CUSTOM AND ITS REVIVAL IN TRANSNATIONAL PRIVATE LAW

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INTRODUCTION

Traditionally, custom was considered to be an autonomous source of law, similar to legislation and case law, but its force was weakened in the 19th century under the influence of modern sovereignty notions and the idea that law could only emanate from states. This weakening had a particular effect in private law, which became domestic and statist, even in respect of international transactions. This change of perception also had an effect on public international law, whose authority suffered as a consequence as well. In private law, the result was the elimination of the force of all immanent law, especially custom but also general principle. Globalization and the consequent transnationalization of private law which led in commerce and finance to the re-emergence of a modern law merchant or new *lex mercatoria*, gave custom, however, a reinvigorated role as an independent source of law, although it still competes with other sources of law, including statist laws of a private or regulatory nature. This leads to a hierarchy of norms which may be seen today as the essence of the new *lex mercatoria*.

I. CUSTOM AND THE IMPACT OF 19TH CENTURY SOVEREIGNTY CLAIMS

Custom is traditionally perceived as an independent and autonomous source of law. Although immanent law, it is nevertheless hard law, no different therefore from other sources of law, especially legislation and case law. This means that customary law must be simi-

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larly applied by judges or arbitrators. In civil law,[1] that was indeed

1. Roman law that preceded the civil law was an amalgam of all kind of legal sources brought together in Byzantium in the *Corpus Iuris* of the Emperor Justinian between 529 and 534 A.D. and of which the Digests were the most important. This law clearly left room for other sources of law like natural law and custom. *See* Digest of Justinian 1.1.1, 1.3.33-34 (Alan Watson ed. and trans., University of Pennsylvania Press rev. English language ed. 1998) (suggesting "[*j*]*us naturale*," "everyday usage" or custom of contentious proceedings shall be observed). This Roman law was revived (without legislation) as of the 11th century as the *ius commune* or universal private law for the Continent of Western Europe (England went its own way). Though it was considered a kind of superior and universal customary law, its revival posed the question of its relationship with emerging local customary and other laws. They were in principle respected so that only the question of precedence, where conflicting, became an issue.
In Digest 1.3.32.1, there was a first complicating provision which said that custom could invalidate the law (*leges*), as it was simply a later demonstration of the people's will. *See id.* However, as for the *ius commune* itself, because of this higher status, it was believed not necessarily to be superseded by newer local customary or statutory law, as it was considered the expression of rationality (*ratio scripta*), with the exception perhaps of city ordinances (or *statuta*) in Northern Italy.

But especially in Northern France, it was felt that the rule of Digest 1.3.32.1 could mean that the Roman (private) law itself could be set aside by local laws even if it was not (yet) custom (they were for this purpose combined with local statutory laws in what came to be called the *droit coutumier*). On the other hand, Canon law, weary of pagan and secular influences, was inclined to reach the opposite conclusion and insisted that bad local law must always be ignored. That became the more general rule. It meant that what was more rational and reasonable prevailed, and that was normally considered to be the Roman law rule (*quidquid non agnoscit glossa, nec agnoscit curia*). Custom and local law then took second place but not otherwise.
That was so particularly in Germany, where, in order to countenance the effects of the lack of centralised power and the ensuing diversity of the various German regions, Roman law also acted as unifier and became the preferred law, especially after the setting up of a central court for all of Germany, the *Reichskammergericht* in 1495 with its seat in Wetzlar, north of Frankfurt. Before it, local laws and customs had to be proven as a fact and, until they were, the Roman law prevailed as the law best known to the court. That was also the approach in Italy. It should be clear from the above, however, that the practical relationship between Roman and local law, including custom, was not perceived in the same manner everywhere. As just mentioned, in France the kings wished to promote the local laws (*droit coutumier*), including their own decrees, at the expense of the Roman law (*droit écrit*) which they saw as the inimical imperial or German usurper's law. This law was therefore considered applicable only if local law did not provide a solution. In Northern France, that is the part of France north of the Loire river, Roman law thus largely disappeared and its study was even for-bidden in the University of Paris as early as 1219 A.D. (by a Pope who was also not interested in furthering German imperial ambitions at the time) until well into the 17th century, but in Southern France it always remained more powerful. Even in the North, Roman law influence subsisted indirectly in the written-up *droit coutumier*, especially in property and contract law. There was further refinement in this development. Even where local laws including customs prevailed, at least as long as they was reasonable, they were often still interpreted in a restrictive way to leave as much room as possible for Roman law. This approach was deduced by Bartolus from Digest 1.3.14, which required that all that was not the *ratio iuris* should not be extensively interpreted and should in any event not be considered a legal rule under Digest 1.3.15. In this vein, the reach of Roman law was expanded further through analogous and extensive interpretation. *See id.* at 1.3.12-13. This approach nevertheless left room for the development of local laws, especially in the cities of

the position until the 19th century, but it was also the original position in the common law.[2] Custom did not, therefore, depend on special government or state sanction, either in statute or treaty, but spoke for itself. A rule of recognition[3] is not then statist either but will be an-

Northern Italy, as in Pisa, Bologna and Milan. This also happened elsewhere, especially in the trading cities of the Hansa in Northern Germany and the Baltic and later in towns like Antwerp, Rotterdam and Amsterdam. In the view of Bartolus, there was always room for such law as custom and city councils were able to accelerate the pace through written city laws and regulations which were then considered to have similar status as custom (*paris potentiae*), although, again, all such local law was to be restrictively interpreted in the face of Roman law on the subject so that as much room as possible was left for the uniform *ius commune* as a subsidiary source of law.

In France, the opposite view became accepted, supported by Molinaeus (1500-1566), especially after the *Coutume* of Paris was published in 1510. This was liberally interpreted and the Roman law restrictively. But, as we saw, there remained room for the Roman law, even in Northern France, particularly in the law concerning personal property and obligations, as was later also shown in these areas in the famous works of Domat and especially of Pothier, which eventually formed the basis for much of the [French] *Code Civil* in these areas.

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2. In England, the old commercial courts and their laws, which were largely customary, were originally more particularly connected with fairs and ports where participants were peripatetic merchants or maritime transporters who required prompt justice to be enforced either against the person of the debtor or (particularly in his absence) his goods if within the court's jurisdiction. The origin of the commercial law and commercial courts was in these domestic staple markets and fairs, also visited by foreigners, and in the maritime activities of the Channel ports. The courts in the staple markets were the Staple Courts, which were statutory from 1354 onwards. Earlier, a Statute of Merchants (Acton Burnell) of 1283, in an effort to attract foreign traders to England, had already promoted the speedy settlement of disputes between all merchants, while an Act of 1303 (*Carta Mercatoria*) had recognised the law merchant as an independent source of law, exempted foreign traders from local taxes, and gave them the freedom to trade throughout England. At the local fairs there was often Borough or Pie Powder Courts, used for civil and criminal litigation between the participants in these markets.

Special maritime courts started to operate after 1360, at first competent mainly in criminal cases (piracy), later also in civil cases with emphasis on charters, ship mortgages, maritime insurance, early forms of bills of lading and the earlier forms of negotiable instruments like bills of exchange and cheques. To appear before these courts, the plaintiff had to prove that the defendant was a merchant and had to establish the applicability of commercial law or custom, but the presence of the defendant was not strictly speaking necessary as long as some of his goods were in the jurisdiction.

It should be noted that the law merchant of those early days was *not* as a consequence a uniform law in any sense and that its content varied with the markets and products covered—and it could be very local—but the common outstanding feature was that both this law and the courts that administered it were autonomous. *See* DALHUISEN, *supra* note 1, at 8. Others have noted other common factors such as their customary character, summary jurisdiction, and spirit of equity and common sense that was not concerned with technicalities. *See generally* W. MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT (1904).

3. Article 38(1) of the International Court of Justice (ICJ) Statute is sometimes so considered, but the sources of law it specifies would likely also operate without it and it does not ex-

other more fundamental rule in the legal order in which the custom operates.

Yet in the 19th century, custom became problematic both in public international law and in private law, although in a somewhat different manner. The reason was the competition with state law that, at least in private law, became all embracing, first in civil law countries with their codification ethos but also in England where the view of Bentham and Austin, that all law, including private law, emanated from a sovereign, took hold. Although the common law itself was often portrayed as of immemorial usage and remained in that sense also immanent if not customary, other custom was then often considered primitive and atavistic.[4] It retained some place in commercial law, but its status became uncertain there as well. It did not help that in an unrelated 18th century development the judges at Westminster had already encroached on the independence of commercial law and its custom by bringing them and the local courts that had administered this law within the common law and its judicial system.[5]

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clude any other sources; it is thus merely declaratory. *See* Statute of the International Court of Justice, art. 38, para. 1, June 26, 1945, 59 Stat. 1055. The same may probably be said of Section 1-103 of the Uniform Commercial Code (UCC), which promotes the force of custom. U.C.C. § 1-103 (1977). This is all the more true if also part of the law merchant. *See infra* note 5. Nothing, however, suggests that this was more than a state of affairs which always existed, even if in England the independent status of custom in, and especially outside, the common law became more contentious, even in commerce.

4. This remains, in more modern times, the view of Hart. H.L.A. HART, THE CONCEPT OF THE LAW 106 (2d ed. 1994).

5. This was due to the jealousy of the common law courts, especially the Court of Admiralty in London. The common law judges eventually took the view that the older commercial and admiralty courts only operated by franchise and could therefore be controlled by the common law courts. Consequently these older courts started to disappear, although they were never formally abolished. After the middle of the 18th century, only the Court of Tolzey in Bristol survived. The overriding influence of Sir Edward Coke is often mentioned in this connection. As to the applicable law, after 1765 the common law courts considered that "the law of merchants and the law of the land are the same: a witness cannot be admitted, to prove the law of merchants." *See* Pillans v. Van Mierop, (1765) 97 Eng. Rep. 1035, 1038 (K.B.). This seems to have concluded the trend and ended the autonomous status of the earlier commercial law including custom. Commercial law, however, was for a long time poorly administered by the common law courts, which is the reason why in common law, for example, the law of chattels long remained underdeveloped.

