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**CAN INDIGENOUS CUSTOMARY LAW BE USED AND  
RECOGNISED IN INTERNATIONAL COMMERCIAL  
CONTRACTS?**

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***Abstract***

*Indigenous customary laws often conflict with or contradict contract laws of foreign legal systems. If an indigenous person wishes to conduct an international transaction according to their customs, problems may arise where customs are inconsistent with governing laws. This paper examines the potential areas of conflict within the lifecycle of a commercial contract to determine if indigenous customary law can be recognised as a legitimate legal system in the context of international commercial contract law.*

***Word length***

*The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 14800 words.*

***Subjects and Topics***

Indigenous Customary Law,  
International Commercial Contract Law, and  
Dispute Resolution.

“All law begins with Custom.”<sup>1</sup>

## *I Introduction*

### *A The Modern International Commercial Contract*

The modern international commercial contract has adapted to cater for the various needs and changing demands of the global trading community. However this has not always been the case. Ancient commercial contracts originated in the pre-commercial era as a result of the social status of members of a clan or tribe. Social status allowed various customs and practices to dictate how and when tribal members could produce and exchange goods and services.<sup>2</sup> These customs developed thereon, and the concept of a contract was conceived when these individuals began to rely on such trade as their livelihood.<sup>3</sup> The contemporary contract we use today is a well-modified result of this primitive contract which has evolved drastically since its pre-commercial times.

Contemporary international commercial contracts can be governed by multiple national and international laws, rules and commercial usage. A typical contract however, would often be governed by the laws of one legal system which has been selected by the contracting parties and is included within the contract in a ‘choice of law’ clause. The validity, performance and termination of the contract is thereon determined according to the chosen laws. A contract may be governed by domestic civil or common law systems of a particular country. Alternatively, parties may select international instruments such as the United Nations Convention on Contracts for the International Sale of Goods,<sup>4</sup> or the UNIDROIT Principles of International Commercial Contracts.<sup>5</sup> Various non-legal material, such as Incoterms,<sup>6</sup> may also govern certain commercial aspects of the contract.

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<sup>1</sup> D J Bederman *Custom as a Source of Law* (Cambridge University Press, Cambridge, 2010) at 3.

<sup>2</sup> Boris Kozolchik *Comparative Commercial Contracts: Law, Culture and Economic Development* (West Academic Publishing, Minnesota, 2014) at 83.

<sup>3</sup> Above n 2 at 83; George Dalton “Traditional Production in Primitive African Economies” (1962) 76 Q J Econ 360.

<sup>4</sup> United Nations Convention on Contracts for the International Sale of Goods (CISG) 1489 UNTS 3 (opened for signature September 1980, entered into force 1986) (hereinafter referred to as “CISG”).

<sup>5</sup> UNIDROIT Principles of International Commercial Contracts, 2010 (hereinafter referred to as “UNIDROIT Principles”).

<sup>6</sup> International Chamber of Commerce Incoterms 2010 (ICC Publications, Paris, 2010) at 5.

In cases where parties have not agreed upon their choice of governing law, rules of private international law will determine the applicable governing law.<sup>7</sup>

Surveys have recorded that English common law and Swiss civil law are among the most popular choices of governing law for international commercial contracts.<sup>8</sup> Other frequently chosen legal systems include New York law, French law and German law.<sup>9</sup> Despite the fact that the roots of contract law have been derived from indigenous law, indigenous legal systems are hardly recognised in an international commercial context and no evidence has been found of its use as the choice of law governing an international commercial contract. Furthermore, none of the above mentioned legal systems recognise or embody indigenous customs and values.

Therefore, if indigenous people contracting with non-indigenous parties wish to perform or interpret a contract according to indigenous customs and practices which are familiar to them, inconsistencies and conflicts may arise due to the differences in their legal systems. This paper aims to highlight some of these inconsistencies and conflicts, and examines whether indigenous customary law could accordingly be formally recognised as a source of law in international commercial contract law.

