Since the middle ages, customs among merchants have made up an important part of the law applicable to the international sale of goods. To the extent that customs have spread across national borders and have become international in character, their recognition has tended to lessen the differences among the various systems of national law. Modern legal systems generally accord a significant role to customs - or usages as they have come to be called - and give a similar role to course of dealings between the parties.

In examining any contemporary attempt at the unification of the law governing the sale of goods it is, therefore, important to consider the role played by usage and course of dealing. Article 9 of the proposed Vienna Convention on the International Sale of Goods, elaborated by UNCITRAL on the basis of the original UNIDROIT text, contains the following provision on usage and course of dealing:

1. The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
2. The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

It is interesting to read this article of CISG together with the comparable provisions of the Uniform Commercial Code, section 1-205.
party such notice as the court finds sufficient to prevent unfair surprise to the latter. Although the CISG text is much less detailed than the Code, there are obvious parallels. Although the CISG has not yet come into effect, the Code has been law in the United States for roughly two decades. It may therefore be of some interest to an international readership to know how the Code provisions on usage and course of dealing have fared in their native land. It seems especially appropriate to address this question in a collection of essays to honor my longtime friend and colleague, Jean Georges Sauveplanne, who has devoted so much of his professional career to the advancement of the unification of law.

Because one of the parties to commercial agreement often contends that it is to be read in the light of a prior course of dealing between the parties or a usage current in a trade, vocation, or place involved in the transaction, it is scarcely surprising that the Code contains a provision on course of dealing and usage of trade. But because this section is found in Article 1, General Provisions, it is not limited to agreements for the sale of goods and applies to all commercial contracts. Its principles extend by analogy to noncommercial contracts as well.

The Code describes a course of dealing as 'a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.' The concept of a course of dealing, therefore, is relevant only when the parties to an agreement have dealt with each other in similar transactions on previous occasions. A sequence of conduct by the parties in their earlier transactions is said by the Code to 'give particular meaning to and supplement or qualify' the terms of their later agreement. The words supplement or qualify make it clear that conduct may have an effect beyond mere interpretation of those terms. Although the term course of dealing has been popularized by the Code, the underlying idea that an agreement is to be read in the light of the parties' previous dealings is not novel and has force even in situations to which the Code is not literally applicable.

The Code describes a usage of trade as a '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.' A usage may be limited to a particular geographical area or to a particular kind of activity, or it may be limited in both ways. Under the Code 'any usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware' is said, just like a course of dealing, to 'give particular meaning to and Supplement or qualify terms of an agreement.' The term usage of trade is relatively new and favored by the Code over the more traditional and narrower term custom. However, the underlying principle, which is that an agreement is to be read in the light of a common practice or method of dealing, is an old one. This principle extends to 'usages' generally, even though they may not be of trade and therefore not subject to the Code. As in the case of a course of dealing, the Code's use of the words supplement or qualify makes clear that more may be involved than merely interpretation of contract language, although many cases involve no more than that.

Reliance an usages to 'supplement' the terms of an agreement has sometimes been criticized as an unwarranted encroachment on the general rules of law that would otherwise be used to perform this task. The Code commentary, however, rejects 'those cases which see evidence of "custom" as representing an effort to displace or negate "established rules of law"' and asserts that usages 'are the framework of common understanding controlling any general rules of law which hold only where there is no such understanding.' In a study of the Tumber industry in Wisconsin, a noted legal historian found that the 'generality in contract concepts . . . was a source of strength, so far as it meant that the legal order could efficiently and smoothly adapt itself to varied circumstances. But there was weakness, so far as contract law achieved this generality by intense devotion to a quite limited range of policies, abstracted from the living context in which they arose. 'He went on to suggest that by allowing proof of usage to remedy this weakness, 'lumber-contract case law made its most distinctive adaptation to the peculiarities of the industry.'

Whether a usage exists is a matter of fact rather than law. 'The existence and scope of . . . a usage,' the Code provides, 'are to be proved as facts.' A party commonly shows a usage by producing expert witnesses who are familiar with the activity or place in which the usage is observed. Their testimony must establish that the practice or method of dealing has 'such regularity in a place, vocation or trade as to justify an expectation that it will be observed with respect to the
transaction in question.’ As the Code commentary points out, however, this is a considerable relaxation of the ‘ancient English tests for proof of “custom,”’ which required not only that the custom be notorious but also that it ‘be “ancient or immemorial,” “universal” or the like.’