It is true that in the late 18th century under Lord Mansfield as Chief Justice, building on the earlier work of Chief Justice Holt, some special commercial law was redeveloped in England, often based on the practices that Lord Mansfield found to exist in the various trades, though then always within the common law. He upheld the exclusive jurisdiction of the common law courts but added that the common law and its courts had to recognise the dynamics of (at least) international business so that commercial law was to evolve alongside commercial

Against this background, it may be considered that the American attitude is reassuringly old fashioned. The UCC makes it very clear in Section 1-103 that custom is favored, particularly if law merchant. It provides that the Code is to be interpreted liberally in order "to permit the continued expansion of commercial practice through custom, usage, and agreement between the parties" whilst "unless displaced by the particular provisions of the Code, the principles of law and equity including the law merchant . . . supplement its provisions."[6]

practice. *See id.* Yet the law of merchants as an independent legal order governing the legal relationship between merchants had ceased to be recognized and the English common law henceforth accepted the (international) character of commercial law only to a limited extent, more in the nature of courtesy or *comitas. C.f.* C. Schmitthoff, *International Business Law: A New Law Merchant*, *in* CURRENT LAW AND SOCIAL PROBLEMS 129, 138-39 (1961). If the custom is international, its status became even more blurred.

What little room was so left for custom, proved nevertheless particularly important for the development of negotiable instruments (although the first time the promissory note was declared a negotiable instrument in England was already in 1680). *See, e.g.*, Sheldon v. Hently, (1681) 89 Eng. Rep. 860 (K.B.). It was also important for the development of bills of lading, and (later) documentary sales, like the *FOB* and *CIF* sales, ship mortgages, the stoppage of goods in transit, and also the concept of bailment (therefore the protection of the physical possession of goods), agency, partnership and joint ownership, though much of this became statutory law in England. However, once having lost the autonomy of its courts, the commercial law never recovered a truly independent role in common law countries, and the same may now also be said for its modern branch of financial law. Nevertheless, commercial law is not incidental or mere *lex specialis*, and it clearly covers whole areas of the common law in full.

Therefore, the distinction between commercial and other private law is no longer fundamental in common law; however, no systematic unity is assumed. The distinction between *law and equity*, each with its own courts, is much more important and cuts through what may now still be considered commercial and modern financial law. Equity thus became an important support for modern commercial and financial instruments and their operation. Reference may be made here to the law of agency, fiduciary duties, assignments, floating charges, tracing and shifting interests, trust structures, conditional and temporary ownership forms, and set-off. This is also the area where the greatest differences with the civil law, which lacks a similar equity facility, subsist. *See* DALHUISEN, *supra* note 1, at 77.

6. U.C.C. § 1-103 (1977). In this respect, it may also be considered significant that a leading American case book opens its Preface as follows: "Law comes from many sources. In an ideal world, the authority of these sources would be clearly defined and neatly demarcated, [. . .] but such is not our world." *See* DAVID P. CURRIE ET AL., CONFLICT OF LAWS, CASES-COMMENTS-QUESTIONS, Preface, at v (7th ed. 2006).

On the other hand, nationalism is not unknown in the United States either, especially amongst those who see American law embedded in American values. *See, e.g.*, Robert Post, *The Challenge of Globalisation to American public Scholarship*, 2 THEORETICAL INQ. L. 323, 325-26 (2001). But there is no extreme positivism, and in the 'realist' sense law may be validated in other ways than by state command or legislation alone. In the United States, it has therefore not led to the idea that all law is necessarily statist, and immanent law is not as such suspect, at least to the extent that it may be considered part of the American way of life.

The American approach has always permitted a strong natural law streak too, well known from the work of Lon Fuller and recognizable in that of Rawls and Dworkin. However, this is a natu-

Elsewhere, however, custom was increasingly ignored,[7] and its role and status hardly discussed. When legal positivism started to develop towards the middle of the 19th century, the struggle concerning custom's status as an independent source of law came, however, again into the open. It is of interest in this connection to note the evolution of the term 'positivism' in legal terminology. The term came into common use in the 19th century following the writings of Auguste Comte in France.[8] In its origin, positivism denoted the scientific study of human behavior and the identification of rules or regularities therein as the basis for the studies of the social sciences. The study of the law thus became a study of natural phenomena based on the observation of human (or states') behavior in an *inductive* manner. As such, legal positivism could be seen as the opposite of natural law which adhered to a more theoretical deductive logical process of rule formulation. It was an acceptance of Hume's skepticism in this respect. In this approach custom was important and originally highly respected as a source of law.

In public international law, positivism retains this inductive meaning, but it started to emphasize, in particular, sovereignty and sovereign behavior, equality of sovereigns, and subsequently their unquestioned and unfettered authority domestically. Eventually this resulted in a sharp distinction between the external and internal status of states.

Externally, this strong emphasis on sovereignty undermined the role of custom in public international law and, ultimately, the authority of public international law itself. Internally, in private law, the term 'positivism' became no less sovereignty infested and now usually

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ralism that is *not* primarily based on universal notions or rationality, but rather on intrinsic morality and on notions of fairness that could still be considered nationally confined and therefore largely historical and cultural.

Indeed, broader international principles and values are sometimes invoked. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573 (2003); Roper v. Simmons, 543 U.S. 551, 576-77 (2005) (acknowledging the fact that the vast majority of countries in the world prohibit juvenile capital punishment). It may also be assumed that the UCC is not a bar to the acceptance in appropriate cases of the force of international custom.

7. As a consequence, in England, custom has often been relegated to a mere implied term and even further limited by the binding force of precedent in court decisions. Its independent development has thus been stultified. It follows that in commercial and financial disputes common law judges may be forced to distinguish cases more aggressively in order to overcome the restraints of binding precedent. Therefore, some greater dynamism in the development of customary commercial law appears to have been accepted. *See* DALHUISEN, *supra* note 1, at 9.

8. *See generally* AUGUSTE COMTE, COURS DE PHILOSOPHIE POSITIVE (2d ed. 1864).

stands (a) for a state's central role in all law formation, (b) for this law as a given and as being static, domestic and therefore territorial in nature and captured in time, valid only until its next amendment, (c) for a dependence on black letter law, an automaticity in its application, and a sharp distinction between norm and fact and often, (d) for a connected formal approach to the interpretation of legal texts, and ultimately (e) for the application of domestic law in this sense to all international dealings (through a system of conflict rules or rules of private international law, itself considered part of the domestic law of the forum).

Thus in private law, positivism started to stand for nationalism, a statist legal culture, and legal formalism. It remains as such the opposite of naturalistic, universal, transnational or informal or diverse law creation; no longer, however, in terms of an inductive as against deductive method, but rather as being adverse to all sources of law other than national legislation, such as custom.[9] It forms the background of the civil law codification, first in its early 1804 French[10] and

9. Eighteenth century writers following Grotius all struggled with the proper place of state law as overriding public policy, especially in view of its domestic nature in a time when law was generally still thought to be more universal, the expression of a pre-existing rationality or morality, especially so in what became the secular natural law school of Grotius and his followers in Germany. *See* DALHUISEN, *supra* note 1, at 55.

But it is one thing for public policy or the *raison d'etat* to prevail over natural law and then also local customs and other sources of law and quite another for ultimately all law, also private law, to emanate from a state, which squeezed out first natural law, but then also custom and any other source of law altogether. That became nevertheless the trend. Thus by the late 18th century, Immanuel Kant (1727-1804), although accepting the existence of rational legal principles in general, did not give them any longer any autonomous legal status. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 148 (1797) (Mary Gregor trans., 1991). All depended on their incorporation in the positive law by a state which could ignore them. That applied to custom all the more.

The dominant 19th century philosopher Hegel confirmed this view in which law could be no more than statist law. *See* HEGEL'S PHILOSOPHY OF RIGHT 135-36 (T.M. Knox trans., 1967). It always had a local character since it depended for its force on a legislator and for its contents on the will of a people that only found its proper expression in a state. This remains far removed from modern notions of democracy or other participatory froms of law creation (like in custom) and the legitimacy of law in that sense.

10. Although in France Francois Quesnay (1694-1774) had said that men do not make law, but only discover those laws that conform to "the supreme reason that governs the universe,"—a typical enlightenment view that presumes an innate order also in human relationships—it was even then thought that this law was more readily discovered by a state. *See* GEOFFREY BRUUN, THE ENLIGHTENED DESPOTS 32 (1967). Montesquieu (1689-1755) had still thought that law was connected with regions, climate and customs, but the *Philosophes* of that time, who were at the heart of the French enlightenment movement, thought differently and started to look for universal (intellectual) principle. BARON DE MONTESQUIEU, SPIRIT OF THE LAWS 316 (J.V.

later in its 1900 German variant,[11] both of which came to ignore all custom, unless a special statutory reference was made to it in the manner of a concession or license.[12]

Prichard ed., Thomas Nugent trans., 1914). Condorcet (1743-1794) opined in this connection that a good law was for all, just as any true proposition is valid for all. *See* Bernard Manin, *Montesquieu*, *in* A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION 728, 729 (François Furet & Mona Ozouf eds., Arthur Goldhammer trans., 1989).