### *B Customary Law in International Commercial Contracts*

Indigenous customary law plays an imperative yet much undervalued role within various societies.<sup>10</sup> In certain countries (including developed countries such as Australia) indigenous customary law is the primary source of law for some communities.<sup>11</sup> But despite its apparent importance, the legal community, both nationally and internationally, has been slow to recognise and enforce customary law.<sup>12</sup> Commonly found legal systems such as the civil and common law systems are globally recognised as being legitimate and

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<sup>7</sup> William F Fox *International Commercial Agreements* (Kluwer Law and Taxation Publishers, Massachusetts, 1988) at 102.

<sup>8</sup> “2010 International Arbitration Survey: Choices in International Arbitration” (2010) School of International Arbitration, Queen Mary University of London <[www.arbitration.qmul.ac.uk](http://www.arbitration.qmul.ac.uk)> at 14; Stefan Vogenauer *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law* (Oxford Institute of European and Comparative Law and the Oxford Centre for Socio-Legal-Studies, 1 October 2008) at 16.

<sup>9</sup> Above n 8.

<sup>10</sup> The terms ‘indigenous law’, ‘customary law’ and ‘custom’ shall hereinafter be used interchangeably to mean indigenous customary law.

<sup>11</sup> Law Reform Commission of Western Australia *Aboriginal Customary Laws: Final Report, Project No 94* (September 2006) at 64.

<sup>12</sup> Jean G Zorn and Jennifer Corrin Care *Proving Customary Law in the Common Law Courts of the South Pacific* (The British Institute of International and Comparative Law, London, 2002) at 13.

comprising of valid laws. On the other hand, indigenous customary law is often regarded as being 'inferior' to the laws and legal systems of colonists, and inappropriate for use in modern societies.<sup>13</sup>

This lack of recognition represses the freedom of indigenous peoples by discouraging them from conducting commercial transactions beyond their community and country, and subsequently denies them opportunities available to non-indigenous citizens. Recognition and enforcement of indigenous customs in the context of international commercial law could therefore be an important step forward in recognising indigenous rights.

### *C Why Recognise by Means of International Commercial Contracts?*

#### *1 The relevance of customary law in commercial transactions*

In the context of international commercial contract law, customary law may be important where one or both parties to a commercial contract are of an indigenous background. In such circumstances, the parties may wish to have their contract governed by indigenous customs and practices which are familiar to them. An example of such a contract could be a contract for the sale of tribal art produced by an indigenous artist to an international art dealer. In this instance, the indigenous seller may be more comfortable conducting international dealings if the contract is subject to terms and conditions which are familiar to the seller. This would help the seller understand the process of contracting internationally and provide reassurance of the validity of the contract. It is also likely that businesses conducted by indigenous traders fall within the category of small and medium-sized enterprises (SMEs). Governing international contracts with laws familiar to indigenous traders in SMEs could then encourage the increase and expansion of such trade.

Commercial contract law may also need to recognise customary law where the subject matter of the contract itself, in addition to the parties involved, originates from an indigenous community. One such example would be a contract which provides for an access and benefit sharing agreement between an international biotechnology company and an indigenous community. The contract could stipulate that the indigenous community is entitled to a share of the profits earned from a particular drug, which has been produced by the company with the aid of indigenous knowledge, regarding a certain plant variety. In such a contract, the subject matter of the contract itself involves an indigenous element, and therefore relevant customary laws may need to be taken into account over the lifecycle of a contract.

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<sup>13</sup> Zorn and Care, above n 12, at 2.

Another area of relevance to indigenous rights in a commercial context arises where indigenous intellectual property is sold or licensed to an international party. Suppose an international filmmaker wishes to create a film which includes various tribal songs, dances and ceremonies particular to an indigenous community. In this instance, the indigenous tribe is the owner of this material and may jointly have copyrights over this material. In this case, the filmmaker would have to enter into a contract to legally use this material. Questions may then arise regarding who should be a party to such a contract and how the material should be used in accordance with indigenous traditions and culture.<sup>14</sup>

## 2 *Why recognise by international commercial contracts, as opposed to other means?*

As illustrated by the above examples, indigenous customary law can play a significant role in the context of international commercial contract law. Therefore, it is important for such customs to be legally recognised and enforceable on an international level.