Once a party has proved a usage, he must also prove that the other party is chargeable with knowledge of it. He may do this by showing that at the time the contract was made the other party either was actually aware of the usage or should have been aware of it. Under the Code, if a party is engaged in the vocation or trade in question, he is presumed to have the requisite knowledge. A party who enters a vocation or trade, therefore, subjects himself to usages of which he may not in fact be aware. It has been suggested that this assumption

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has ‘the salutary effect of inducing newcomers to master the language of the trade promptly.’ But it goes well beyond the rule relating to a course of dealing, as to which a party could not help but be aware, and cases are rare in which a court has charged a party with a usage in a vocation or trade in which he is not engaged.

To what extent is a party precluded from showing a course of dealing or a usage by the fact that the agreement in question is a written one? On this important question the Code has two opposing provisions. Under the Code's formulation of the parol evidence rule, a writing may be ‘explained or supplemented’ by evidence or course of dealing or usage of trade even if it is a complete integration. There is no requirement that an ambiguity be demonstrated before a usage can be proved, and there is no prohibition against introducing a usage to show a different meaning than the one that would otherwise be apparent. Under the Code's specific provisions on course of dealing and usage, however:

The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

Thus evidence will only be admitted to show a course of dealing or usage of trade that is ‘consistent’ with the express terms; otherwise the terms alone will control. The question is then what is meant by ‘consistent’? If the evidence is offered merely for the purpose of interpretation, to ‘give particular meaning to . . . terms of an agreement, ‘the Code commentary suggests that it will be admiss-

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sible unless the course of dealing or usage of trade is ‘carefully negated’ by the writing. This, however, merely rejects the ‘plain meaning’ rule as to such evidence when it is offered for the purpose of interpretation, a result that in no way offends the parol evidence rule. The controversial cases under the Code are those in which the evidence was clearly introduced to ‘supplement or qualify terms of an agreement. In these cases courts have differed as to whether the evidence is admissible.

In a case before a lower court in New York, the operator of an automobile service station sought to restrain an oil company from terminating its franchise agreement, despite a provision that allowed either party to terminate the agreement at the end of the franchise period by giving 90-days notice. The operator sought to show a ‘custom of the gasoline-service industry to renew franchise agreements unless the franchise has failed in a material respect to adhere to the contract provisions.’ The court barred the evidence, however, holding that ‘the Code itself codifies the well established rule . . . that evidence of custom or usage in the trade is not admissible where inconsistent with the express terms of the contract,’ and that in the case before it, ‘the express terms of the contract cover the entire area of termination and negate plaintiff's argument that the custom or usage in the trade implicitly adds the words 'with cause' in the termination clause . . . Only language consistent with the tenor of the otherwise complete agreement is admissible under the guise of 'custom and usage' and the Code effects no change in that doctrine.

The Fourth Circuit displayed a more tolerant attitude toward evidence of usage in a later case involving a seller who sued a buyer for breach of a contract to sell phosphate with a 'Minimum Tonnage Per Year' of 31,000 tons for each of three years. Phosphate prices soon dropped sharply, and the buyer failed to order the stated minimum for the first year. The buyer offered evidence that 'because of uncertain crop and weather conditions, farming practices, and government agricultural programs, express price and quantity terms in contracts for materials in the mixed fertilizer industry are mere projections to be adjusted
according to market forces’, but the trial court excluded this evidence. The Fourth Circuit held this was error, although it expressly accepted the conclusion of the New York court that 'the Uniform Commercial Code restates the well established rule that evidence of usage of trade and course of dealing should be excluded whenever it cannot be reasonably construed as consistent with the terms of the contract.' The court concluded, however, that because the contract was 'silent about adjusting prices and quantities to reflect a declining market', it was 'reasonable to construe this evidence as consistent with express terms of the contract', and therefore the evidence was admissible. Thus, though both the New York court and the Fourth Circuit used a test of consistency, their applications of that test were inconsistent.

Both course of dealing and usage are based on facts existing at the time the contract was made. Sometimes the conduct of the parties after the contract is made indicates the meaning that they attach to the contract language subsequently in dispute. Such 'practical construction' is given great weight by the courts. As one court has said, 'the interpretation placed upon a contract by the parties themselves, before a dispute has arisen, is entitled to the greatest weight.' Conduct bearing an interpretation usually occurs during the course of performance of the contract. The Code says this in a section entitled 'Course of Performance or Practical Construction':

Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

The concept of a course of performance is not limited to the sale of goods and has long been applied to contracts of all kinds. It is sometimes difficult to draw the line between conduct that is the basis for a course of performance, on the one hand, and conduct that is the basis for waiver or modification, on the other, but a 'single occasion of conduct' cannot amount to a course of performance, although it may result in waiver or modification. In case of conflict, the provisions of the agreement prevail over course of performance but, at least according to the Code, course of performance controls both course of dealing and usage of trade.