Subsequently the issue was from whom this law emanated. In this connection the abbe Sieyes (1748-1836) declared that the nation was prior to everything. "Its will is always legal; indeed it is the law itself." EMMANUEL SIEYES, QU'EST-CE QUE LE TIERS ÉTAT? 10 (1979). Such states were to be guided by reason preferably through the intervention of enlightened despots or an elite, who would then also formulate the law. Others, like Rousseau, preferred the idea of the general will, more in the style of Grotius. This came to the *Encyclopedie* through Diderot's article on 'Natural Law' where it was still connected with the idea of true rationality or reason as such always paramount. Rousseau no longer saw it that way. Law and its creation became the policy of the sovereign, defined by the social contract which made citizens outside it anti-social. *See* JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 112-21 (G.D.H. Cole trans., 1950).

In truth, law started to stand for the state and its insights and organisatorial talents rather than for rationality. Here the idea of the radical reshaping of society through the law took hold even in France of the enlightenment, ultimately extolled in the Republic of Virtue of Robespierre in which states were paramount in all things; individuals were nothing. There was no natural or other immanent law or principle left. Maximilien Robespierre, *Lettres a ses Commettans*, *in* 2 OUVRES 55 (1792). All was politics. That is romanticism in which the irrational may triumph also in the law and its formation.

But it is not fully the background of the French Code Civil of 1804 and the decline of custom as a legitimate source of law in France. Although its main author Portalis considered the abolition of local custom one of the great achievements of the Code, this was so mainly as a cleaning up exercise or rationalization of local laws. *See* NAISSANCE DU CODE CIVIL: LA RAISON DU LEGISLATEUR (P.A. Fenet ed., 1989) (also called *Code Napoleon*). It may further be said that in its set-up, largely based on the earlier works of Domat and Pothier, the Code Civil retained a claim to a more universal rationality and remains as such an enlightenment rather than statist product, although ultimately it was promulgated as a product of state policy.

11. In Germany, on the other hand, the Code of 1900 was more properly the product of the romantic movement that led to states taking over the law, although it is true that the German early 19th century Historical School of von Savigny, also referred to as the School of the Pandectists, is often distinguished. Von Savigny sought a national German law as a reaction primarily against the universal natural law school, which he also saw embedded in the French Civil Code, which in the meantime had been adopted in large parts of Germany (and in the Netherlands, Belgium and Luxembourg) as a sequel of the Napoleonic conquests. Savigny thought this claim to universalism to be a cancer in the heart of Germany, though he continued to use the intellectual deductive method of the natural law school and ended up deducing the new German system from classical Roman law, rather than from German regional or customary laws. *See* VON SAVIGNY, VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT [OF THE VOCATION OF OUR DAY FOR LEGISLATION AND JURISPRUDENCE] (1814). But a national effort, at least in scholarship became for him essential, in which the national spirit or *Volksgeist* was invoked even though Germany did not become one nation before 1870. Under his student Puchta, following Hegel, the *Volksgeist* idea soon became a belief in *statist* law which was then translated into national legislation and ultimately codification for a modern centralised and civil service-dominated state and judiciary. There was no proper place any longer for other

This may be a passing phase in our thinking about the law and its evolution, but as discussed below, custom may be regaining its true status as source of law particularly at the transnational level in a more globalised market place. This affects in particular international commerce and finance.

national expression, not even customary law. The *Volksgeist* thus started to concern form more than substance.

But there was also an intellectual overlay and ultimately this approach became an intellectual exercise in system thinking as prelude to the German Civil Code of 1900. It embodied another typical 19th century German idea of law as science and technique even if typical product of nationalism. This is at the heart of the German codification effort as an abstract system of law which, if properly understood and explained, was then believed to be able to tailor for all eventualities. This subsequently became the codification ethos even in countries like France and Austria that had codified much earlier. It further increased the intolerance towards other, outside, sources of law.

Romanticism itself may perhaps best be defined as mankind's effort to come to grips with its own irrationalities. It was as such a reaction against enlightenment which, in line with the classical tradition, still proceeded from the idea that all had its given place and that that also applied to human action which therefore, if properly understood, was in truth rational.

In romanticism, the accent is rather on will or creation, not on knowledge: in its extreme form, the idea is that everyone creates an own universe including its values and that is all. It means that there is no discernible innate structure of things in human action and social activity beyond what people have managed to create for themselves. There is no limit on freedom in that sense nor is there any form to the unceasing flow of human experiences. Reality is an amalgam of dark forces that can at best be understood in terms of myth and symbolism or metaphor but one never really knows for what they stand.

In this atmosphere, also the state may become a mystical institution and so is the law that it creates, but it can do so at will and there is, at least as far as human behaviour is concerned, nothing beyond its control and there are no innate rules or limitations. There is no other source of law or rationality outside it. Even the invisible hand of the market can be manipulated and so can the rest, either in a conservative or progressive manner or in any other. The action is not then on knowing society or in discovering its ways but on recreating it and law formation becomes here a tool in this process which is organised by each individual state in its inexorable own march into history. Codification must then also be seen in that context and is not then confined in its reach by innate pre-existing principle or realities.

These notions and feelings came together with those of the German Historical School of Law and form the background of the German Civil Code of 1900, which thus was equally nationalistic, intellectual and abstract, an icon of German culture of that time, product of national studies and statist. As such it ignored all immanent law or principle and then custom as an independent source of law as well.

12. Article 3 of the former Dutch Civil Code (in force until 1992) was specific in this policy and expressed it clearly, but even then it was thought that the force of custom was ultimately decided by a higher rule, as indeed was the validity of the code. *See* P. SCHOLTEN, ASSER ALGEMEEN DEEL 131 (2d ed. 1934). One source of law could not itself wipe out another.

III. THE EFFECTS OF TRANSNATIONALISATION ON PRIVATE LAW FORMATION: THE REVIVAL OF CUSTOM

The remainder of the discussion shall leave public international law to the side and concentrate on private law. In a modern sense, custom can best be reconsidered, approached and understood from the point of view of the transnationalisation of private law in international professional dealings where the influence of states recedes.[13] This discussion concerns custom in its operation in the international or transnational commercial and financial legal order. Customary law represents here immanent law and its rules are *not* then contractual, although they may be clarified by contract. Custom of this nature has a *dynamic* concept of the law and its formation at its core, and it is posited that as such, as in olden times, it is directly effective and therefore functions as an autonomous law creating source of law or force.

Custom in this sense will often be directory or supplementary. That means that it may be set aside or clarified by contract, but it can also be *mandatory*, especially in personal property law, when as a consequence there will be no such freedom to supersede or clarify it by contract. This can be shown domestically,[14] but becomes much clearer in international dealings. The Hague-Visby rules concerning bills of lading[15] were often so construed even before they became treaty law, and any custom that may form itself internationally in respect of the set-off is likely to be of a similar compulsory nature, al-

13. *See generally* J.H. Dalhuisen, *Legal Orders and their Manifestation: The Operation of the International Commercial and Financial Legal Order and its* Lex Mercatoria, 24 BERKELEY J. INT'L L. 129 (2006).

14. For example, in one U.S. case involving a state version of Article 9 of the UCC, the commercial practice supporting a fairer balance between the interests of the buyer in the ordinary course of business and the secured party was invoked to protect such a buyer against contractual security interests under Section 9-320 (where a down payment had been made) as soon as assets were set aside for him, therefore even before he acquired title, and the security interest of the financier of the seller's inventory was thereby dislodged. *See* Daniel v. Bank of Hayward, 425 N.W.2d 416, 422-23 (Wis. 1988). Custom is here invoked as an overarching mandatory concept. Little proof of the existence of such commercial practice or custom was presented in this case which also showed that the accepted practice in this respect could change overnight through case law which yielded here also to academic writing and lower court findings.

15. *See* W.E. Haak, *Internationalism above Freedom of Contract*, *in* ESSAYS ON INTERNATIONAL AND COMPARATIVE LAW IN HONOUR OF JUDGE ERADES 69, at 71 (Neth. Int'l. L. Rev. ed., 1983). It is sometimes also suggested that international mandatory customary law overrides the jurisdiction of the *forum actoris* (of the plaintiff therefore). J.P. Verheul, *The Forum Actoris and International Law*, *in* ESSAYS ON INTERNATIONAL AND COMPARATIVE LAW IN HONOUR OF JUDGE ERADES, *supra*, at 196, 204-06.

though embellishments may still be possible through contractual netting clauses but no more than such custom would then allow.[16] It could also be said that the old law merchant concerning negotiable instruments was mandatory international custom before it became caught up in the 19th century national codifications, or statutory law in England. This mandatory custom may, as such, well have revived, notably in the form of internationally issued and traded eurobonds. Indeed, even where these bonds make English law applicable, it is not considered to detract from their original status of transnationalized negotiable instruments,[17] probably not even now that in most cases they have become mere book-entry entitlements in a paperless environment.[18] This may also affect the way these instruments are repoed or given in security, cleared and settled.[19] Eurobonds are the key

16. In this connection, in the swap and repo markets, the ISDA Swap Master Agreements of 1987/1992/2002 and the PSA/ISMA Global Master Repurchase Agreement of 1992/1995 may also acquire the status of custom in the areas they cover, at least in the London and the New York markets where they operate. *See, e.g.*, PUBLIC SECURITIES ASSOCIATION AND INTERNATIONAL SECURITIES MARKETS ASSOCIATION, GLOBAL MASTER REPURCHASE AGREEMENT (1995), http://archives1.sifma.org/agrees/95globalrepo.pdf. This may be particularly relevant for their close-out and netting provisions. The status of contractual bilateral netting with its enhancements of the set-off principle and its inclusion of all swaps between the same parties, leading to a netting out of all positions in the case of default at the option of the non-defaulting party and *ipso facto* in the case of bankruptcy, could otherwise still remain in doubt under local laws.

