ing] the generally recognized usages regarding the matter of the non-conformity of goods in international sales") (cites ICC rule on trade usages); ICC Final Award in Case No. 6076 of 1989, 15 Y.B. COMMERCIAL ARB. 83, 94-95 (1990) (relying on facts "well known within the trade"

Reliance on trade usages is particularly pronounced in arbitrations between private parties and foreign governments. For example, in the *Aramco* ad hoc arbitration between Saudi Arabia and Aramco, the arbitrators interpreted the terms of the oil concession "in their plain, ordinary and usual sense, which is the sense accepted in the oil industry."[221] Elsewhere in the award, the tribunal explained that it "cannot overlook the practices and usage of commerce, known by both Parties at the time the Agreement was signed, unless it be prepared to content itself with abstract reasoning and to lose sight of reality and of the requirements of the oil industry."[222] Nonetheless, reliance on trade usage in such arbitrations is weak evidence as to arbitral practice generally, because of the unusual nature of arbitrations between states and private parties.[223]

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to evaluate whether resale of product after breach was reasonable); ICC Award No. 2583, 1976, *quoted in* LEW, *supra* note 214, at 470:

> it suffices to refer to the usages commonly admitted on the question in the market in most countries and in particular in Libya, to judge whether one or several serious breaches by the foreman of his essential obligations justify the Spanish contractor abandoning the shipyard during the course of his work. . . .

See also ICC Final Award in Case No. 6268 of 18 May 1990, 16 Y.B. COMMERCIAL ARB. 119, 124 (1991) (looking to "industry practice" in determining whether alleged agent had authority to enter agreement to arbitrate); ICC Award in Case No. 4667 of 1984, *described in* Paul Bowden, *L'Interdiction de se Contredire au Detriment d'Autrui (Estoppel) as a Substantive Transnational Rule in International Commercial Arbitration, in* TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION 125, 133 (Emmanuel Gaillard ed., 1993) (holding company bound to contract signed by commercial director, even though beyond director's scope of authority; tribunal relied on "good faith" and "relevant trade usages").

221. Saudi Arabia v. Arabian American Oil Co. (Aramco), 27 Int'l L. Rep. 117, 179 (ad hoc arbitration Aug. 23, 1958).

222. *Id.* at 188; *see also* ICC Final Award in Case No. 3572 of 1982, 14 Y.B. COMMERCIAL ARB. 111, 116-17 (1989) (declining to apply national law, instead applying "internationally accepted principles of law governing contractual relations"; tribunal explained that this "has become common practice in international arbitrations particularly in the field of oil drilling concessions and especially to arbitrations located in Switzerland. Indeed, this practice, which must have been known to the parties, should be regarded as representing their implicit will."); Mobil Oil Iran Inc. v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 3, 27-28 (1987) (finding oil sale and purchase agreement not governed by national law of one party and instead applying general principles of international and commercial law; "[t]his conclusion is in accord with the spirit of Article 29 and with the usages of trade, as expressed in agreements between States and foreign companies, notably in the oil industry, and confirmed in several recent arbitral awards") (citing awards).

223. It may be that in such arbitrations choice of trade usages and *lex mercatoria* as the applicable law should be seen as a pre-commitment device by which countries seek to reassure their contractual partners against subsequent changes in national law. Lando, *supra* note 215, at 143-44 (explaining that clauses instructing arbitrators to apply the *lex mercatoria*

3. Duty of Good Faith

Unlike NGFA arbitrators, international arbitrators frequently rely on considerations of good faith in resolving contract disputes. International arbitral tribunals are very willing to apply the good faith requirements of national laws and to find that a contracting party has not acted in good faith.[224] Moreover, international arbitrators frequently state that parties to international contracts must act in good faith regardless of whether national law imposes such a requirement.[225] Indeed, a number of commentators have

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are often inserted in contracts between a government or government enterprise on the one hand and a private enterprise on the other. The government does not wish to submit to the laws of a foreign state. A private party will not wish to have the contract governed by the laws of the foreign government since they may be changed to his disadvantage after the contract is made.)

But see Georges R. Delaume, *The Myth of the Lex Mercatoria and State Contracts, in* LEX MERCATORIA AND ARBITRATION, *supra* note 204, at 111. *Cf.* Geoffrey P. Miller, *Choice of Law as a Precommitment Device, in* THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed., 1999).

224. *See* Cairo Regional Centre for International Commercial Arbitration Final Award of 21 Dec. 1995, 22 Y.B. COMMERCIAL ARB. 13, 17-18 (1997) (Egyptian law); Hamburg Chamber of Commerce Partial Award of 21 March 1996, 22 Y.B. COMMERCIAL ARB. 35, 42 (1997) (German law) ("The general principle of good faith also applies to international contracts for the delivery of goods by installments."); ICC Final Award in Case No. 8362 of 1995, 22 Y.B. COMMERCIAL ARB. 164, 168-69 (1997) (New York law); Ad Hoc UNCITRAL Award of 17 November 1994, 21 Y.B. COMMERCIAL ARB. (1996) 13, 34 ("good faith is among the basic legal principles common to all Arab countries"); ICC Final Award in Case No. 6283 of 1990, 17 Y.B. COMMERCIAL ARB. 178, 181 (1992) ("the Arbitral Tribunal considers that defendant did not execute its contractual obligations in good faith and has therefore breached the Agreement"); ICC Partial Award in Case No. 5073 of 1986, 13 Y.B. COMMERCIAL ARB. 53, 65 (1988) ("the good faith that claimant owed to defendant in the performance of the contract as extended 9 March 1983, obligated it to provide more ample notice of termination than it in fact did"); ICC Award on the Merits (of December 29, 1972) Made in Case No. 2114, 5 Y.B. COMMERCIAL ARB. 189, 190 (1980) ("present dispute is exactly the type of case where good faith is of utmost importance").