At present, the international recognition of customary law is contingent on its legal recognition by national or international legal instruments such as treaties, conventions, statutes and common law. Where custom lacks such recognition, it may be necessary to determine if customary law may alternatively be recognised by international commercial contract mechanisms itself. Recognition by international commercial contracts may be an ideal alternative, given the rapid increase in transnational and global trade. The international nature of such contracts could allow for simultaneous recognition in multiple jurisdictions and increase awareness of indigenous customs and practices that were previously unknown. Furthermore, foreign States may be obliged to recognise indigenous law where a court decision or arbitral award has been made based on such indigenous customs. The Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters requires contracting States to enforce judgments obtained in other countries,<sup>15</sup> and the New York Convention imposes similar obligations regarding arbitral awards.<sup>16</sup> Where judgments or arbitral awards are obtained following the application of indigenous law, such international obligations prescribing their enforcement could lead to widespread recognition of indigenous customs.

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<sup>14</sup> See generally, Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (LexisNexis Butterworths, Wellington, 2002) at 99-122.

<sup>15</sup> Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (opened for signature 1 February 1971, entered into force 20 August 1979), art 4.

<sup>16</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York 330 UNTS 38 (opened for signature 10 June 1958, entered into force 7 June 1959), art 1(1).



The doctrine of party autonomy in contract law (which has received extensive recognition on a national and international level) gives contracting parties the freedom to select the laws or legal rules applicable to the contract.<sup>17</sup> According to Murphy, “unlike laws imposed from above, customs arise from below”,<sup>18</sup> from the common people. Party autonomy which allows contracts to operate in a similar manner makes it an ideal means of recognition of customary law. Where parties have chosen a dispute resolution mechanism such as arbitration, the doctrine of party autonomy would allow parties to select uncodified customs and customary rules of law (which cannot be used in international cross-border litigation) to govern their contract. The use of customary law in this manner may fast-track the process of global recognition by bypassing long and arduous processes of recognition by legislation or common law.<sup>19</sup>

Codification is undesirable as it freezes custom and prevents it from being fluid and adaptable.<sup>20</sup> Recognition by common law is scarce as judges are unwilling to apply customs where their application has not been prescribed by national law. Expatriate judges who are only trained to apply legislation and judicial precedent are unfamiliar with relevant customs and how they are to be applied. Where judges are willing to use customary law, it must be pleaded and proved as if it were a fact rather than law. This requires expert evidence from anthropologists or tribal elders and oral statements from friends or relatives acting as witnesses.<sup>21</sup> This is problematic where parties wish to appeal a court decision regarding a point on customary law but are denied the right to appeal a ‘fact’ of the case. Contractual incorporation circumvents such issues and gives indigenous people the option to use relevant customary laws, as they see fit.

#### *D Aims of the Paper*

This paper has three main sections. For legal recognition in international commercial law, customary law should be established as being a legitimate form of legal authority

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<sup>17</sup> Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell Limited, London, 2004) at 94.

<sup>18</sup> James Bernard Murphy *The Philosophy of Customary Law* (Oxford University Press, New York, 2014) at xii.

<sup>19</sup> International cross-border litigation, which is governed by rules of private international law, would nonetheless require customary law to be recognised by its domestic legal system. But it is possible that recognition of custom in international arbitration would encourage domestic courts and parliaments to take similar measures.

<sup>20</sup> Zorn and Care, above n 12, at 47.

<sup>21</sup> Zorn and Care, above n 12, at 34.

(comprising of laws or rules of law). The first section of the paper seeks to do so by examining the various definitions of customary law and how it is being used by different indigenous communities around the world.

If it is established that customary law is indeed legitimate and eligible for international recognition, it is then necessary to explore how it could be used in a transnational contract. This is explored in the second section of the paper, alongside possible areas of conflict with contract laws of commonly used legal systems. Suggestions are also provided as to how these conflicts can be addressed by incorporating custom into the various stages of the lifecycle of a contract.

If customary law can be incorporated into a contract as the governing law, it is also necessary to determine if such incorporation would be recognised in dispute resolution. The third section of the paper concisely explores whether customary law could be recognised in the three main dispute resolution mechanisms of litigation, arbitration and mediation.