17. It is often said that the negotiability of eurobonds derives from the force of market custom. For a discussion of the older English cases on international bonds law, see Goodwin v. Roberts, (1876) 1 App. Cas. 476 (H.L.) (U.K.); Picker v. London and County Banking Co., (1887) 18 Q.B.D. 512 (U.K.). These relate to Russian and Prussian bonds and emphasized that the financial community treated these instruments as negotiable regardless of domestic laws. *See also* Bechuanaland Exploration Co. v. London Trading Bank, (1898) 2 Q.B. 658, 671 (U.K.). It was accepted in connection with the negotiability of bearer bonds that "the existence of usage has so often been proved and its convenience is so obvious that it might be taken now to be part of the law." *See* P. WOOD, LAW AND PRACTICE OF INTERNATIONAL FINANCE 184 (London, 1980). Though modern case law does not exist confirming the point, these cases are still considered good law in England. For the explicit reference in this connection to the custom of the mercantile world which may expressly be of recent origin, see DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 1800 (14th ed. 2006).

18. *See* DALHUISEN, *supra* note 1, at 805-06.

19. The customary status of these instruments is backed up by the practices of the eurobond market in issuing and trading supported by the rules and guidelines of the ICMA (International Capital Market Association (formerly IPMA and ISMA)), and in clearing and settlement by the rules of Euroclear and Clearstream. *See* DALHUISEN, *supra* note 1, at 230.

The main concern here is to create a situation where the capital raising operation is in as detached as possible from local elements and laws, especially in terms of tax, foreign exchange, syndication, underwriting or placement rules, and subject to an autonomous regime. To achieve this at least in the eurobond market, the issuing company (often through a fully guaran-

instrument of the largest capital market in the world, which is itself perceived as informal and off-shore. Again, the proprietary aspects here are paramount.

The law of assignment of receivables may well attain a similar customary status if there is an international transfer or if the transfer concerns receivables with creditors and debtors in different countries.[20] It concerns here also largely proprietary law that is mandatory, but party autonomy is here on the increase and at least sometimes accepted in the choice of law even though on the whole the *lex situs* (whatever it may be for intangible assets) prevails in proprietary matters and a choice of law by the parties was therefore not traditionally believed effective.[21]

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teed financing subsidiary) traditionally operates from a tax haven base so as to avoid withholding tax payments on interest. The foreign exchange restrictions on payment of interest and principal are likely to be minimised by the creation of paying agents in several countries providing a choice for the investor.

Another measure to promote the detached nature of the instrument is the creation of an underwriting syndicate that operates from a country, like England, that does not hinder or regulate the operation unduly, and that allows placement in other countries (although it may still limit the placement of eurobonds in a country's own currency). To have syndicate members in various countries promotes the international character of the syndication and placement.

These are practical measures an issuer can take to promote the internationality or transnationality of the negotiable instruments issued by him. The documentation surrounding the creation, nature and sale of these instruments like the subscription, underwriting and selling agreements, may as a consequence acquire a transnational flavour as well. This means that the choice of a domestic law in the documentation may not be controlling either and could even be inappropriate as it may disturb the balance between all the elements of transnational law or the lex mercatoria to operate fully.

20. Here important issues of notification and documentation arise especially with respect to the use of receivables in modern financing where local law impediments in this regard to bulk assignments are increasingly removed and a reasonable description and immediate transfer upon the conclusion of the assignment agreement is becoming normative. Future (replacement) receivables are increasingly likely to be able to be included so that questions of identification and sufficient disposition rights no longer arise either. Exceptions derived from the underlying agreements out of which these receivables arise are increasingly ignored, especially any third party effect of contractual assignment restriction whilst others are limited to situations in which the assignment gives rise to unreasonable burdens. *See* U.C.C. §§ 2-210, 9-404 (1977). For a comparative summary, see DALHUISEN, *supra* note 1, at 968.

The promissory note as negotiable instrument with its independence from the underlying transaction out of which it arises becomes here the better transnational analogy, perhaps aided by the UNCITRAL 2001 Convention on the Assignment of Receivables in International Trade, although it has not received any ratifications and is certainly not as clear and advanced as it could have been. *See* DALHUISEN, *supra* note 1, at 970, 1014.

21. DALHUISEN, *supra* note 1, at 718 n.308. Particularly in more recent Dutch case law, even in the proprietary aspects of assignments, sometimes the law of the underlying claim and, in other cases, the law of the assignment, have been upheld as applicable following Article 12(1) and (2) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations rather

In the elaboration of the rules of contract and property, further mandatory rules of custom may develop, especially in the areas of legal capacity and contractual validity. In personal property such rules may develop against demands for a re-transfer of ownership, upon default, or upon an invalid contract of sale. Concepts of *finality* may require extra rules in terms of the independence of the transfer, of protection of *bona fide* purchasers or purchasers in the ordinary course of business (for commoditized products), or of reliance notions, also in the case of payments. International custom may increasingly oblige.

Custom or practice may surface in other ways, perhaps as presumptions. For instance, amongst professionals, the presumption of the capacity of the parties may be customary. Ensuing custom may then also acquire a mandatory flavor. At least in the international commercial sphere, typical legal capacity limitations derived from domestic law, even that of the residence of the party concerned, are increasingly ignored, especially in the case of legal entities, although domestically they may remain of the greatest importance.[22] It follows that in international commercial matters, local aspects of capacity, but also of illegality, nullity and collapse of title or voidable title, might well become less relevant. International trade and its flows may be considered here a more overriding concept, at least between professionals in the business sphere. If this is the trend, it would confirm

than on the law of the debtor or that of the assignor. This allows for party autonomy and a contractual choice of law in proprietary matters.

There are in the Netherlands three Supreme Court cases in this connection, the last two of which have elicited considerable international interest. *See* Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 17 april 1964, NJ 23 (Neth.), HR, 11 juni 1993, NJ 776 (Neth.); Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 16 mei 1997 RvdW 126 (Neth.). For a discussion of the first two cases, see J.H. Dalhuisen, *The Assignment of Claims in Dutch Private International Law*, *in* COMPARABILITY AND EVALUATION 183 (K. Boele-Woelki et al. eds., 1994); T.H.D. Struycken, *The Proprietary Aspects of International Assignment of Debts and the Rome Convention, Article 12*, LLOYD'S MAR. & COM. L.Q. 345 (1998). For more recent treatment in England in support of the law of the assigned underlying claim and for the validity of the assignment (in respect of an insurance policy), see Raffeisen Zentralbank Österreich A.G. v. Five Star General Trading L.L.C., (2001) 3 Eng. Rep. 257 (A.C.). For a recent defense of full party autonomy in these matters and therefore also the acceptance of the use of private international law as a route to open up the *numerus clausus* system of proprietary rights in civil law in respect of claims (without much emphasis on the equivalency test), see generally AXEL FLESSNER & HENDRIK VERHAGEN, ASSIGNMENT IN EUROPEAN PRIVATE INTERNATIONAL LAW (2006).

22. This was shown in the cases concerning swaps entered into with municipal authorities in the U.K. per Lord Ackner. *See generally* Hazell v. Hammersmith and Fulham London Borough Council, [1991] Eng. Rep. 545 (H.L.).

the applicability of mandatory customary law in the legal infrastructure of international sales and asset transfers.

Again, it concerns here the key aspects of the operation of the international markets and it is somewhat hard to understand why under the influence of state absolutist thinking in modern writing the operation of custom and of custom creating forces is sometimes still denied.[23] These customs may even be mandatory, especially where the infrastructure of the law of contract and property is concerned. These rules are not at the free disposition of the parties. They may as such be closely related to, supported by or an elaboration of fundamental principle or of international public policy or public order.

Indeed, there are other autonomous sources of law in the international commercial and financial sphere or transnational law. *Fundamental legal principle*, sometimes human rights related,[24] suggests itself especially. The roots of the law of property may be found here, the idea therefore of mine and dine, but also the principle of *pacta sunt servanda* as the root of contract law, liability for one's own actions as the root of tort law and negligence, and also the concept of reliance, apparent authority and entrusting. One sees the root of fi-

23. For public international law, see generally Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999). State self interest does not, in their view, allow for binding legal obligations, not even in treaties let alone customary international law (which they define as behavioral regularity amongst states). *Id.* State power is idealized and international law is mere convenience to promote self-interest. For a critique from the same rational choice perspective that these authors adopt, see ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS 188 (2008). For private law, see 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, 21, 28 (Thomas E. Carbonneau ed., 1990).

24. The impact of human rights on private law formation has been noted and is now often referred to as the constitutionalisation of private law. In commerce and finance, these rights or principles are not many and must, in any event, always be seen in a typically private law context, especially in commerce and finance. The term 'constitutionalization' may not therefore be well chosen. For this concept in Germany, see generally CLAUS-WILHELM CANARIS, GRUNDRECHTE UND PRIVATRECHT, EINE ZWISCHENBILANZ (1998); HUMAN RIGHTS IN PRIVATE LAW (Daniel Friedmann & Daphne Barak-Erez eds., 2001); Hugh Collins, *Utility and Rights in Common Law Reasoning: Rebalancing Private Law through Constitutionalization* (LSE Law Dept., Law, Society and Economy Working Paper, 2007), *available at* http://www.lse.ac.uk/collections/law/wps/WPS06-2007collins.pdf.

The freedom to contract and to own property are here important. Then there are procedural protections. It must be considered in this connection, however, to what extent the horizontal effect (sometimes) of human rights, their effect between private parties, is not in truth a revival of natural law notions or fundamental or general legal principle. Analogy presents itself. There is overlap also with the normative interpretation technique whilst public order arguments might often also be used instead.

duciary duties in situations of dependency. Naturally, one should give back what belongs to others; this is the root of the law of unjust enrichment. Fundamental principle will also demand respect for honestly acquired rights. Furthermore, there are fundamental notions of equality between those in similar positions like shareholders and common creditors. Fundamental procedural protections are well known too, as are those against sharp practices, excessive market power, bribery and money laundering. There may also be fundamental labor law protections and environmental law principles developing.