225. *See* Ad Hoc Award of April 1982, 8 Y.B. COMMERCIAL ARB. 94, 116 (1983) (argument "contradicts both the general principle of good faith and the fundamental principle *pacta sunt servanda*, both principles forming the basis of all contractual relations, particularly in international affairs, and which are specifically enshrined in international commercial usages and international law"); ICC Partial Award Made (June 14, 1979) in Case No. 3267, 7 Y.B. COMMERCIAL ARB. 96, 100 (1982) ("the abruptness of this deduction without advance warning other than a notice sent simultaneously with the making of such deduction does not appear in keeping with the good faith spirit which should have prevailed in the performance of the Contract") (arbitrators authorized to act as "*amiable compositeurs*"); Arbitral Tribunal of Hamburg Friendly Arbitration Award of January 15, 1976, 3 Y.B. COMMERCIAL ARB. 212, 213 (1978) ("the forementioned principles are not based on German rules of law, but are rather a consequence of the principle of good faith in trade. These principles have because of their

identified a duty of good faith as one of the general principles of international trade law developed in international arbitration proceedings.[226]

4. The *Lex Mercatoria*

Some commentators find a "discernable trend in arbitral practice that supports the proposition that arbitrators, in the absence of a choice of law by the parties, may apply the so-called *lex mercatoria*, without the need to justify this measure by reference to any national conflict rule."[227] As discussed above, the *lex mercatoria*—or law merchant—incorporates trade usages as well as general principles of international trade law, depending on how the phrase is defined.[228] A number of published awards have applied the *lex mercatoria* as applicable law, even when parties have not so agreed.[229] Some arbitrators find their

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character a supra-national validity"); ICC Award Made in Case No. 1784 in 1975, 2 Y.B. COMMERCIAL ARB. 150, 150 (1977) ("requirement of good faith which should govern the determination of the parties' obligations and their fulfillment, particularly when the agreement involved is an international contract").

226. *See* Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579, 590 (1985) ("ICC arbitrators consider the good faith obligation as part of international commercial usages"); Bernardo M. Cremades, *Practitioners' Notebook: The Impact of International Arbitration on the Development of Business Law*, 31 AM. J. COMP. L. 526, 527 (1983) ("Arbitral decision making has developed good faith as an overriding rule of international contracting"); Mustill, *supra* note 146, at 174 & n.88 (identifying *lex mercatoria* as including rule, among others, that "[a] contract should be performed in good faith"); BERGER, *supra* note 75, at 544 (listing "bona fides" as "one of constituent elements" of *lex mercatoria*); KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA Annex I at 278 (1998) ("*[t]he parties must act in accordance with the standard of good faith and fair dealing in international trade*") (italics in original); CRAIG ET AL., *supra* note 109, at 624 ("Performance and renegotiation in good faith"); SCHMITTHOFF, *supra* note 16, at 47. *But see generally* Note, *General Principles of Law in International Commercial Arbitration*, 101 HARV. L. REV. 1816 (1988) (not mentioning good faith). For detailed discussion of other such general principles, see TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION 125, 133 (Emmanuel Gaillard ed. 1993); BERGER, *supra*, at Annex I at 278 .

227. OKEZIE CHUKWUMERIJE, CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 130 (1994).

228. *See* CRAIG ET AL., *supra* note 109, at 603, 607-19; *see supra* note 183 and accompanying text.

229. *See* Paris Chamber of Arbitration Award in Case No. 9246 of 8 Mar. 1996, 22 Y.B. COMMERCIAL ARB. 28, 31 (1997) ("the arbitral tribunal deems it more proper to refer to the body of rules of international commerce which have been developed by practice and affirmed by the national courts (lex mercatoria)"); ICC Interim Award in Case No. 5314 of 1988, 20 Y.B. COMMERCIAL ARB. 35, 40 (1995) ("the Arbitral Tribunal decides: 1. The American law generally and the law of the State of Massachusetts in particular, supplemented if needed by the *lex mercatoria*, is the law applicable to the dispute"); Compania Valenciana de Cementos Portland v. Primary Coal, Inc., ICC Interim Award of 1 September 1988,

authority to do so in the trade usage provision of the ICC Rules.[230] The number of reported arbitral awards that address the *lex mercatoria* may be misleading, however, in light of the much larger number of unreported arbitral awards that evidently do not.[231]

Other awards refuse to apply the *lex mercatoria* absent agreement of the parties.[232] Such agreement is extremely rare. Stephen Bond's study of the arbitration agreements of parties involved in ICC arbitrations in 1987 and 1989 found that only a handful selected "general principles" of law to govern the parties' dispute and none specified the *lex mercatoria* to be the basis for the arbitrators' decision.[233] Only three percent of the clauses in 1987 and four percent in 1989 authorized the arbitrators to decide in equity (*ex aequo et bono* or as *amiable compositeur*).[234] Instead, a substantial majority of clauses (seventy-five percent in

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described in CHUKWUMERIJE, *supra* note 227, at 131-32 (applying *lex mercatoria* in absence of choice of law by parties); ICC Award Made Oct. 3, 1980, Case No. 3540, 7 Y.B. COMMERCIAL ARB. 124, 129 (1982) ("tribunal, upon careful consideration, holds that . . . the application of the '*lex mercatoria*' should be used here") (arbitrators deciding as *amiables compositeurs*); *see also* CRAIG ET AL., *supra* note 109, at 296 & n.44 (citing ICC Awards No. 1641, 1859, and 3267).

230. *See* ICC Interim Award in Case No. 5314 of 1988, 20 Y.B. COMMERCIAL ARB. 35, 39 (1995)("Whereas, on the other hand, Art. 13(5) of the ICC rules obliges the arbitrators to take account of the relevant trade usages. Whereas the *lex mercatoria* takes its source in the trade usages and in the principles generally applicable in international trade." (citation omitted)); *id.* at 40 (tribunal decides that applicable law shall be "supplemented if needed by the *lex mercatoria*"); ICC Award Made Nov. 29, 1980, Case No. 3380, 7 Y.B. COMMERCIAL ARB. 116, 119 (1982) ("It is not excluded that these general principles [of law and justice under the contract] are, partly, the same as the 'trade usages,' which arbitrators have to take into account anyway, according to" the ICC Rules).