All the examined issues will then be analysed as a whole to determine if indigenous customary law can and should be used and recognised in international commercial contracts.

## *II Definition and Nature of Customary Law*

### *A Defining Customary Law*

Many scholars have attempted to provide conclusive definitions of what indigenous customary law entails. However, in most cases, such efforts can be futile. Indigenous laws vary not only among different States, but also among different tribes within a given village or settlement. Concepts which are characteristic to one community may be entirely omitted in another and practices which mean one thing could indicate the opposite to a different tribe. Some traditional rules may have its meaning changed when translated to modern legal terminology, discouraging the imposition of familiar legal definitions on such customs.<sup>22</sup>

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<sup>22</sup> E Adamson Hoebel *The Law of Primitive Man* (Harvard University Press, Cambridge Massachusetts, 1954) at 19.

Information on customary law may be found in the texts of early travellers, anthropological and ethnological writings and colonial reports of commissions of inquiry and parliamentary committees.<sup>23</sup> However they are not reliable sources for determining the law as they rarely focused on the substantive law. For the purposes of this paper, therefore, several definitions will be examined to understand and determine what customary law entails.

Customary law, in general, can be defined as all those rules of conduct which regulate the behaviour of individuals and communities.<sup>24</sup> Accordingly, indigenous customary law comprises of such rules applicable to indigenous peoples and communities. The present UN working definition describes indigenous peoples as:<sup>25</sup>

... peoples having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories ... [and] form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

It is apparent from this definition that indigenous law is a means of preservation and continuity of indigenous culture, and not merely a means of regulating conduct. It is a localised form of law, attached to a particular tribe or its members, or to the particular area within which they reside.<sup>26</sup> Indigenous law is intertwined with land, the sea, the universe, spirituality, ancestors and culture. It is more spiritual than judicial, as sacred boards and ceremonial acts are all considered to be a part of the Law.<sup>27</sup> It is sourced from the practices, stories, songs, dances, poems, ceremonies and paintings of indigenous people, passed down over generations. They are considered valid sources of law and courts often refer to them when ascertaining what a particular custom is. For example, in the case of *Re Certified*

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<sup>23</sup> G J van Niekerk “Orality in African Customary and Roman Law of Contract: A Comparative Perspective” (2011) *De Jure* 364 at 365.

<sup>24</sup> J H Driberg “Primitive Law in East Africa” (1928) 1 *Africa* 63 at 65.

<sup>25</sup> J R M Cobo *Study of the Problem of Discrimination against Indigenous Populations Volume V: Conclusions, Proposals and Recommendations* (United Nations, E/CN.4/Sub.2/1986/Add.4, 1987) at 379.

<sup>26</sup> A N Allott “The Judicial Ascertainment of Customary Law” (1957) 20 *MLR* 244 at 246.

<sup>27</sup> S Cane *Pila Ngru: The Spinifex People* (Freemantle Arts Centre Press, Freemantle, 2002) at 69.

*Question II: Navajo Nation v McDonald*,<sup>28</sup> the Supreme Court of Navajo referred to a story of the Navajo people to determine the fiduciary obligations of a tribal chairman.<sup>29</sup>

## *B Present Use and Recognition of Customary Law*

### *1 State recognition*

State recognition is often awarded to indigenous customary laws by provisions in national constitutions. According to Cuskelly, 115 countries have recognised customary law in their constitution to varying degrees.<sup>30</sup> Countries such as Bolivia, Papua New Guinea, South Africa and the Philippines have incorporated pre-colonial customary law into the constitution alongside the civil or common law systems, to achieve legal pluralism. Some countries broadly recognise custom by providing definitions,<sup>31</sup> and establishing it as a source of national law.<sup>32</sup> Procedures for the establishment of proof,<sup>33</sup> and judicial recognition of custom have also been provided for in some jurisdictions.<sup>34</sup>

Where constitutional recognition has not been granted or sufficiently provided for, some countries have alternatively awarded recognition by statute. Tuvalu and Kiribati, which do not have constitutional provisions for the recognition of custom, have enacted the Laws of Tuvalu Act,<sup>35</sup> and the Laws of Kiribati Act respectively,<sup>36</sup> which establish customary law as an official source of domestic law. With regard to commercial contracts, these Acts expressly require courts to take account of custom when determining matters relating to any transaction that was intended by the parties to be regulated by custom.<sup>37</sup> Papua New Guinea has introduced the Customs Recognition Act,<sup>38</sup> which extensively provides for

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<sup>28</sup> *Re Certified Question II: Navajo Nation v McDonald* [1989] A-CR-13-89 (SC).