These fundamental principles, which come straight from Grotius and may in commerce and finance not be many, are absolutely mandatory and, if properly understood, the basis of all (transnational) private law subject to further elaboration in contract, custom, treaty law of a private law nature, and general principle.

In fact *general principle* may be another autonomous source of transnational law. Earlier, it tended to be referred to as the law of civilized nations.[25] That formula was taken up in oil concessions later[26] and was, therefore, capable of being included in a contract of

25. Lord Asquith of Bishopstone appears to have been the first one (in 1951) to refer in this connection to "the application of principles rooted in the good sense and common practice of the generality of civilised nations—a sort of 'modern law of nature.'" Petroleum Dev. (Trucial Coast) Ltd. v. Sheikh of Abu Dabi, 1 INT'L & COMP. L.Q. 247, 251 (1952).

26. Thus, in oil concessions references to the law of all civilized nations used not to be uncommon, although now probably considered offensive to the oil producing country in question. *See* Iranian Petroleum Agreement of 1954 (referring to "principles of law common to Iran and to the various countries to which the other parties belong and, failing that, by principles of law generally recognized by civilized nations, including such principles applied by international tribunals"). Under *ad hoc* exploration agreements with Libya, the arbitrations that eventually also decided on the nationalization issues were to be governed by the "principles of the law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of these principles as may have been applied by international tribunals." Texaco Overseas Petroleum Co. v. Lybian Arab Republic, 4 Y.B. Com. Arb. 177, 181 (1979). Especially in the oil and gas industry there were many similar clauses. Thus, the Aminoil Concession Agreement of 1979 made reference to the law of the Parties "determined by the Tribunal, having regard to the quality of the parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world." Kuwait v. Aminoil, 21 I.L.M. 976, 980 (1982). Where such a choice of law is made, one must assume the fuller set of *lex mercatoria* norms and their hierarchy to apply, but also that the applicability of public law may not be affected.

In this vein, the construction contract of the Channel Tunnel provided that it was to be governed by "the principles common to both English law and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals." Channel Tunnel Group. v. Balfour Beatty Constr. Ltd., [1995] A.C. 334, 347 (H.L.). In the international commercial and financial legal

this type as the contractual choice of law, although there remained justified doubts in how far such a contractual choice of law could limit state powers. Nevertheless, there remains acknowledged room for general legal principles to speak autonomously, thus for themselves as source of law. Again, in a private law sense, these general principles may be mandatory or directory.[27]

Party autonomy may itself be considered another autonomous source of transnational law. Of course, in contract it is based on the fundamental notion of *pacta sunt servanda*, which is then likely to implement it further. But party autonomy may also play an increasing role in personal property and thus in the creation of personal property rights. It goes against the older civil law notion of the *numerus clausus* of proprietary rights, surprisingly now sometimes also advocated for common law by proponents of the Law and Economics school who favor standardization.[28] Nevertheless, there is increasingly strong evidence of a more flexible use of proprietary rights in international finance.[29] Such proprietary rights then operate as effective risk management tools when assets of a debtor are used in funding schemes, reason why greater flexibility is of the essence. In such cases modern financial products often show the character of what may best be explained in terms of equitable proprietary rights in a common law sense, cut off therefore at the level of *bona fide* purchasers or, in respect of commoditized assets (including receivables), at the level of

order, as a newly emerging order, one would expect, however, an attitude to problem solving that is less encumbered by the past even where concepts are borrowed from domestic law in a comparative law search for better solutions.

It follows that the chosen law could itself point in the direction of the *lex mercatoria*, although it always leaves the question of whether otherwise applicable mandatory law and regulatory law can be so affected.

27. No fundamental distinction is here made between rule and principle; it is all a matter of degree and they are both equally subject to interpretation in the light of the fact situations they are meant to cover.

28. Thomas M. Merrill and Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000). *See also* Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and The Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002). For common law writers on the subject of the *numerus clausus* earlier, see Bernard Rudden, *Economic Theory v Property Law: The* Numerus Clausus *Problem*, *in* OXFORD ESSAYS IN JURISPRUDENCE, 3D SERIES 239 (1987); A. Fusaro, *The* Numerus Clausus *of Property Rights*, *in* 1 MODERN STUDIES IN PROPERTY LAW 307 (E. Cooke ed., 2001). For the idea of contractualization of proprietary rights in common law, see generally John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 624 (1995).

29. *See* DALHUISEN, *supra* note 1, at 730.

purchasers in the ordinary course of business rather than through a limitation in number of these proprietary rights. It means that these newer rights only operate amongst a group of professional insiders, normally banks. The commercial and financial flows themselves remain protected as a superior public policy issue. It concerns here in particular trust structures, conditional and temporary ownership rights (including repos and finance leases), or floating charges operating at the transnational level. Again transnational customary law of a private law nature is likely to lead the way. Internationalized property rights have been found to exist in international assets, therefore even the concept of title itself may become transnationalized in customary law.[30]

At the transnational level, a fifth source of law may be *treaty law*. A treaty is a peculiar source of transnational law, however, because as national legislation (through ratification) it is limited in place and therefore not truly transnational but only concerns states that ratified it and perhaps residents of those states or activities in their territories. Nevertheless, it is probably best to consider private law of that nature, like the 1980 Vienna Convention on the International Sale of Goods, also a source of transnational private law. In respect of residents of or activities in states that did not ratify, such treaty law may even operate as expression of general principle or even custom.[31]

Soft law means rules that do *not* emerge from an autonomous source of law and are not law in that sense. In the international commercial and financial sphere, soft law often means proposals or sets of principles from UNIDROIT, UNCITRAL or other such organizations, or from think-tanks that aspire to reflect the living law particularly at the transnational level. Academic opinion may also be part of soft law. If soft law reaches the level of treaty law, it will op-

30. Though transnational property rights have been explored to some extent in air and sea transport with connected bills of lading and negotiable instruments, this subject remains largely untouched. International property rights may be more common in the context of public international law and in intellectual property. *See, e.g.*, R.R. CHURCHILL AND A.V. LOWE, THE LAW OF THE SEA (3d ed. 1999); ENERGY LAW IN EUROPE, para. 2.01, at 14 (Martha Roggenkamp et al. eds., 2001); STEPHEN MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 111-70 (2001); PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW & THE ENVIRONMENT 1-33, 250-97, 298-346, 347-403, 500-44 (2d ed. 2002); DAVID GILLIES & ROGER MARSHALL, TELECOMMUNICATIONS 71 (2d ed. 2003); C. TRITTON, INTELLECTUAL PROPERTY IN EUROPE, chs. 2-6 (2d ed. 2002).

31. Goode limits transnational law to treaty law only. *See infra* note 39. His view seems extreme, given the territorial limitations on the application of treaty law.

erate in that category and becomes, then, law. Soft law may also attain the level of law as custom or general principle. The work of the International Chamber of Commerce (ICC) is here an important case in point. The Incoterms and UCP have been exceedingly successful and although normally incorporated by contract and then operating as contract law, they may well operate as custom if not so incorporated, and they are indeed usually so considered and applied.[32]

To repeat, short of soft law emerging as custom or general principle, it is not law, and therefore not a norm that must be applied, al-

32. The idea of the UCP as transnational law is associated with the Austrian jurist Frederic Eisemann, Director of the Legal Department of the ICC at the time. He first proposed this concept at a 1962 King's College London Colloquium. *See* FREDERIC EISEMANN, LE CREDIT DOCUMENTAIRE DANS LE DROIT ET DANS LA PRATIQUE 4 (1963). Clive Schmitthoff in England followed Eisemann's approach, though always applying it in the context of national law.
In France, the status of the Incoterms and UCP as international custom is now well established. *See* Y. LOUSSOUARN AND J.D. BREDIN, DROIT DU COMMERCE INTERNATIONAL 48 (1969); *see also* J. Puech, *Modes de paiement*, *in* LAMY, TRANSPORT TÓME II, No. 324 (2000); Berthold Goldman, *Lex Mercatoria*, *in* FORUM INTERNATIONALE, No. 3 (Nov. 1983); Trib. de Commerce de Paris [Commercial Tribunal], Mar. 8, 1976, 28 Le Droit Maritime Francais 558 (1976) (Fr.); Cour de Cass., Oct. 14, 1981, Semaine Juridique II 19815 (1982), note Gavalda & Stoufflet (Fr.); Cour de Cass., Nov. 5, 1991, Bull civ. IV, no. 328 (1992) (Fr.). In Belgium the Tribunal de Commerce of Brussels, Nov. 16 1978, *reprinted in* 44 REV. DE LA BANQUE 249 (1980), also accepted the Incoterms and UCP as international custom.

The German approach remains uncertain, especially because, as a written document the UCP and its regular adjustments are seen as contrary to the notion of custom. *See* Norbert Horn, *Die Entwicklung des internationalen Wirtschaftechts durch Verhaltungsrichtlinie*, 44 RABELS ZEITSCHRIFT 423 (1980). *But see* C.W. CANARIS, BANKVERTRAGSRECHT, pt. I, 926 (3d ed. 1988).

In the Netherlands, the Supreme Court has not so far fully accepted the UCP as objective law. *See* Hoge Raad, no. 153, May 22, 1984, N.J. 607 (1985). The lower courts are divided, as are the writers. *See* P.L. WERY, DE AUTONOMIE VAN HET EENVORMIGE PRIVAATRECHT 11 (1971). But *c.f.* Jan Dalhuisen, *Boekbespreking [Bank Guarantees in International Trade]*, 6033 W.P.N.R. 52 (1992).