These, then, are the fundamentals of usage and course of dealing under the unification achieved by the Code in the United States. It will be of interest to see what impact CISG may have in this area in its first decades.

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* This article is based in part on § 7.13 of the author's new treatise, Contracts (Little Brown Company 1982), copyright by E. Allan Farnsworth and used with permission.

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2 UCC 1-250(1). On the requirement of a 'sequence' of conduct, see Sun River Cattle Co. v. Miners Bank, 164 Mont. 237, 521 P.2d 679 (1974) ('holding and paying of one check is not sufficient to form "a sequence of previous conduct"'), remittitur corrected, 164 Mont. 479, 525 P.2d 19 (1974). A 'course of dealing,' which consists of conduct prior to the agreement in question, should not be confused with a 'course of performance,' which consists of conduct subsequent to the agreement. See text at note 26 infra. Nor should a course of dealing be confused with the prior negotiations that resulted in the agreement in question, especially because the Code relaxes the parol evidence rule as to course of dealing. See text at note 19 infra.

3 UCC 1-205(3). See Agricultural Serv. Assn. v. Ferry-Morse Seed Co., 551 F.2d 1057 (6th Cir. 1977) ('prior course of dealings and the usage of the trade modified ... implied warranties' under UCC 2-316(3)(c)). But see Schubtex v. Allen Snyder, Inc., 49 N.Y.2d 1, 399 N.E.2d 1154 (1979) (although agreement to arbitrate 'could in a proper case be implied
from a course of past conduct,' evidence did not support that conclusion in this case).

4 See Restatement Second § 223, which states an analogous rule.

5 UCC 1-205 (2). As Comment 7 makes clear, 'usages may be either general to trade or particular to a special branch of trade,' Nanaku Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981) (usage of 'the asphalt paving trade in Hawaii, rather than the purchase and sale of asphalt alone'); Hummel v. Skyline Dodge, 41 Colo. App. 572, 589 P.2d 73 (1978) (usage of wholesale car trade); cf. Tucker v. Forty-Five Twenty-Five, 199 So.2d 522 (Fla. Dist. Ct. App. 1967) (difference in usages of Orthodox and Reform Jews).

6 UCC 1-205(5). Although there is no requirement that the usage be reasonable, it cannot vary a rule of law, such as the statute of frauds, that the parties could not vary by explicit agreement. Ozier v. Haines, 411 N.E. 2d 485 (1952) ('the customs pleaded could not render nugatory the provision of the Statute of Frauds'); Farmers Coop. Ass'n v. Cole, 239 N.W. 808 (N.D. 1976) ('exceptions to the Statute of Frauds cannot be enlarged by usage in the trade'). That usage cannot, of itself, show renewal of a contract, see City Mortgage & Discount Co. v. Palatine Ins. Co., 226 Ala. 179, 145 So. 490 (1933).

7 The difference between usage and custom is discussed in the text at note 14 infra. The Code makes a passing reference to custom in UCC 1-102(2) (a) ('to permit the continued expansion of commercial practices through custom, usage and agreement of the parties').

8 See Restatement Second §§ 219-222, which state analogous rules. For an example of a case governed by UCC 1-205, although not by Article 2 of the Code, see Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040 (5th Cir. 1971) (standby and subordination agreements). For examples of usages that might not have been regarded as coming within the Code, see Congregation B'nai Sholom v. Martin, 382 Mich. 659, 173 N.W.2d 504 (1969) (Jewish usage that disputes be resolved according to Jewish law); Tucker v. Forty-Five Twenty-Five, supra note 6 (Reform Jewish usages as to Passover Seder); Fisher v. Congregation B'nai Yitzhok, 177 Pa. Super. 359, 110 A.2d 881 (1955) (Orthodox Jewish usage as to seating in synagogue).

9 Representative pre-Codes cases involving interpretation only include Dixon, Irnaos & Cia. v. Chase Natl. Bank, 144 F.2d 759 (2d Cir. 1944), cert. denied, 324 U.S. 850 (1945) (usage of New York banks issuing letters of credit to accept guaranty instead of missing part of set of bills of lading); Ermoliev v. R.K.). Radio Pictures, 19 Cal.2d 543, 122 P.2d 3 (1942) (usage that 'United Kingdom' included Eire, the Irish Free State); Hurst v. W.J. Lake & Co., 141 Or. 306, 16 P.2d 627 (1932) (usage that 'minimum 50% protein' included 49.5 percent protein); Smith v. Wilson, 3B & Ad. 728, 110 Eng. Rep. 266 (K.B. 1832) (usage that 'thousand' rabbits meant 1200). But see the cases discussed in text notes 24 and 25 infra, in which more interpretation was involved.