<sup>29</sup> The Navajo people are indigenous people inhabiting reservations in Arizona, New Mexico and Utah. The Navajo people have their own government and court systems, which deal with matters related to their tribe. For more information, see <[www.navajo-nsn.gov](http://www.navajo-nsn.gov)> and <[www.navajocourts.org/publicguide.htm](http://www.navajocourts.org/publicguide.htm)>.

<sup>30</sup> K Cuskelly *Customs and Constitutions: State Recognition of Customary Law around the World* (IUCN Publications, Bangkok, 2012) at 6.

<sup>31</sup> See, for example, the Constitution of the Republic of Ghana 1992, art 11(3) and the Constitution of the Independent State of Papua New Guinea 1975, sch 1(2).

<sup>32</sup> For example, the Constitution of the Republic of the Gambia 1997, s 7 and the Constitution of the Republic of Singapore 1963, art 2.

<sup>33</sup> See Constitution of the Republic of Rwanda 2003, art 145.

<sup>34</sup> For example, the Constitution of the Republic of South Africa 1996, s 39(2).

<sup>35</sup> Laws of Tuvalu Act 1987 (Tuvalu), ss 4(2)(b) and 5(2).

<sup>36</sup> Laws of Kiribati Act 1989 (Kiribati), ss 4(2)(b) and 5(2).

<sup>37</sup> Laws of Kiribati Act 1989, (Kiribati) sch 1(3) and Laws of Tuvalu Act 1987, (Tuvalu) sch 1(3).

<sup>38</sup> Customs Recognition Act 1963 (PNG).

various aspects regarding proof and recognition of customs. This is supplemented by the Underlying Law Act, which establishes customary law as an underlying law of the State.<sup>39</sup> The Solomon Islands has also introduced the Customs Recognition Act, which is yet to be enforced.<sup>40</sup>

Where chosen governing laws of an international contract are within the legal system of such countries, customary law could undoubtedly be applied when resolving disputes and determining remedies.

## 2 *Judicial recognition*

Customary law is regularly applied by national courts in countries where custom is officially recognised as a source of law. However, most such cases deal with matters outside commercial contract law. Research suggests that there are very few cases, if at all, relating to the application of indigenous law in commercial contract disputes. Therefore, some non-contractual cases have been examined below to determine whether customary law could be applied in a similar manner in commercial and contractual matters.

National courts, unlike tribal courts, can occasionally be hesitant to recognise and apply customary law where it has not been provided for in domestic law. Even where courts have been provided with rules on the recognition and pleading of customs, judges may not be inclined to recognise custom as a legitimate source of law. An example of this reluctance is found in the Solomon Islands case of *Allardyce Lumber Company Limited v Laore*, where the High Court chose to disregard relevant customary laws despite the fact that the Constitution provided for its application.<sup>41</sup> In the Fijian case of *Serupepeli Dakai No. 1*, judges proceeded to use incorrect codified law despite protests from parties who preferred the application of customary law.<sup>42</sup> Courts are also be reluctant to apply custom where it allows parties to bring the same dispute to court many times over if the desired outcome has not been achieved, as was the case in *Lafea v Afu*.<sup>43</sup>

However, the general approach has been more accommodating, and courts have, on numerous instances, applied customary laws and practices when determining cases. In the Vanuatu case of *Molu v Molu No 2*, the Supreme Court of Vanuatu acknowledged that,

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<sup>39</sup> Underlying Law Act 2000 (PNG), ss 3(1)(a) and 4(1)(a).

<sup>40</sup> Customs Recognition Act 2000 (SB).

<sup>41</sup> *Allardyce Lumber Company Limited v Laore* [1990] SBHC 96, [1990] SILR 174.