English law does not require any incorporation in the documentation. *See* Harlow & Jones Ltd. v. Am. Express Ban Ltd. (1990) 2 Lloyd's Rep. 343, 346-49 (Q.B.) (concerning the applicability of the ICC Uniform Rules for Collection (URC) which are less well known, but nevertheless subscribed to by all banks in England); Power Curber Int'l Ltd. v. Nat'l Bank of Kuwait S.A.K., [1981] 2 Lloyd's Rep. 394, 398-99 (A.C.) (considering the UCP as such, also with reference to the fact that "all, or practically all" banks in the world subscribe to them, which seems the true criterion in England).

Under the American approach, the UCP was deemed to have the force of law "to effect orderly and efficient banking procedures and the international commerce amongst nations." Oriental Pac. (USA) Inc. v. Toronto Dominion Bank, 357 N.Y. Supp. 2d 957, 958 (N.Y. 1974). Since the Incoterms and UCP are similar to UCC Articles 2 and 5, they may not operate as international custom in domestic American cases. In international cases, however the Incoterms and UCP probably still operate as custom in the United States, and then supersede conflicts of law rules in that area.

though it may provide guidance (usually supplementary to hard law or as some manifestation thereof). The UNIDROIT and European Contract Principles are of this nature, as are many unratified UNIDROIT and UNCITRAL projects, and their model laws.

I must move on to discuss custom more fully, and will no longer dwell on these other sources of (transnational private) law except to say that in my view[33] they present a hierarchy of norms, which in international commerce and finance forms the essence of the modern international law merchant or new *lex mercatoria*. Their importance figures in the following order: fundamental legal principle, mandatory custom, treaty law or general principle in that order, party autonomy, and then directory custom, treaty law or general principle, in that order. The 1980 Vienna Convention on the International Sale of Goods, Article 7, gives a kind of order also, but it is confused. In any event, it cannot conclusively determine its own rank amidst all other sources of law that may also apply.[34]

These transnational norms are supplemented by national law as the residual rule, found on the basis of ordinary conflicts rules, so that the system of the modern *lex mercatoria* forms a complete system of law. We can also say that what is happening here is that domestic laws found to be applicable to a given case through conflicts rules are now increasingly preceded by the application of transnational sources of law in international transactions. Local regulation impacting international transactions, on the other hand, is *outside* the scope of the modern *lex mercatoria* and competes with it in the manner as set-forth in Article 7 of the 1980 EU Rome Convention on the Law Applicable to Contractual Obligations and in the United States (better) in Sections 401 and 402 Restatement (Third) International Relations (1987). That is then truly a matter of jurisdiction to prescribe.[35] As these issues are now generally considered arbitrable, judges and arbitrators must deal with these matters when they arise in the cases that they decide, even though they are not issues of private law proper.[36]

33. *See generally,* Dalhuisen, *supra* note 13.

34. On the true meaning of this, see DALHUISEN, *supra* note 1, at 411-15.

35. On this competition between the *lex mercatoria* and regulatory laws, see Dalhuisen, *supra* note 13, at 169.

36. In Europe, see Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l., 1999 E.C.R. I-3055 (holding that EC Treaty's antitrust provisions (Article 85) were matters of public order that could first be raised in setting aside proceedings). In the United States, see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985) (holding that competition issues are arbitrable in international cases).

IV. THE OPERATION OF CUSTOM IN MODERN PRIVATE LAW

The English approach to custom in private law was already briefly noted above and is caught up in the 19th century notion that all law emanates from the sovereign. The emphasis in the English context remains on presumed consent. In this system, custom is at best an implied term in the law of the sovereign.[37] As a consequence, custom may be considered subjective and has to be proven. The common criteria are then that it must be more than a course of action habitually followed, must have consistency and regularity, and must be recognized as binding by the parties.[38] This formulation of custom seems also to be accepted by the Vienna Convention on the International Sale of Goods (Article 9). Thus according to Article 9(1), the parties are bound by "any usage to which they have agreed and by any practices that they have established between themselves."[39]

This provision is simply an extension of the contract and intent principles, implying a subjective approach to custom. Article 9(2) tries to undo some of the impact of Article 9(1) by accepting as an implied condition: "all usages of which the parties knew or ought to have known and which in international trade are widely known to or regularly observed (but not merely widely operative) between the parties to contracts of the type involved in the particular trade concerned."[40]

Judges and especially arbitrators without a natural *lex fori* generally choose the regulatory law of the country with the most direct connection to the transaction. They might also apply international minimum standards as a matter of international public order, such as trends found in BIT's for environmental, labor and financial stability.

37. See Prod. Brokers Co. Ltd. v. Olympia Oil & Cake Co. Ltd., (1916) 1 A.C. 314, 324 (U.K.). C.*f.* Gen. Reinsurance Corp. v. Forsakringaktiebolaget Fennia Patria, [1983] Q.B. 856 (U.K.).

38. *See generally* 12(1) HALSBURY'S LAWS OF ENGLAND ¶ 601-95 (Lord Mackay of Clashfern ed., 4th ed. 1998). In England, for the notion that practice is not law, and therefore international practice not international law, see Roy Goode, *Rule, Practice, and Pragmatism in Transnational Commercial Law*, 54 INT'L & COMP L.Q. 539, 549 (2005). Again, legal rules are in this view always national or must at least be sanctioned by some national legal system to become effective. Although usages are here distinguished and their normative force accepted, it is less clear whether they can be international and autonomous in that sense. *But see* Schmitthoff, *supra* note 5.

39. U.N. Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, art. 9(1), 19 I.L.M. 668, 674 (1980).

40. *Id.* art. 9(2).

All the same, the Convention cannot, strictly speaking, be conclusive in the matter of custom, because the force of international usages and practices may derive from other sources or from custom itself, especially if they operate generally, therefore also amongst other parties, as indeed fundamental legal principle does also and even more basically. So much seems to be accepted in Article 4 of the Convention.

As discussed above, civil law countries often ignore or hide custom as a consequence of their 19th century codification ethos and statist attitude to all private law. Thus, in civil law countries, it became normal only to take custom into account (except as implied contractual term) if the relevant codes specifically referred to it.[41] Custom was then largely considered an issue of contract interpretation and custom normally figured beside good faith notions in this respect. Article 1135 of the French Civil Code and Section 157 of the German Civil Code (BGB) are here the most important examples. It is now mostly accepted that such good faith notions may, in pressing cases, also be used to adapt the contract, when these notions become absolutely mandatory, especially when meant to protect weaker parties. It is conceivable that in the normative or teleological method of interpretation, custom may sometimes play a role similar to good faith, as Section 157 of the German Civil Code clearly suggests. Although parties may normally deviate from custom this may not then be effective either, custom in this instance having become absolutely mandatory as well.

In Article 6(2) of the new Dutch Civil Code, good faith plays a leading role in every case and may overrule the wording of the contract as well as the effect of custom and statutes. This is a unique approach, so far not followed elsewhere. It confirms that notions of good faith can be absolutely mandatory, certainly when they appeal to more fundamental principles of protection. As such, this approach is understandable in consumer law. For professionals, the rule of 1-

41. *See generally supra* note 12 and accompanying text. Other instances of a special statutory reference to custom include the French Law of 13 June 1866 concerning commercial usages, and the Law of 19 July 1928 concerning the relevance of usages in the settlement of employment disputes. S*ee* Yvon Loussouarn, *The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law*, 18 LA. L. REV. 235, 248 (1958). In Germany, Section 346 of the Handelgesetzbuch (HGB) [Commercial Code], which refers to custom in commercial transactions, is often viewed as simply an elaboration of Section 157 of the Bürgerliches Gesetzbuch (BGB) [Civil Code], which allows references to good faith and custom in contractual interpretation.

302(b) UCC may be preferred. Under it professionals can set good faith standards amongst themselves, which apply unless they prove manifestly unreasonable. Such standards of good faith may also be set by custom, which therefore would become irrelevant only if proving to be manifestly unreasonable in the circumstances. On the other hand, outside the area of contract, like in property law where the notion of custom will normally be mandatory, there seems to be hardly room for good faith correction, except perhaps in special cases like in the exercise of these customary proprietary rights and their effect on others.

Only the UCC openly favors custom as we saw. This view has recently faced serious criticism, notably from Lisa Bernstein,[42] in my view improperly so. In fact, there may be some confusion. The view is that informal custom—courses of dealing, trade usages and so on—are often replaced by rules of trade organizations that are more precise. Arguably, these trade organization rules provide, therefore, a more effective method of dispute-resolution and may play a more important role than the UCC and related customs when disputes arise. While it is admitted that parties may accept custom in their dealings as long as co-operation is productive, when disputes arise, it is argued, they prefer these more precise rules by way of end game. This suggests that these rules are absolutely mandatory in litigation judging behavior that was earlier prescribed by more informal custom. It would seem that it either has to be the one or the other.

The idea appears to be that trade organizations by codifying and updating their customs in an activist manner produce something that is different from custom and has a fundamentally different status. Indeed these codifications are considered to be only contractual.[43] But it is hard to see why this is necessarily so; custom may be enhanced through these codifications with the speical benefit that it is thereby much easier to establish or prove.[44] However, these codifications throw into relief the importance and special role of what I call the

42. *See generally* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions*, 99 MICH. L. REV. 1724 (2001); Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996).

43. *See* Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, *supra* note 42, at 756.

