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BOOK REVIEW: TRADE USAGES AND IMPLIED TERMS IN THE AGE OF ARBITRATION, EDITED BY FABIEN GÉLINAS

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I. INTRODUCTION

Commercial disputes often arise out of ambiguous or uncertain contract terms. In such disputes, the parties invite the court or, in the case of commercial arbitration, the tribunal to construe the words of a contract. Where the contract is silent, the parties may request the court or tribunal to "fill in the gaps" by implying certain terms into a contract. This is often done by reference to trade usage, so that certain words and practices take on a specialized meaning specific to a particular trade or business field. It is fairly common for tribunals to take into account trade usage even in circumstances where the terms of a contract are not necessarily ambiguous.

While this exercise may be relatively straightforward on the domestic plane, it is less so in the field of international arbitration. On this complex and intriguing subject, TRADE USAGES AND IMPLIED TERMS IN THE AGE OF ARBITRATION[1] draws together a collection of papers which provide a concise overview of key legal systems' and legal instruments' approach to implied contractual content. Crucially, the chapters take into account judicial practice and offer practical analysis. Moreover, the book explores the extent to which trade usage is evolving into a transnational legal doctrine, and the conceptual parameters of its development.

II. THE BOOK

As highlighted by Gélinas in an insightful introductory chapter, the status of trade usage lies in a somewhat uncomfortable hierarchical position between law and contract, so that a transnational conception of trade usage has emerged from international arbitral practice. Accordingly, the primary theme of TRADE USAGES AND IMPLIED TERMS IN THE AGE OF ARBITRATION is to explore how trade usage fits into

1 TRADE USAGES AND IMPLIED TERMS IN THE AGE OF ARBITRATION (Fabien Gélinas ed., Oxford Univ. Press 2016).

domestic law and the now broadly accepted notions of transnational private law and *lex mercatoria*.

Part I does so by offering six national perspectives on trade usage and implied terms. Geoff R. Hall's chapter traces the development of custom and usage in English law as a tool for contextualizing the parties' agreement, with the ultimate aim of accurately discerning their intentions. In doing so, Hall takes the reader through key cases, illustrating the English courts' gradual movement from a primarily textualist approach towards greater emphasis on the relevant context in contractual interpretation. This journey starts with a helpful overview of the seminal judgments of the House of Lords in *Prenn v. Simmonds*[2] and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen*.[3] Building on Lord Wilberforce's judgments in these cases, Hall draws out the significance of Lord Hoffmann's judgments in, *inter alia*, *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*[4] and its application in other common law systems, including Canada, New Zealand, Australia, and the United States. Hall's analysis of the law on implied terms is also a helpful summary of the law's development prior to *Marks & Spencer v. BNP Paribas*.[5] Hall draws his analysis together in the concluding parts of the chapter, where he assesses the role of custom and usage as perhaps the earliest form of contextualism in contractual interpretation in England.

Lydie Van Muylem's chapter looks at implied content of contracts from a civil law perspective and through the prism of the French and Belgian legal systems in particular. For those unfamiliar with the civil law tradition, Van Muylem provides an effective summary of the core principles underpinning both systems. Looking at the mechanisms through which usages are applied in contracts, Van Muylem also provides the reader with interesting insight into the development of principles of good faith and equity as sources of implied content.

[2] Prenn v. Simmonds, [1971] 1 WLR 1381 (HL).
[3] Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen, [1976] 1 WLR 989 (HL).
[4] Inv'rs Comp. Scheme Ltd. v. West Bromwich Bld. Society, 1 WLR 896 (HL).
[5] Marks & Spencer plc v. BNP Paribas Secs. Servs. Tr. Co. (Jersey) Ltd., [2015] UKSC 72.

Marie-Claude Rigaud explores the use of what she terms as "white space" (also known as blank space or negative space) in a contractual context and the legislative and judicial response to such space. The Quebec Civil Code mandate to incorporate by interpretation certain usages established by course of dealing or similar grounds is considered, along with the approach of the courts to tempering the potential impact of usages on subjective intent. The chapter offers an interesting examination of how to balance the importation of usages – objectively determined – with subjective contractual intent.