<sup>42</sup> *Serupepeli Dakai No 1 & Others v Native Land Development Corporation and Others* SC civ cas 542/1979.

<sup>43</sup> *Lafea v Afu* [1992] SBCA 1.

where relevant, custom should be adopted and enforced as law, as they are justiciable before courts of Vanuatu.<sup>44</sup> This approach has been complied with in subsequent cases in Vanuatu, such as *Waiwo v Waiwo*, where customary law practices were taken into account when determining damages for a divorce proceeding.<sup>45</sup> In Fiji, courts have even applied customary law in criminal cases. For example, a customary apology was a mitigating factor in reducing a criminal sentence in *R v Vodo Vuli*.<sup>46</sup> Customary law has also been successfully pleaded in Western jurisdictions, such as in the Irish case *Moore v Attorney General*.<sup>47</sup>

South African Courts have applied customary law to a number of domestic cases. In *Alexkor Ltd v Richtersveld Community*, the Court acknowledged customary law as being an integral part of the national law which stands independently of the civil and common law systems.<sup>48</sup> A commonly applied indigenous principle is the concept of *Ubuntu*, which is roughly equivalent to the concept of good faith.<sup>49</sup> Contractual matters have been deliberated in the light of this concept of *Ubuntu* in cases such as *Everfresh Market Limited v Shoprite Checkers Limited*.<sup>50</sup>

Courts also use customary law when interpreting and applying statutory provisions and judicial precedent, even where custom is not a part of formal law.<sup>51</sup> For example, in *Grundler v Namaduk*,<sup>52</sup> the Supreme Court of Nauru used customary laws to interpret the meaning of the word 'child' in a legislative instrument. In *Waiwo v Waiwo*,<sup>53</sup> the Vanuatu Magistrate's Court took customary laws into account when interpreting provisions for damages for adultery under the Matrimonial Causes Act 1988 of Vanuatu.<sup>54</sup>

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<sup>44</sup> *Molu v Molu No 2* [1998] VUSC 15.

<sup>45</sup> *Waiwo v Waiwo* [1996] VUMC 1.

<sup>46</sup> *R v Vodo Vuli* SC Rev Cas 6/1981, 14 August 1981.

<sup>47</sup> *Moore v Attorney General* [1929] IR 191.

<sup>48</sup> *Alexkor Ltd & Another v Richtersveld Community & Others* [2003] ZACC 18 at 51.

<sup>49</sup> *S v Makwanyane and Another* [1995] ZACC 3 at [237].

<sup>50</sup> *Everfresh Market Virginia (Pty) Limited v Shoprite Checkers (Pty) Limited* [2011] ZACC 30 at 23.

<sup>51</sup> Zorn and Care, above n 12, at 9.

<sup>52</sup> *Grundler v Namaduk* [1969-82] NLR (B) 92.

<sup>53</sup> Above n 45.

<sup>54</sup> Jennifer Corrin and Don Paterson *Introduction to South Pacific Law* (3rd ed, Palgrave Macmillan, Victoria, 2011) at 58.

As illustrated, customary law has been applied in various situations, including the determination of damages and sanctions. Accordingly, it is concluded that custom may be applied in a similar manner where commercial contract disputes are involved.

### *3 Use of custom as the primary or sole form of law*

Certain communities solely recognise and practice customary law, in the absence of other laws or legal systems. The Inuit people, for example, regard the *Shaman* as the leader of the tribe. The *Shaman* has the authority to commence legal action under relevant indigenous customs and rules, and makes legal decisions on behalf of the tribe and its people.<sup>55</sup> In Somaliland (an autonomous region of Somalia) customary law, called *xeer*, is the predominant, and often sole, form of law.<sup>56</sup> The absence of State regulation and lack of other legal systems has led to Somali tribes structuring an elaborate indigenous law system which is in effect today.<sup>57</sup> Certain indigenous tribes within South Africa, such as the Tswana tribe, have also given the force of law to indigenous customs and norms. District and Tribal chiefs discourage and deny support to old customs inappropriate for modern use, similar to the civil and common law systems.<sup>58</sup> Certain Aboriginal tribes in Australia also continue to regulate their lives by customary law, despite the existence of the Australian common law system.<sup>59</sup>

### *4 Contracts in customary law*

Research suggests that certain indigenous tribes entered into contractual agreements for commercial transactions. For example, pearl shells, bamboo necklaces and boomerangs were traded for coolamon, shields and spears among different Aboriginal tribes in Western Australia.<sup>60</sup> The Law Reform Commission of Western Australia is of the opinion that a customary law of contract was practiced among the Aboriginal communities, which was more advanced than a mere barter system and relied on contractual concepts of bargain,

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<sup>55</sup> Hoebel, above n 22, at 73.