44. *See* Richard A. Epstein, *Confusion About Custom: Disentangling Informal Customs from Standard Contractual Provisions*, 66 U. CHI. L. REV. 821 (1999).

spokesman function in immanent legal orders which will be discussed further below. Thus, these industry bodies, if recognized as *proper spokespersons* for the relevant immanent legal order, may further elaborate on them without necessarily detracting from their customary status. That is an important proposition.[45] To obtain in this manner greater legal clarity in certain areas of (international) business would in any event not seem to condemn more informal custom and similar practices in areas where trade associations are not operative.

Like custom, private trade organization codifications need not cover contractual matters only. As custom, these codifications can be mandatory especially in property law (and even in contract law when dealing with matters of contractual infrastructure like capacity and validity or legality), as we saw, but also in the protection of weaker parties. In such cases, these codifications may also appeal to higher more fundamental principles of protection, especially in situations of dependency. In proprietary matters, the Hague-Visby rules as transnational custom were already mentioned. Parties cannot set them aside without depriving the bill of lading of its status. Also the UCP is relevant in this connection. The UCP is based on the key notion of independence of the letter of credit. Parties can deviate from that but the result would be that there is no longer a letter of credit. It would thus seem that the UCP represents mandatory custom also, at least in this aspect.

The set-off when operating as a transnational custom has a similar status and may also cover in a mandatory manner the effect of netting agreements expanding the set-off concept unless limited by the same custom. This was already mentioned before and it was further said that the eurobond has a similar customary international status. In this connection the developing law of international assignments was also noted. Again, it concerns here the infrastructure of the modern market place.

45. Customary law of this kind may also result from the World Bank (IBRD) efforts in the area of international direct investment and their protection (Guidelines for Foreign Direct Investment) and may then well be mandatory. Customary norms developed in this manner may be regularly updated and therefore abruptly changed without undermining their basic status of custom or objective law. Bilateral Investment Treaties (BIT's) may demonstrate general principles even in terms of international minimum standards in labor law and environmental protection or in the area of financial regulation that may increasingly be considered as customary and therefore relevant even outside these treaties.

V. DEFINITIONS OF CUSTOM IN PRIVATE LAW: MODERN THEORIES AND EFFECTS

The more proper question is now what custom truly is and when practices qualify as custom, and should therefore be accepted and applied as an independent source of law. This is not a simple question. Definitions are scarce. Even the UCC does not define the term itself but does contain in Section 1-303 a definition of the usage of trade and also a statement as to the role of a course of dealing.

In the UCC, 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."[46] A course of dealing "is a sequence of previous conduct between parties to a particular transaction which is fairly regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."[47] The UCC states further that "a course of dealing between the parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement."[48]

Although many, including this author, do not see a fundamental difference between custom, the usage of trade and course of dealing, it should be noted that since the latter terms are intended mainly for Article 2 of the UCC, these terms function particularly within the sale of goods, therefore mainly in contract. The Comment bears this out. These definitions do notably not cover the use of custom in areas like property law, tort[49] or fiduciary duties, nor probably any instance in which customary law is mandatory, even in contract. These definitions are thus only partly relevant in this discussion.

The working definition used in this paper is that *custom* is a practice which is universal in the trade or a relevant segment thereof. As such it *cannot* be unilaterally withdrawn or changed unless such change is authorised by the custom itself. Change or withdrawal of custom in an individual case would require an industry shift or at least

46. U.C.C. § 1-303(c) (1977).

47. *Id.* § 1-303(b).

48. *Id.* § 1-303(d).

49. Custom in tort law will not be further discussed here, but *c.f.* Richard A. Epstein, *The Path to* The T.J. Hooper: *The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992).

the other party's consent unless the custom is mandatory when it cannot be varied. Judges and arbitrators must accept and may invoke custom of this nature *ex officio*: *ius curia novit*, the judge knows the law, even if they might still require elucidation by the party invoking it. Thus, custom is not fact, but law, even though parties may be wise still to prove it. However, the extent to which judges and arbitrators may invoke custom on their own motion, especially transnational custom, may still be the subject of justified enquiry, especially in private law.[50] This important aspect will not be discussed here any further.[51]

Another preliminary observation should be made here: custom should be distinguished from standard contract terms. The latter are basically contractual, in essence an organizational technique of a dominant operator covering all or certain classes of its customers or clients. Standard contract terms are therefore specific to the dominant operator employing them. As contracts of adhesion they must be reasonable in content, and in this manner it may be helpful if standard contract terms reflect normal or general practices in an industry.[52] This relationship to business practices does not make standard contract terms custom, however. Only when they become standardized for an industry, either informally or through the operation of trade associations, may they acquire the form of custom but they normally do not.

Most authorities suggest a longer process for the emergence of custom from practice, unless the business community itself insists that its rules or law merchant must be applied and enforced. Trade organizations may be of considerable help here. A key modern insight is, however, that the formation of custom in this sense may not be a long process; custom of this nature is dynamic and may change overnight.[53] This dynamicism and changeability is the simple consequence

50. This question was relevant in B.P. Exploration Co. (Libya) Ltd. v. Lybian Arab Republic, 53 I.L.R. 279, 359 (1977).

51. One may argue, for example, that because custom (at least informal custom) derives from factual behavioral patterns, it must be proven like any other fact except when generally known. If the arbitrator is selected as an expert out of the peer group, the parties may depend on his knowledge of the customs of the trade, and therefore avoid pleading or proving the relevant custom.

52. *See* Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd., [1989] 1 Q.B., 433, 445 (U.K.) (Bingham, J.).

53. For the notion of 'instant customary law' as a source of public international law, see Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23, 35-37 (1965).

of custom following and sustaining the commercial and financial practice, which may itself change suddenly when new commercial and financial developments so dictate.

There remains, however, the problem that so far we have not found a material criterion to distinguish non-obligatory social convention, habits and routines from legally enforceable rules of custom. The importance of the difference is that, if convention, habit and routine are relied on, the result is, in terms of conduct and reliance, purely contractual. Convention, habit and routine do not otherwise function as default or supplementary rules.

To establish the relevance and force of custom, ideally we should have some broader idea of how such practices become legally normative and binding. Since few cases and arbitral decisions on this issue are published, modern immanent legal orders may be forced to rely more on internal and external signs of the existence and operation of these rules or their identification.

It is true that rules may be identified merely because they work and are accepted,[54] but their general acceptance does not establish who has the power in these orders to find, activate, and formulate these rules or principles and move them forward. The participants themselves in their daily attitudes, such as those in the eurobond markets, and international arbitrators, when it comes to dispute resolution, may figure here prominently as in dispute resolution even practitioners do in their expert testimonies, but especially trade associations as e.g. the ICMA in the eurobond market and the ICC for the Incoterms and UCP play an important role in moving these rules forward.

Traditional theories of custom, like the one of von Hayek,[55] proceed as follows: effective custom evolves through the natural selection of rules and practices but may be guided by deliberate improvements

Modern game theory confirms the accelerated formation of customary law and demonstrates that in so-called information cascades when the benefit of predecessors' actions is compelling, widespread imitation will follow immediately, see David Hirschleifer, *Social Influence, Fads and Information Cascades*, *in* THE NEW ECONOMICS OF HUMAN BEHAVIOR 188, 202 (M. Tommasi and K.I. Ieruli eds., 1995).

54. Hart's view of international law which, it would seem, could then also apply to private law custom either domestically or transnationally. *See* HART, *supra* note 4, at 227, 231. However, following Bentham and Austin, Hart held a deprecating attitude to custom. *See id.*

55. F.A. Hayek, 1 LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 35-54, 74-90 (1973).

on the part of the participants, legislatures (especially if called upon to help), courts and others, like arbitrators.

In modern Law and Economics this discussion acquires a broader flavor as it goes to the existence and operation of immanent legal orders more generally. This approach may be the better context in which to consider custom. Law and Economics presents here a more fact finding approach.[56] For international commercial law to arise as a legal and autonomous source of law: (a) the norms that arise in the relevant specialized business communities must be empirically identifiable; (b) the inventive structure that produces or internalizes the norms should be analyzed using game theory and the notion of equilibrium; and (c) the efficiency of the incentive structure should be evaluated using analytical tools from economics to avoid harmful laws, like monopolistic practices, which can not then be enforced. The emphasis in Law and Economics is here on empiricism, efficiency considerations, rationality, consistency and predictability. Perhaps, the 'modernity' and 'advanced' or forward-moving nature of the norms themselves could become an affirmation of their force in the context of their international validity.[57] In Law and Sociology, other important insights have emerged which do not contradict these findings and may well support them.[58]

56. *See generally* Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215 (1994) [hereinafter Cooter, *Structural Adjudication*]; Robert D. Cooter, *Decentralised Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996) [hereinafter Cooter, *Decentralised Law*].

57. Hence older oil concessions refer to general principles of civilized nations, while new oil concessions do not. *See supra* note 26.

58. See Gunther Teubner, *Breaking Frames: The Golden Interplay of Legal and Social Systems*, 45 AM. J. COMP. L. 149 (1997), for a different slant on the positive new law merchant and its origin. Teubner's "golden interplay" is seen in the "close structural coupling with non-legal rule production." This interplay leads to an evolutionary progression in which laws originate on the basis of an imaginary or fictitious legal environment in which there is mostly a pretense of legal rights and obligations fed by expectation. According to Teubmer, new laws are more readily accepted as binding when they are developed in the context of this perceived legal environment. However, since this environment is both non-political and factual, the development of rules in this manner may destroy the role of practicing lawyers and distort the existence of static system of rights and obligations.

The modern concept of internalization may indeed be helpful,[59] but with respect to informal custom, there will always be some uncertainty about validity and content and it may often not be possible to say exactly when custom arises. That does not deny its existence or condemn its operation. To give an example: in an environment of many participants it will soon become clear that in terms of safety and efficiency, roads should be divided into two lanes, with one lane going one direction and the other going the other direction. More precise rules emerge about passing and the precedence of traffic. Someone may step forward to take control of the traffic flow, in essence formulating more rules.