10 UCC 1-205 , Comment 4. For a representative case in which a rule of law was 'displaced,' see Spurgeon v. Jamieson Motors, 164 Mont. 296, 521 P.2d 924 (1974) (usage excluded implied warranties under UCC 2-316(c)).


12 UCC 1-205 (2) . The Code does not require the party who seeks to show a usage to plead it, but, under UCC 1-205(6) , the party offering evidence of a usage must give the other party notice 'sufficient to prevent unfair surprise.'

13 For example, see Frigaliment Importing Co. v. B.N.S. Intl. Sales Corp., 190 F. Supp. 116 (S.D.N.Y.1960) (operator of chicken eviscerating plant and employee of publisher of market report on poultry trade testified as to meaning of chicken); Fisher v. Congregation B'nai Yitzhok, supra note 8 (rabbits testified as to seating practices of orthodox Judaism). If the dispute is heard by one or more arbitrators who are themselves experts familiar with usages, such testimony may be necessary.

14 UCC 1-205 , Comment 5 ('full recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree'). The Code does not expressly preserve several other requirements that are traditionally imposed, such as that the usage be legal, reasonable, and certain. See LEVIE, Trade Usage and Custom under the Common Law and the Uniform Commercial Code, 40 N.Y.U.L. Rev. 1101, 1102-1206 (1965); see also NOTE, 55 Colum. L. Rev.1192 (1955). As to the requirement of reasonableness, see UCC 1-205 , Comment 6, and as to that of certainty, see Comment 9.

15 UCC 1-205(3) subjects the parties to 'any usage of trade in the vocation or trade in which they are engaged.' On the rationale for this, see WARREN, Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule, 42 U. Pitt. L. Rev. 515 (1981). The parties can, of course, incorporate a usage by reference. Leitner v. Braen, 51 N.J. Super. 31, 143 A.2d 256 (1958) (contract provided for 'usual sponsoring fees').

16 Foxco Indus. v. Fabric World, 595 F.2d 976 (5th Cir. 1979) (buyer bound by usage of trade association as to meaning of 'first quality,' although it was not a member and 'did not know of the industry's usage'); Heggblade-Marguleas-Tenneco v. Sunshine Biscuit, 59 Cal. App. 3d 948, 131 Cal. Rptr. 183 (1976) (corporation formed by merger of one corporation that had grown potatoes for processing and another that had marketed other agricultural products was not 'as a matter of law' ignorant of usage in marketing of processing potatoes); Berwick Smith Co. v. Salem Press, 331 Mass. 196, 117 N.E.2d 825 (1954) (party in publishing trade bound by usage of the trade although 'he had never had a book printed before'); cf Lynch v. Maw, 3 Utah 2d 271, 282 P.2d 841 (1955) ('a customer who engages a broker to execute an order on the stock exchange ... is bound by [the exchange's] rules and customs whether or not he has actual knowledge of them'). But cf. Flower City Painting Contractors v. Guminia Constr. Co., 591 F.2d 162 (2d Cir.1979) (‘neophyte minority painting
and still be 'consistent' with them. The word qualify is not used elsewhere in this context. Under UCC 2-202, terms of

Frankel v. Pitlor, 166 Neb. 219, 88 N.W.2d 770 (1958) (plumber who dealt with real estate broker not bound by local

usage of real estate brokers since it was 'not one which a person engaged in the plumbing business could be expected to

know about'); Mieske v. Bartell Drug Co., 92 Wash.2d 40, 593 P.2d 1308 (1979) (retail customer of film processor not

bound by usages among film processors); J. H. Rayner & Co. v. Hambro's Bank [1943] 1 K.B. 37 (C.A. 1942) (bank that

issued letter of credit not bound by usage in market for goods because banker is not 'affected with knowledge of the

customs . . . of every one of the thousands of trades for whose dealings he may issue letters of credit'). But cf. Lynch v.

Maw, supra note 17. As to conflicts between usages, see Markey v. Brunson, 286 F. 893 (4th Cir.1923) (seller bound by

usage of place where contract was made and where he was to deliver goods); Tucker v. Forty-Five Twenty-Five, supra

note 5 (Orthodox Jewish cantor bound by Reform Jewish custom of hotel for which he had contracted to conduct

Passover Seder).