231. *See* CRAIG ET AL., *supra* note 109, at 300 n.58 ("by comparison with the number of cases submitted to (ICC) arbitration *lex mercatoria* appears only rarely . . . one should not come away with the impression that most ICC arbitrations, or even a large proportion of them, refer to *lex mercatoria*") (quoting then-General Counsel of ICC in 1986); *see also* DEZALAY & GARTH, *supra* note 102, at 41-42 (describing "polarization between academics and practitioners" over concepts such as *lex mercatoria*).

232. *See* ICC Interim Award in Case No. 6149 of 1990, 20 Y.B. COMMERCIAL ARB. 41, 56-57 (1995); ICC Interim Award of 1985 in Case No. 4650, 12 Y.B. COMMERCIAL ARB. 111, 112 (1987).

233. *See* Bond, *supra* note 184, at 19; *see also* Barton S. Selden, Lex Mercatoria *in European and U.S. Trade Practice: Time to Take a Closer Look*, 2 ANN. SURV. INT'L & COMP. L. 111, 113-14 (1995) (reporting results of "extremely unscientific . . . survey" of international lawyers):

> Virtually every recipient replied that he had not had a client enter into a contract incorporating *lex mercatoria* as a choice of law in the past ten years. Most went on to add that they would strongly advise against such a provision, if a client were foolish enough to propose it.

234. *See* Bond, *supra* note 184, at 19.

1987 and sixty-six percent in 1989) identified a particular national law as governing the contract.[235]

When arbitrators rely on the *lex mercatoria*, they readily consider good faith and similar considerations in making their decisions. A leading example is the *Norsolor* award of 1979.[236] In *Norsolor*, the Turkish claimant sought damages for breach of an agency agreement by the French respondent. The contract did not provide for a particular national law to govern; accordingly, the arbitrators "considered that it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legislation, be it Turkish or French, and to apply the international *lex mercatoria*."[237] One principle that "inspires" the *lex mercatoria*, according to the arbitrators, "is that of the good faith which must preside the formation and the performance of contracts."[238] Because respondent's conduct "was scarcely compatible with the maintaining of good commercial relations," the tribunal found it liable for breach of contract.[239]

5. Prior Dealings Between the Parties

The evidence on the use of prior dealings in arbitral awards is much more meager than that on trade usages. Prior dealings between the parties as the basis for the arbitrator's decision are rarely discussed in the international arbitration literature.[240] This does not mean that they are irrelevant to the arbitrators' decisions; it merely means that the subject is of less academic interest. The ongoing debate on *lex mercatoria* makes trade usages highly topical; dealings between the parties are much less germane to that debate. Nonetheless, the apparent absence of

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235. *See id.*

236. Pabalk Ticaret Limited Sirketi v. Norsolor S.A., ICC Award of Oct. 26, 1979, No. 3131, 9 Y.B. COMMERCIAL ARB. 109 (1984) [hereinafter *Norsolor*]. The award ultimately was upheld by the Supreme Court of Austria. *See* Norsolor S.A. v. Pabalk Ticaret Ltd. (Oberster Gerichtshof, Nov. 18, 1982), 9 Y.B. COMMERCIAL ARB. 159 (1984). For another example, see ICC Case No. 2291 (1976), *described in* DE LY, *supra* note 16, at 263 (according to De Ly, the "tribunal revised freight tariffs on the basis of the principle of the *lex mercatoria* or *rebus sic stantibus* and according to which in international commercial transactions a certain contractual balance should exist between the mutual obligations of the parties").

237. *Norsolor*, *supra* note 236, at 110.

238. *Id.*

239. *Id.* at 111.

240. For one exception, see Alexsandar Goldštajn, *Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention*, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 55, 99 (Petar Šarčević & Paul Volken eds., 1986) (listing "hierarchical ranks of the sources of *lex mercatoria*" as the contract followed by "the practice established between the contracting parties").

such discussions in publications by arbitrators and academics is noteworthy.

On occasion, arbitral tribunals will rely on prior dealings or conduct of the parties in resolving contract disputes. The most frequent reported use of parties' conduct has been by the Iran-United States Claims Tribunal,[241] which has relied on prior conduct in deciding issues of contract interpretation, performance, and waiver.[242] The Tribunal was established by agreement of the governments of Iran and the United States[243]

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241. Jacomijn J. van Hof states that although the Iran-U.S. Claims Tribunal has considered codified trade practices in its awards, "there are no cases where (trade specific) uncodified customs and usages were applied." JACOMIJN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES: THE APPLICATION BY THE IRAN-U.S. CLAIMS TRIBUNAL 268-69 (1991). This seems to be somewhat of an overstatement. *See* Lockheed Corp. v. Iran, 18 Iran-U.S. Cl. Trib. Rep. 292, 316 (1988):

> In such transactions, a seller's risk of loss or damage to goods customarily does not extend beyond the point at which its liability for transportation or insurance costs ceases. The Tribunal has no reason to believe, and the IAF has not asserted, that Lockheed accepted any greater risk of loss here.

See also Anaconda-Iran, Inc. v. Iran, 13 Iran-U.S. Cl. Trib. Rep. 199, 233 (1986) (requiring parties to "brief in their future pleadings . . . the relevant usages of the trade in respect of contractual limitations of remedies similar to the provisions contained in Article 9 of the TAA"); General Dynamics Corp. v. Iran, 5 Iran-U.S. Cl. Trib. Rep. 386, 394 (1984) (contract did not require Navy to pay customs broker fee and "[t]he Tribunal is not satisfied that under the circumstances of the transaction the Navy would be liable for such costs pursuant to trade usage").