Thus, custom distinguishes itself from convention in that it is understood and followed as the prevailing rule by participants and from legislation and case law in the sense that it is likely to be much closer to reality as participants perceive it, may be product of their experiences, but, especially when private codifications emerge, also of the way they wish to progress and develop their rules further for the future.

In this connection custom is often rightly seen as what is *normally done*, but it may also move forward under terms of what *reasonably needs to be done* for efficiency or other reasons. Here, trade associations come in more specifically. The development of traffic rules again lends a potent example. Once a police function is established, even voluntarily, participants will listen and accept the police rules. These rules are then further developed and perfected to improve the traffic flows. A system of penalties for rule breakers will follow, which may be as primitive as *de facto* excluding them from use of the particular stretch of road.

Private codification, along with case law and arbitral awards, are ways through which this law can be known and as already mentioned

59. The development of bills of lading and bills of exchange indicates similar evolution. S*ee, e.g.*, JAMES STEVEN ROGERS, THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES (1995). This evolution demonstrates the very close connection between factual behaviour and the rules of law that come to prevail, as even the instinctive objectors accept that a given rule is the only logical solution to a legal problem. For further detail on this approach in terms of the type and conditions of co-operation and co-ordination, see generally ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBOURS SETTLE DISPUTES (1991); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989). Rules may also be internalized for reasons other than pressing efficiency demands, namely for reasons such as pressing moral demands or the requirements of social peace.

judges and arbitrators fulfill here a spokesman function, as does legal scholarship, but their formulations cannot stultify this law, especially not in terms of precedent. Their findings are foremost declaratory of the law so found and applied even if the decision may function as precedent in its application to the facts (which in any event move on all the time). Trade associations or other private codifiers may move on more quickly, although formulation of custom in this manner may not always prove advantageous as it deprives custom of some of its nimbleness. Custom must be ever-changing according to fast moving realities, especially clear in modern commerce and finance.

Though custom is always in progress, in areas such as finality of transfers or payments, or in matters of set-off and netting,[60] it is likely to be as precise and specific as any other law. Even in these areas, however, custom is also likely to be fairly basic, without much further refinement. For example, in terms of finality, as noted above, general customary notions of independence, *bona fide* purchasers or payees, and reliance ensure that judges and arbitrators need not establish the history of the assets and payments received to settle a particular dispute. The simplicity of custom and the absence of detail may well reflect the fact that professionals are capable of living with some greater risk, here to promote greater clarity. This is so even in contract law:

60. Since Lord Mansfield's time, certainty has been traditionally stressed in English case law, especially in mercantile transactions. *See, e.g.*, Vallejo v. Wheeler, (1774) 1 Cowp. 143, 153 (K.B.) (U.K.); *see also* Homburg Houtimport B.V. v. Agrosin Private Ltd. ("The Starsin"), [2003] UKHL 12, (2003) 1 Lloyd's L. Rep. 571, 577 (Lord Bingham of Cornhill); Compania de Neviera Nedelka S.A. v. Tradex Int'l. S.A. ("The Tres Flores"), [1974] Q.B. 264, 278 (U.K.) (Roskill J.). Some American cases also emphasize certainty. *See, e.g.*, Mc Carthy, Kenney & Reidy, P.C. v. First Nat'l Bank of Boston, 524 N.E.2d 390 (Mass. 1988). However, these cases often involve negotiable instruments and letters of credit, all related to payments, or bills of lading, and therefore part of a narrow strand of commercial law in which finality plays a particularly important role. *See* Pero's Steak and Spaghetti House v. Lee, 90 S.W.3d (Tenn. 2002).

In this context, emphasis on finality is consistent with the transnationalization of commercial and financial law. *See generally* Joseph H. Sommer, *A Law of Financial Accounts: Modern Payment and Securities Transfer Law*, 53 BUS. L. 1181 (1998). In fact, some assert that transnationalization of commercial law may be enhanced by finality. However, in this context it would also seem misconceived to ask for clearer rules of conflicts of laws and be satisfied even with arbitrary rules. That is a step back and contrary to the basic tenants, history, and true needs of international commerce and finance.

In other areas, for example, where good faith notions are now commonly used in business, the emphasis may more properly be on common sense solutions or even on extra rights and duties, although it can also be argued that especially in commerce and finance, pre- and post-contractual rights and duties (e.g. disclosure duties prior to contract and renegotiation duties in the case of hardship), for instance, are to be more narrowly construed than in consumer law. It is as precise and specific as any other law.

notions of mistake, duress, *force majeure* and change of circumstances may be much less important for professionals who conclude thousands of contracts, some of which may do better than others.[61] That might also be seen as customary in that circle. The essentials are the key; if more is needed, private codification may be appropriate. However, the lengthy negotiations often required for this type of codification and the lack of urgency in most of these codification discussions suggest also that the importance of commercial custom is *not* truly in its detail.

As far as the effect is concerned, customary law will set aside other *directory* private law, even in civil law where it is mostly statutory, unless parties wish it to be otherwise, but the nature of custom is such that *both* parties to a contract must in that case agree to retain the (statutory) alternative. Without such an agreement, custom is the default rule and a party may unilaterally opt out of customs only if opting-out is a part of the custom itself. For example, concessions, like a price reduction, may still be unilaterally revocable even if granted on a regular basis. However, revocation would not be possible if the other party relied on the discount in ongoing transactions. That is then a matter of contract proper rather than of custom as explained before.[62]

Even *mandatory* statutory or case law may become ineffective if the practice of parties will not conform and other custom develops. This issue of *non-usus*, especially relevant for regulation, may arise in situations where governments intend to regulate commercial practices. *Non-usus* usually indicates that the government's mandatory measure is too far removed from reality to be effective and becomes wishful political thinking. In other words, a rule that cannot or will not stick becomes ineffective, even if the rule was meant to be mandatory. It is a delicate issue that cannot here be further discussed.

Domestically there is also the question of the relationship between (mandatory) custom and (mandatory) good faith notions already discussed above.[63] Internationally, of course, there is also the issue of whether domestic regulation, that is a domestic governmental interest or public policy, is sufficiently closely connected to still have

61. *See* DALHUISEN, *supra* note 1, at 299.

62. Yet it might be wise all the same to introduce an anti-waiver provision in the contract. *See* Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U CHI. L. REV. 781 (1999).

63. *See supra* note 39 and accompanying text.

an effect on the transaction and the laws that otherwise apply to it, including customary laws, especially relevant if there is no appreciable conduct and effect on the territory of the state in question. That is the issue of the jurisdiction to prescribe discussed above.

Not only is the conduct of business affected by custom in this manner; the interpretation of legal documents is then guided by similar considerations, therefore by *what is normal*, but also by what should be done to be practical in the future. As noted above, custom is mainly mentioned by the German and French Civil Codes in that context. These codes have always incorporated custom in this manner, indicating that custom or what is normal in the circumstances is a pervasive notion in the law. In fact, custom is so much part of all living law that without it, law cannot be properly understood or applied. But custom is not the sole source of law and must be understood in its relationship to the other legal sources, therefore in the hierarchy of norms which especially the modern law merchant is likely to produce and was described above.

CONCLUSION

At least in the communitarian view, in which according to some,[64] the notion of community may claim moral primacy over the notion of states (notions of democracy, participation and legitimacy through community involvement) one must question whether states or nations can remain the only true sources of law and of its values. A modern strand of Law and Economics posits that the decentralization of the law is a modern necessity.[65] Transnationalisation of private law is an ideal area under which to study these contentions. It is appropriate to recognize custom in its former role as autonomous source of law, especially in international commerce and finance. Customary law can be a directory (default rule) rule or a mandatory rule. The mandatory role of customary law is especially appropriate in the law of

64. *See* PHILIP SELZNICK, THE COMMUNITARIAN PERSUASION 64 (2002). Some French legal scholars asserted the concept of internal sovereignty of all social groupings much earlier. *See* GEORGES GURVITCH, L'IDEE DU DROIT SOCIAL 84 (1932); *see generally* GEORGES GURVITCH, SOCIOLOGY OF LAW (1942). Such social groupings were even considered to create their own law within nations, thus limiting state law and rendering it inferior to the law of these social groupings. For a similar approach in The Netherlands, see H.J. VAN EIKEMA HOMMES, HOOFDLIJNEN DER RECHTSSOCIOLOGIE EN DE MATERIELE INDELING VAN PUBLIEK EN PRIVAATRECHT (1983).

65. *See generally* Cooter, *Structural Adjudication*, *supra* note 56; Cooter, *Decentralised Law*, *supra* note 56.

moveable property (including receivables), in legal infrastructure issues (both in the law of contract and property), in bills of lading, in negotiable or similar instruments (including Eurobonds), in set-off and netting notions, in assignments, and where custom may appeal to public order requirements (in terms of protection of weaker parties and in the development of fiduciary duties in situations of dependency). As demonstrated above, in international financial markets, much now depends on this customary law. These customs are also essential in clearing and settlement; although, even then, custom must be seen as one among other sources of law, which together form a hierarchy of norms. Transnational custom of this nature further competes with public policy requirements of the states with a sufficient interest in the particular (international) transaction.

Essentially, custom is an expression of what is understood as normal or best practice in the group that the custom concerns. In this sense, resort to custom is ingrained in all law and in its application. Barring public policy, normality is the true legal default rule and custom is one of its major expressions. In business, custom reflects what is most desirable in terms of common sense and experience. In commerce and finance, custom's objective is therefore to best serve the needs of the business community given that community's perception of its own needs and future.