UCC 2-202.

UCC 1-205(4) . In Comment 5 to UCC 1-205, reference is made to the incorporations of 'trade codes', presumably in

writing, as usages. If such 'trade codes' are incorporated by agreement, however, they would appear to qualify as express
terms.

UCC 2-202, Comment 2.


not disturb an essential thrust of the parol evidence rule that an unambiguous term may not be contradicted by parol').

It is not clear what the Code means by qualify or how a usage could 'qualify' terms of an agreement under

UCC 1-205 (3) and still be 'consistent' with them. The word qualify is not used elsewhere in this context. Under UCC 2-202,
terms of an integrated agreement may be 'explained or supplemented', but presumably not 'contradicted' by usage. Comment 1 to

UCC 1-205 speaks only of the instance in which the 'commercial context ... may explain and supplement' a writing.

Division of Triple T. Serv. v. Mobil Oil Corp., 60 Misc.2d 720, 730-731, 304 N.Y.S.2d 191, 202-203 (1969), aff'd mem.,
v. Town of Glastonbury, 158 Conn. 592, 264 A.2d 557 (1969) ('a custom in the sewer construction trade ... could not vary
the specific terms of the contract'); John F. Davis Co. v. Shepard Co., 71 R.I. 499, 47 A.2d 635 (1946) ('evidence to show a
usage was inadmissible as its only purpose would be to alter or contradict the express contract of the parties').

School Dist., 503 S.W.2d 833 (Tex. Civ. App. 1974) (error to exclude usage in air conditioning industry that reasonable
variations within specifications were acceptable). See also Nanakuli Paving Rock Co. v. Shell Oil Co., supra note 5 ('a
usage should be allowed to modify the apparent agreement, as seen in the written terms, as long as it does not totally
negate it'). The court in the Royster case also pointed out that the contract did 'not expressly state that course of dealing
and usage of trade cannot be used to explain or supplement the written contract.' 451 F.2d at 9. It seems doubtful,
however, that such a general provision would have been decisive. For a case distinguishing the Royster case, see
1978). Both the Division of Triple T and the Royster cases are criticized in Kirst, supra note 1.

Reconstruction Fin. Corp. v. Sherwood Distilling Co., 200 F.2d 672, 676 (4th Cir. 1952); see also Thompson v.
Fairleigh, 300 Ky. 144, 187 S.W.2d 812 (1945) ('There is an old saying of an English judge: "show me what the parties did
under the contract and I will show you what the contract means."') But cf. Chandler-Simpson v. Gorrell, 464 P.2d 849
(Wyo. 1970) (a contract that is not 'ambiguous, uncertain or indefinite . . . is not subject to construction by act of the
parties').

UCC 2-208(1). Unlike the provisions on course of dealing and usage of trade, this provision is placed in the sales rather
than in the general article. On the effect of the conduct of successors to parties, see Comment, 57 Iowa L. Rev. 215
(1971).

Jet Forwarding v. United States, 437 F.2d 987 (Ct. Cl. 1971) (carrier's 'conduct throughout the mass movements ... showed their concurrence with shipper's interpretation'); Hanson v. P. A. Peterson Home Assn., 35 Ill. App.2d 134, 182
N.E.2d 237 (1962) (in interpreting contract with home for elderly, 'there is no more convincing evidence of what the
parties intended by their contract than to see what they did in carrying out its provisions').

See UCC 2-208, Comment 4 ('A single occasion of conduct does not fall within the language of this section but other
sections such as the ones on silence after acceptance and failure to specify particular defects can affect the parties' rights
on a single occasion.'); For an example of conduct amounting to waiver, see H. B. Deal Constr: Co. v. Labor Discount
Center, 418 S.W.2d 940 (Mo. 1967) ('parties by agreement established a pattern, a routine practice, a method of handling
change orders which the parties accepted . . . as full compliance with . . . the contract').

UCC 2-208(2); V-M Corp. v. Bernard Distrib. Co., 447 F.2d 864 (7th Cir. 1971) ('where the express terms . . . cannot be
harmonized with the course of dealings and performance by the parties, the express terms shall control'); In re Chicago &
E.I. Ry., 94 F.2d 296 (7th Cir. 1938) ('If by mistake the parties follow a practice in violation of the terms of the agreement,
the court should not perpetuate the error'). But see UCC 2-208(3) ('course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance').

Referring Principles:

I.2.2 - Trade usages