242. *See* GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 286-92 (1996) (describing awards); *see also* Uiterwyk Corp. v. Iran, 19 Iran-U.S. Cl. Trib. Rep. 106, 122 (1988) (finding agency relationship "in which the respective roles of the parties were evidenced by long and consistent practice"); First Travel Corp. v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 360, 367, 368 (1985) ("Tribunal can have recourse to a number of . . . aids to interpretation where the plain terms of the contract are inconclusive," including trade usage and "conduct of the Parties and their subsequent practice"; finding neither source helpful in this case). For a non-Tribunal example, see Ad Hoc Final Award of 20 Nov. 1987, 14 Y.B. COMMERCIAL ARB. 47, 66 (1989) (finding against defendant on ground that defendant's practice on contract at issue was "contrary to the defendant's practice on other contracts").

243. *See* Declaration of the Government of the Democratic and Popular Republic of Algeria (Jan. 19, 1981), and Declaration of the Government and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of America and the Government of the Islamic Republic of Iran (Jan. 19, 1981) ("Claims Settlement Declaration"), *reprinted in* ALDRICH, *supra* note 242, at Annex I at 541-49. Article V of the Claims Settlement Declaration provides: "The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances." *Id.* at 547. For discussion of choice of law issues generally before the Tribunal, see John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 AM. J. INT'L L. 278 (1989).

and is not the product of the market competition described previously.[244] Nonetheless, a number of the arbitrators at the Tribunal participated in international commercial arbitrations both before serving at the Tribunal and after. Given that all Tribunal awards are published, one would expect that concerns about their reputations as prospective arbitrators would induce at least those arbitrators considering a return to private practice to decide cases at the Tribunal so as to signal how they would decide cases thereafter.

Overall, this evidence is based on a non-random sample of awards and other sources and is subject to a number of caveats discussed previously.[245] Nonetheless, the available evidence suggests that the sort of formalistic decisionmaking found by Professor Bernstein in NGFA arbitrations is not the usual practice in international commercial arbitration. International arbitrators appear to rely to a significant degree on trade usages in resolving contract disputes; however, they rely only to a much lesser degree on the parties' prior dealings.[246]

V. CONCLUSION

This article has examined the role of commercial norms—as reflected in trade usages and the parties' prior dealings—in resolving contract disputes in international commercial arbitration. Reliance on commercial norms has costs: it restricts the ability of contracting parties to allocate part of their agreement to extra-legal means of enforcement. Yet it also has benefits, particularly for generalist decisionmakers for whom commercial norms provide necessary information about the parties' agreement. International commercial arbitration provides a useful source of evidence to help in resolving the empirical

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244. *See supra* notes 102-14 and accompanying text.

245. I did not include arbitration awards from countries with non-market economies when the arbitrators were not subject to the competition described previously. *See* LEW, *supra* note 214, at 28-29 (senior officials in chambers of commerce in socialist countries were "appointed by the Ministry of Foreign Trade"); *see also supra* notes 134-41 and accompanying text. Even so, those arbitration tribunals did at least make "references" to usage and custom, *see* LEW, *supra* note 214, at 472-74, as well as prior dealings between the parties, *see* Court of Arbitration of Chamber of Foreign Trade of the German Democratic Republic Award of May 26, 1982, 9 Y.B. COMMERCIAL ARB. 103, 103 (1984).

246. The lesser reliance on the parties' prior dealings as compared to trade usages may be due to greater costs and perhaps smaller benefits of such reliance. The parties' prior dealings will more likely reflect relational aspects of their deal than usages of the trade; giving legal sanction to prior dealings thus may be more likely to impose costs of the sorts identified by Professor Bernstein. Conversely, the parties' prior dealings may provide less information about the parties' agreement than trade usages, although the UCC seems to assume otherwise. *See* UCC § 2-208 & cmt. 1.

question of whether the costs outweigh these benefits, because it is consensual, resembles adjudication in public courts in important ways, and is a highly competitive business.

International arbitration rules and statutes frequently direct arbitrators to consider trade usages; some statutes and rules even seem to give trade usages the same weight as the express terms of the parties' contract. International arbitrators likewise readily consider trade usages in resolving contract disputes, assisting them in interpreting contract provisions, filling gaps in the contract, evaluating the parties' performance, and sometimes even in altering seemingly clear contract language. International arbitrators also commonly evaluate whether a contracting party has acted in good faith or in a reasonable manner, which often may require a resort to trade practices. By contrast, arbitral rules and statutes never address the role that prior dealings between the parties should play in an arbitrator's decision, and published arbitral awards only infrequently consider prior dealings in resolving contract disputes. Overall, the evidence presented here, while largely impressionistic, provides at least some support for the incorporation of commercial norms—as reflected in trade usages but not in the parties' prior dealings—into commercial laws such as the CISG and the UCC.

APPENDIX I:

International Arbitration Rules on Trade Usages

UNCITRAL Arbitration Rules (1976)

See art. 33(3), *reprinted in* REISMAN ET AL. 623, 639:

> "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

American Arbitration Association (AAA) (1997)

See art. 28(2), *reprinted in* REISMAN ET AL. 493, 508:

> "In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract."

Australian Centre for International Arbitration

Adopts UNCITRAL Rules. *See UNCITRAL Arbitration Rules* (visited Jan. 4, 2000) <http://www.acica.com.au/rules.htm>.

Belgian Centre for Arbitration & Mediation (CEPANI)

No provision. *See Belgian Centre for Arbitration and Mediation* (visited Jan. 4, 2000) <http://www.cepani.be/ english.html>.

British Columbia International Commercial Arbitration Centre

Follows UNCITRAL Rules. *See BCICAC Rules*, art. 30(5) (visited Jan. 4, 2000) <http://www.bcicac.com/cfm/index.cfm?L=91&P=99>.