An Italian perspective follows from Luca G. Radicati di Brozolo and Giacomo Marchisio. Their co-authored chapter, much like the other contributions to the first part of TRADE USAGES AND IMPLIED TERMS, offers the reader a brief, yet informative, overview of the development of contract theory in Italian law. Radicati and Marchisio then engage in a general analysis of the three types of usage in Italian law, which the authors emphasize to be distinct and diverse. The authors proficiently navigate the reader through the relevant Italian legislation, drawing on numerous examples from local jurisprudence to give the provisions of the Civil Code the necessary color and practical context. The second part of the chapter, on the other hand, puts usages in the global context, rightly recognizing that this is where the challenge lies irrespective of jurisdiction. The authors' conclusions are of particular value to practitioners with exposure to arbitrations or litigation with an Italian element.

In *Not Merely Facts*, Helge Dedek provides the fifth and penultimate national perspective, from Germany. In an intellectually engaging chapter, Dedek explores the ambiguity of so called "normative" usages by reference to leading cases in the local courts. His analysis seeks to reconcile the ideologies of free will and party autonomy, which are meant to be reflected in the terms of a contract, with the judiciary's ability to create a "normative will" of the parties by implying content which the parties did not expressly agree to.

The focus of the final chapter of Part I is the Uniform Commercial Code (UCC), a uniform set of commercial transaction rules adopted as law in many U.S. states, as an instrument for establishing trade usages. This study is wide-ranging. It considers

the origins of the UCC's incorporation strategy, *i.e.*, the consideration of trade usage, course of performance, and dealing as a tool of contractual interpretation, together with its implementation in practice. Christopher R. Drahozal also considers the influence of the UCC's incorporation strategy on the common law, which continues to apply to those contracts where the UCC does not apply. In order to offer the reader the most informed view, Drahozal also draws together the most prominent criticisms of the UCC.

For practitioners, each of these chapters offers a valuable glimpse into legal systems often highly relevant in international arbitration. Contrary to the domestic focus of Part I, however, the second part of TRADE USAGES AND IMPLIED TERMS looks at the same concepts in the transnational context. Various core international legal instruments are considered in a carefully crafted and considered collection of essays.

The role of trade usages in the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG) is investigated in the chapter by Geneviève Saumier. Recognizing the role of the CISG as a central instrument in the development of trade usage in international trade and transnational law, Saumier strikes the balance between identifying the main principles and provisions of the CISG (also providing the reader with an overview of the legislative history of such provisions) and noting the areas of debate still surrounding trade usages in relation to the CISG in relevant commentary and case law.

Similarly, Lauro Gama Jr.'s chapter on the UNIDROIT Principles of International Commercial Contracts offers the reader a concise overview of trade usages and, to a certain extent, implied obligations in this context. Gama summarizes the basic principles underlying the UNIDROIT Principles and international trade more generally. Perhaps most helpfully, however, Gama offers practitioners and advanced students a well-crafted analysis of the development and integration of trade usages in transnational law and their interpretive influence against the backdrop of specific articles of the UNIDROIT Principles and other international instruments. While acknowledging the significant contribution of the UNIDROIT Principles to the

development of trade usages, the author recognizes the fragile legal status of trade usages, as they remain, in his words, "an institution in the making."

Chapter 9 offers an overview of trade usages in the context of arbitration under the rules of the International Chamber of Commerce (ICC). The ICC Rules specifically instruct a tribunal to take into account "relevant trade usages" together with the provisions of the contract between the parties. The chapter is, accordingly, a practical and pragmatic analysis of ICC arbitral practice in this area and arbitral tribunals' interpretations of usages.

The volume suitably concludes with two final chapters which look towards the future. H. Patrick Glenn looks at the future role of trade usages from the perspective of the historical development of the informal norms of the law merchant, and its suitability and potential for a more frequent direct role in transnational commercial cases. Fabien Gélinas' final chapter then skillfully draws the contents of this book together. As an experienced arbitrator, he does so by identifying the question facing modern international practitioners in this context – namely how much weight to accord to trade usages irrespective of the parties' choice of law.

III. CONCLUSION

Overall, TRADE USAGES AND IMPLIED TERMS IN THE AGE OF ARBITRATION offers a useful summary of the application of trade usages in major legal systems, while not shying away from the complexity and difficult questions the employment of such usages invites in the transnational context. It will therefore undoubtedly prove helpful to both practitioners of transnational arbitration, as well as more academically minded lawyers.

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