Cairo Regional Centre for International Commercial Arbitration (CRCICA)

Follows UNCITRAL Rules. *See CRCICA Rules*, art. 33(3) (last modified Mar. 11, 1998) <http://www.crcica.org.eg/crcica98.htm#ArbitrationRules>.

Central Chamber of Commerce of Finland

No provision. *See Rules of the Board of Arbitration of the Central Chamber of Commerce of Finland* (last modified Aug. 28, 1999) <http://www.keskuskaup pakamari.fi/lakiasiat/vlkrules.html>.

Chamber of Commerce and Industry of Geneva (CCIG)

No provision. *See* Chamber of Commerce and Industry of Geneva (CCIG) Arbitration Rules (1992), *reprinted in* 18 Y.B. COMMERCIAL ARB. 195 (1993).

Chamber of Commerce and Industry of the Russian Federation

Follows UNCITRAL Rules. *See* International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Arbitration Rules § 13(1) (1995), *reprinted in* 21 Y.B. COMMERCIAL ARB. 265, 270 (1996).

Chamber of Commerce, Industry and Agriculture of Panama

Follows UNCITRAL Rules. *See Center for Conciliation and Arbitration of the Chamber of Commerce, Industry and Agriculture of Panama*, art. 58(2), *reprinted in* 4A WORLD ARB. REP. 5034, 5051:

> "The arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account commercial usages applicable to the case."

Chicago International Dispute Resolution Association (CIDRA)

Follows UNCITRAL Rules. *See The Arbitration Rules of CIDRA*, art. 32(3) (last modified July 20, 1999) <http://www.cidra.org/rules.html#32>.

China International Economic and Trade Arbitration Commission (CIETAC)

See China International Economic and Trade Arbitration Commission Arbitration Rules, art. 53 (1998) <http://sunflower.singnet.com.sg/~arbiter/cietez.htm#tc60>:

> "The arbitration tribunal shall independently and impartially make its arbitral award on the basis of the facts, in accordance with the law and the terms of the contracts, with reference to international practices and in compliance with the principle of fairness and reasonableness."

Commercial Arbitration and Mediation Center for the Americas

See Mediation and Arbitration Rules, art. 30(2), *reprinted in* 22 Y.B. COMMERCIAL ARB. 320, 340 (1997):

> "In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract."

CPR Institute for Dispute Resolution

See rule 10, *reprinted in* REISMAN ET AL. 676, 687:

> "10.1 The Tribunal shall apply the substantive law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the Tribunal shall apply such law or laws as it determines to be appropriate."
>
> "10.2 Subject to Rule 10.1, in arbitrations involving the application of contracts, the Tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract."

Croatian Chamber of Economy

Follows UNCITRAL Rules. *See Zagreb Rules*, art. 38(3) (effective May 7, 1992) <http://www.hgk.hr/komora/sud/rules.htm#Start>.

Danish Institute of Arbitration

No provision. *See Rules of Procedure of the Danish Institute of Arbritation* (visited Jan. 24, 2000) <http://www.denarbitra.dk/rulesp.html>).

Economic and Agricultural Chambers of the Czech Republic

See The Rules, § 8(1) (visited Jan. 4, 2000) <http:www.arbcourt.cz/E_index.htm>:

> "The Arbitration Court shall decide disputes in accordance with the rules of the applicable material law, guiding themselves, within the scope thereof, by the contract concluded between the parties and having regard to the custom of trade."

Estonian Chamber of Commerce and Industry

See Rules of the Arbitration Court of the Estonian Chamber of Commerce and Industry, art. 16 (modified Oct. 20, 1998) <http://www.koda.ee>:

> "In settling a dispute the actions of the Arbitration Court shall be guided by the provisions of substantive law, the terms of the contract, common practice and the present regulations."

Euro-Arab Chambers of Commerce

No provision. *See Rules of Conciliation, Arbitration and Expertise, reprinted in* 11 Y.B. COMMERCIAL ARB. 228 (1986).

Federal Economic Chamber (Vienna)

See The New Rules of Arbitration and Conciliation of the International Arbitral Centre of the Federal Economic Chamber Vienna (Vienna Rules), art. 16(1), *reprinted in* 18 Y.B. COMMERCIAL ARB. 206, 214 (1993):

> "In any case, the arbitrators shall observe the contract and the usages of trade applicable to the transaction."

G.C.C. Commercial Arbitration Centre

See Arbitral Rules of Procedure, art. 28(4) (last modified Oct. 23, 1998) <http://www.gccarbitration.com>:

> "The tribunal shall settle disputes in accordance with the following:
>
> 1. The contract concluded between the two parties as well as any subsequent agreement between them.
> 2. The law chosen by the parties.
> 3. The law having most relevance to the issue of the dispute in accordance with the rules of the conflict of laws deemed fit by the Tribunal.
> 4. Local and international business practices."

German Institution of Arbitration

Follows UNCITRAL Rules. *See Arbitration Rules*, § 23.4 (visited Jan. 4, 2000) <http://www.dis-arb.de>.

Hong Kong International Arbitration Centre

Recommends UNCITRAL Rules. *See Recommended Mediation and Arbitration Clauses* (last modified Aug. 20, 1999) <http://www.hkiac.org/services.htm>.

Hungarian Chamber of Commerce

See Rules of Procedures of the Court of Arbitration, art. 13(4), *reprinted in* 20 Y.B. COMMERCIAL ARB. 295, 301 (1995):

> "In each case, the arbitral tribunal makes its decisions in compliance with the stipulations of the contract and by taking into consideration applicable commercial customs."

Indian Society of Arbitrators

See Rules of Arbitration and Conciliation of Indian Society of Arbitrators, New Delhi, art. 13.5 (visited Jan. 4, 2000) <http://www.singhania.com/ca/appen_2_03. html>:

> "In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages."

Institute of Arbitrators & Mediators Australia

Adopts UNCITRAL Rules. *See Rules for the Conduct of Commercial Arbitration*, rule 20 (visited Jan. 4, 2000) <http://www.instarb.com.au/rules.htm>.

Institute of Arbitration (Belgium)

No provision. *See* <http://www.eco.be/institut/regleng.htm> (webpage no longer available, copy on file with author).

Inter-American Commercial Arbitration Commission (IACAV)

See Rules of Procedure of the Inter-American Commercial Arbitration Commission, art. 33(3) (1982), *reprinted in* REISMAN ET AL. 585, 603:

> "In all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

International Chamber of Commerce (ICC)

See Rules of Arbitration, art. 17(2) (1998), *reprinted in* CRAIG ET AL. 111:

> "In all cases, the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages."

Italian Association for Arbitration

See Rules for International Arbitration, art. 22(3), *reprinted in* 21 Y.B. COMMERCIAL ARB. 230, 240 (1996):

> 'In all cases, the arbitrator shall take into account the provisions of the contract and the customs concerning the matter in dispute."

Japan Commercial Arbitration Association (JCAA)

No provision. *See* 20 Y.B. COMMERCIAL ARB. 285 (1995).

Korean Commercial Arbitration Board (KCAB)

No provision. *See Commercial Arbitration Rules of KCAB* (visited Jan. 4, 2000) <http://www.kcab.org/e/kcab2.html>.

Kuala Lumpur Regional Centre for Arbitration

Adopts UNCITRAL Rules. *See Rules for Arbitration*, rule 1(1) (visited Jan. 4, 2000) <http://www.klrca.org/rules/index.html>.

Latvian Chamber of Commerce and Industry

Adopts UNCITRAL Rules. *See Arbitration* (visited Jan. 4, 2000) <http://sun.lcc.org.lv/Chamber-pages/arbitration.html>.

London Court of International Arbitration

No provision. *See* <http://www.lcia-arbitration.com/town/square/xvc24/rulecost/english.htm>.

Milan Chamber of National and International Arbitration

See International Arbitration Rules, art. 13, *reprinted in* 21 Y.B. COMMERCIAL ARB. 247, 255 (1996):

> "In any case the arbitrator shall take into account the provisions of the contract and trade usages."

Ministry of Justice (Thailand), Arbitration Institute

See Arbitration Rules, rule 28 (last modified Dec. 20, 1999) <http://www.oja.go.th/Nnidex.htm>:

> "The arbitral tribunal shall decide in accordance with legal principle and the rule of justice. In the interpretation of contract, the tribunal shall take into account its enforceability and the usages of trade applicable to the transaction."

Netherlands Arbitration Institute

See Arbitration Rules, art. 47, *reprinted in* 13 Y.B. COMMERCIAL ARB. 205, 224 (1998):

> "In all cases the arbitral tribunal shall take into account any applicable trade usages."

Portuguese Chamber of Commerce & Industry

See Rules of the Arbitral Tribunal, art. 28 (visited Jan. 4, 2000) <http://www.internationaladr.com/portugal1.htm#Arbitral Rules>:

> "The tribunal shall always, in the award, take in consideration the trade usage."

Singapore International Arbitration Centre (SIAC):

No provision. *See Arbitration Rules* (last modified July 21, 1999) <http://siac.tdb.gov.sg/rules.html>.

Spanish Court of Arbitration

Adopts UNCITRAL Rules. *See Working Statutes of the Spanish Court of Arbitration*, art. 3, *in* 4A WORLD ARB. REP. 5279, 5280 (1982).

Stockholm Chamber of Commerce

No provision. *See Rules of the Arbitration Institute of the Stockholm Chamber of Commerce* (1999) (visited Jan. 24, 2000) <http://www.chamber.se/arbitration/english/rules/scc_ rules_cont.html>.

Vietnam International Arbitration Centre (VIAC)

See Arbitration Rules, art. 23, *reprinted in* 21 Y.B. COMMERCIAL ARB. 288, 293 (1996):

> "The arbitral tribunal or the sole arbitrator, as the case may be, shall settle the dispute on the strength of the terms and conditions of the original contract, if the dispute arise from relations thereunder, in accordance with the law applicable to it and with any related international treaty, taking into account the trade usages and international practice."

World Intellectual Property Organization (WIPO)

See WIPO Arbitration Rules, art. 59(a), *reprinted in* 20 Y.B. COMMERCIAL ARB. 340, 361 (1995):

"In all cases, the Tribunal shall decide having due regard to the terms of any relevant contract and taking into account applicable trade usages."

Zurich Chamber of Commerce

No provision. *See International Arbitration Rules of Zurich Chamber of Commerce* (visited Jan. 4, 2000) <http://www.zurichcci.ch/>.

Sources: The sources for the rules are as follows: W. MICHAEL REISMAN ET AL., DOCUMENTARY SUPPLEMENT TO INTERNATIONAL COMMERCIAL ARBITRATION: CASES MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES (1997) (REISMAN ET AL.); YEARBOOK OF COMMERCIAL ARBITRATION (Y.B. COMMERCIAL ARB.); PARKER SCHOOL OF FOREIGN & COMPARATIVE LAW, WORLD ARBITRATION REPORTER (1997) (WORLD ARB. REP.); W. LAURENCE CRAIG ET AL., ANNOTATED GUIDE TO THE 1998 ICC ARBITRATION RULES WITH COMMENTARY (1998) (CRAIG ET AL.); and various Internet sources, as indicated.

APPENDIX II:

International Arbitration Statutes on Trade Usages

UNCITRAL Model Law on International Commercial Arbitration (1985)

Art. 28(4):

> "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

Argentina (1981)

No provision.

Australia (1989)

Adopts UNCITRAL Model Law. *See* International Arbitration Act, 1974, §§ 15(1), 16(1) (1992) (Austl.), *reprinted in* 1 HANDBOOK at Australia: Annex II-5 to -6.

Austria (1983)

No provision.

Bahrain (1994)

Adopts UNCITRAL Model Law. *See* Decree Law No. 9 of 1994 with Respect to Promulgation of International Commercial Arbitration (Bahr.), art. 1, *reprinted in* 1 HANDBOOK at Bahrain: Annex I-1.

Belgium (1985)

No provision.

Bermuda (1993)

Adopts UNCITRAL Model Law. *See* The Bermuda International Conciliation and Arbitration Act 1993, § 23(1) *reprinted in* 1 HANDBOOK at Bermuda: Annex I-7.

Brazil (1996)

See Law No. 9.307 of 23 Sept. 1996, art. 2, para. 2 (Braz.), *reprinted in* 1 HANDBOOK at Brazil: Annex I-1:

> "The parties may also agree that the arbitration shall be conducted under the general principles of law, customs and usages, and international rules of trade."

Bulgaria (1993)

Follows UNCITRAL Model Law. *See* Law on International Commercial Arbitration, art. 38(3) (1988), *amended by* Law Amending the Law on International Commercial Arbitration (1993) (Bulg.), *reprinted in* 1 HANDBOOK at Bulgaria: Annex 1- 6:

> "In all cases the arbitral tribunal shall apply the terms of the contract and shall take into account trade usages."

Canada (1986)

Federal: Adopts UNCITRAL Model Law. *See* Commercial Arbitration Act, R.S.C., ch. C-34.6, § 5(1) (1985) (Can.), *reprinted in* 1 HANDBOOK at Canada: Annex I-2.

Quebec: Follows UNCITRAL Model Law. *See* An Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration, S.Q. 1986, ch. 73, art. 944.10 (Can.), *reprinted in* 1 HANDBOOK at Canada: Annex III-4:

> "[The arbitrators] shall in all cases decide according to the stipulations of the contract and take account of applicable usage."

British Columbia: Follows UNCITRAL Model Law. *See* British Columbia International Commercial Arbitration Act, R.S.B.C. 1996, ch. 233, § 28(5), *reprinted in* 1 HANDBOOK at Canada: Annex V-10.

Ontario: Adopts UNCITRAL Model Law. *See* Ontario International Commercial Arbitration Act, R.S.O. 1990, ch. I-9, § 2, *reprinted in* 1 HANDBOOK at Canada: Annex VII-1.

People's Republic of China (1994)

See Arbitration Law of the People's Republic of China, art. 7, *reprinted in* 1 HANDBOOK at P.R. China: Annex II-1:

> "In arbitration, disputes shall be resolved on the basis of facts, in compliance with law and in an equitable and reasonable manner."

Colombia (1991)

No provision.

Cyprus (1987)

Adopts UNCITRAL Model Law. *See* The International Commercial Arbitration Law, 1987 (Cyprus), *reprinted in* 1 HANDBOOK at Cypress: Annex I-1 to -3.

Czech Republic (1994)

No provision.

Denmark (1972)

No provision.

Egypt (1994)

Follows UNCITRAL Model Law. *See* Law No. 27 for 1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, art. 39(3) (Egypt), *reprinted in* 2 HANDBOOK at Egypt: Annex I-11:

> "The arbitral panel, when adjudicating the merits of the dispute, shall decide in accordance with the terms of the contract in dispute and the usages of the trade applicable to the transaction."

England (1996)

No provision.

Finland (1992)

No provision.

France (1981)

See C.CIV., art. 1496 (Fr.), *reprinted in* 2 HANDBOOK at France: Annex I-9:

> "In all cases [the arbitrator] shall take into account trade usages."

Greece (1971)

No provision.

Germany (1998)

Follows UNCITRAL Model Law. *See* § 1051, para. 4 ZPO (F.R.G.), *reprinted in Full Text of the New German Arbitration Law in Force as of 1 January 1998*, 14 ARB. INT'L 1, 11 (1998):

> "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

Hong Kong (1997)

Adopts UNCITRAL Model Law. *See* Arbitration Ordinance, art. 34C(1) (H.K.), *reprinted in* 2 HANDBOOK at Hong Kong: Annex I-27.

Hungary (1994)

Follows UNCITRAL Model Law. *See* Act LXXI of 1994 on Arbitration, § 50 (Hung.), *reprinted in* 2 HANDBOOK at Hungary: Annex I-14:

> "The arbitral tribunal shall decide in accordance with the terms of the contract as well as by taking into account the trade practices applicable to the transaction."

India (1996)

Follows UNCITRAL Model Law. *See* The Arbitration and Conciliation Ordinance, 1996, No. 8 of 1996, art. 28(3) (India) (identical text), *reprinted in* 2 HANDBOOK at India: Annex I-12.

Indonesia (1981)

No provision.

Ireland (1998)

Adopts UNCITRAL Model Law (text unavailable; parliamentary debates do not indicate any change to UNCITRAL provision on trade usages).

Israel (1974)

No provision.

Italy (1994)

See C.P.C., art. 834 (Italy), *reprinted in* 2 HANDBOOK at Italy: Annex I-8:

> "In both cases the arbitrators shall take into account the provisions of the contract and trade usages."

Japan (1890)

No provision.

Kenya (1995)

Follows UNCITRAL Model Law. *See* The Arbitration Act, 1995, No. 4 of 1995, art. 29(5) (Kenya), *reprinted in* 2 HANDBOOK at Kenya: Annex I-10:

> "In all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction."

Korea (1973)

No provision.

Libya (1980)

No provision.

Luxembourg (1981)

No provision.

Malaysia (1980)

No provision.

Malta (1996)

Follows UNCITRAL Model Law. *See* Arbitration Act 1996, No. II of 1996, art. 45(3) (Malta), *reprinted in* 3 HANDBOOK at Malta: Annex I-15:

> "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall, if relevant, take into account the usages of the trade applicable to the transaction."

Mexico (1993)

Follows UNCITRAL Model Law. *See* Decree Containing Amendments and Diverse Additional Provisions Made to the Commercial Code and the Federal Code of Civil Procedure, July 22, 1993, art. 1445(4) (Mex.) (similar text), *reprinted in* 3 HANDBOOK at Mexico: Annex I-9.

The Netherlands (1986)

See Code of Civil Procedure, art. 1054(4) (Neth.), *reprinted in* 3 HANDBOOK at the Netherlands: Annex I-9:

> "In all cases the arbitral tribunal shall take into account any applicable trade usages."

New Zealand (1996)

Follows UNCITRAL Model Law. *See* Arbitration Act 1996, art. 28(4) (N.Z.), *reprinted in* 3 HANDBOOK at New Zealand: Annex I-14:

> "In all cases, the arbitral tribunal shall decide in accordance with the terms of any contract and shall take into account any usages of the trade applicable to the transaction."

Nigeria (1988)

Follows UNCITRAL Model Law. *See* Arbitration and Conciliation Decree 1988, Decree No. 11, art. 47(5) (Nig.) (similar text), *reprinted in* 3 HANDBOOK at Fed. Rep. of Nigeria: Annex I-14.

Norway (1980)

No provision.

Peru (1992)

Follows UNCITRAL Model Law. *See* Decree Law No. 25935, art. 103 (Peru), *reprinted in* 3 HANDBOOK at Peru: Annex I-21:

> "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account, in commercial matters, the usages of the trade applicable to the transaction."

Poland (1984)

No provision.

Portugal (1986)

No provision.

Romania (1993)

See Book IV, Code of Civil Procedure, arts. 340-370 on Arbitration (as amended by Law No. 59 of 23 July 1993), art. 360 (Rom.), *reprinted in* 3 HANDBOOK at Romania: Annex I-10:

> "The arbitral tribunal shall decide the dispute on the basis of the principal contract and the applicable rules of law, taking into account trade usages, as the case may be."

Russian Federation (1993)

Follows UNCITRAL Model Law. *See* Law of the Russian Federation on International Commercial Arbitration, art. 28(3) (Russ.) (similar text), *reprinted in* 3 HANDBOOK at Russian Fed: Annex I-7.

Saudi Arabia (1983)

No provision.

Scotland (1990)

Adopts UNCITRAL Model Law. *See* Law Reform (Scotland) Act 1990, § 66(2), *reprinted in* 3 HANDBOOK at Scotland: Annex III-1.

Singapore (1994)

Adopts UNCITRAL Model Law. *See* International Arbitration Act 1994, Republic of Singapore, No. 23 of 1994, art. 3(1), *reprinted in* 3 HANDBOOK at Singapore: Annex I-1.

South Africa (1978)

No provision.

Spain (1988)

No provision.

Sri Lanka (1995)

Follows UNCITRAL Model Law with significant change. *See* Arbitration Act, No. 11 of 1995, art. 24(4) (Sri Lanka), *reprinted in* 3 HANDBOOK at Sri Lanka: Annex I-7:

> "The arbitral tribunal shall decide according to considerations of general justice and fairness or trade usages only if the parties have expressly authorised it to do so."

Sweden (1981)
No provision.

Switzerland (1987)
No provision.

Thailand (1987)
No provision.

Tunisia (1993)
Follows UNCITRAL Model Law. *See* Arbitration Code, art. 73(4) (Tunis.) (similar text), *reprinted in* 4 HANDBOOK at Tunisia: Annex I-9.

Turkey (1982)
No provision.

Ukraine (1994)
Follows UNCITRAL Model Law. *See* Law on Commercial Arbitration, art. 28(4) (Ukr.) (similar text), *reprinted in* 4 HANDBOOK at Ukraine: Annex I-9:

United States (1990)
Federal Arbitration Act: No provision.
California: Follows UNCITRAL Model Law. *See* CAL. CIV. PROC. CODE § 1297.285 (West Supp. 1999) (identical text).
Colorado: No provision. *See* COLO. REV. STAT. §§ 13-22-502 to -507 (1997).
Connecticut: Follows UNCITRAL Model Law. *See* CONN. GEN. STAT. Ann. § 50a-128(4) (West 1997).
Florida: *See* FLA. STAT. ANN. 684.15(1) (West 1990):

> "The tribunal may take into account its own experience and any customs, usages of trade, or other facts and circumstances which it deems relevant."

Georgia: No provision. *See* GA. CODE ANN. §§ 9-9-39 to -51 (1982 & Supp. 1999).
Hawaii: No provision. *See* HAW. REV. STAT. ANN. §§ 658D-2 to -9 (Michie 1995).
Maryland: No provision. *See* MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2B-01 to -09 (1995).
North Carolina: Follows UNCITRAL Model Law. *See* N.C. GEN. STAT. § 1-567.58(d) (1999)).
Ohio: Follows UNCITRAL Model Law. *See* OHIO REV. CODE ANN. § 2712.55 (Banks-Baldwin 1994).
Oregon: Follows UNCITRAL Model Law. *See* OR. REV. STAT. § 36.508(5) (1998).
Texas: Follows UNCITRAL Model Law. *See* TEX. CIV. PRAC. & REM. CODE § 172.251(e) (West 1998)).

Zimbabwe (1996)
Follows UNCITRAL Model Law. *See* Arbitration Act 1996, No. 6 of 1996, art. 28(4) (Zimb.) (similar text), *reprinted in* 4 HANDBOOK at Zimbabwe: Annex I-11.

Sources: The source for all the references, except when indicated otherwise, is INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, I-IV INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (Pieter Sanders & Albert Jan van den Berg eds., 1997); *see also* International Trade Law Branch, United Nations Office of Legal Affairs, United Nations Commission on International Trade Law (UNCITRAL), Status of Conventions and Model Laws 14 (last updated Dec. 14, 1999) <http://www.uncitral.org/english/status/status.pdf> (identifying legislation based on UNCITRAL Model Law on International Commercial Arbitration) (citing Guatemala, Iran, Lithuania, and Oman in addition to those listed above).