<sup>56</sup> Brendan Tobin *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters* (Routledge, Oxon, 2014) at 73.

<sup>57</sup> At 73-76.

<sup>58</sup> Hoebel, above n 22, at 278.

<sup>59</sup> Kathryn Trees “Contemporary issues facing customary law and the general legal system: Roebourne – a case study” in Law Reform Commission of Western Australia *Aboriginal Customary Laws: Background Papers*, Project No 94 (December 2005) 213 at 215.

<sup>60</sup> Law Reform Commission of Western Australia *Aboriginal Customary Laws: Discussion Paper, Project No 94* (January 2006) at 274.

promise, obligation, enforceability and sanctions.<sup>61</sup> Promises to make or supply goods were formally recognised, and the breach of such a promise was subject to sanctions.<sup>62</sup>

Indigenous communities in various regions of the African continent appear to have well-developed contract laws within their customary law. Indigenous tribes in Guinea are known to have been involved in the trade of Ivory with Dutch merchants. These international commercial transactions were often governed by customary laws and practices known to the indigenous traders.<sup>63</sup> Such customary law did not explicitly contain a general model of contract (which fits within generally globally recognised models), but some rules which regulated the conduct and obligations of the parties did exist.<sup>64</sup>

Certain indigenous tribes have also been known to transfer incorporeal property such as power and status, as well as intellectual property rights such as ownership of tribal songs and prayers, by means of commercial contracts.<sup>65</sup>

Where an international trader wishes to engage in commercial transactions with indigenous peoples within such communities and tribes, their customary laws and practices relating to contracts may have to be taken into account.

##### *5 Customary dispute resolution mechanisms*

Indigenous tribes (for example the Dou Donggo people of Indonesia) are generally reluctant to resort to dispute resolution mechanisms such as litigation, mediation and arbitration, which involve public bodies or authorities from outside the community.<sup>66</sup> This “culturally reinforced aversion” arises from the fact that they consider such methods to be demeaning to families and communities.<sup>67</sup> The more favourable preference tends to be customary dispute resolution mechanisms, conducted by certain members and heads of their respective community.

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<sup>61</sup> *Aboriginal Customary Laws: Discussion Paper*, above n 60, at 275.

<sup>62</sup> M Ellinghaus “An Australian Contract Law?” (1989) 2 *Journal of Contract Law* 13 at 13.

<sup>63</sup> Niekerk, above n 23, at 371.

<sup>64</sup> Max Gluckman *The Ideas in Barotse Jurisprudence* (2nd ed, Manchester University Press, Manchester, 1972) at 176.

<sup>65</sup> See Hoebel, above n 22, at 58-61.

<sup>66</sup> Graham Hassall “Alternative Dispute Resolution in Pacific Island Countries” (2005) 9 (2) *J South Pac Law* 1 at 2.

<sup>67</sup> Tobin, above n 56, at 72.



A nationally recognised customary dispute resolution method is customary arbitration in Nigeria. Customary arbitration is a process involving the “voluntarily submission of the parties to the decision of arbitrators who are either chiefs or elders of their community and their agreement to be bound by such decision.”<sup>68</sup> Various Nigerian cases, such as *Okereke v Nwankwo*,<sup>69</sup> and *Agu v Ikwibe*,<sup>70</sup> have now recognised customary arbitration as a valid dispute mechanism and it carries the same binding power as a judgment obtained by a judicial body, if both parties agree to the terms of arbitration and a binding decision.<sup>71</sup> The legitimacy and binding nature of customary arbitration has also been recognised by English model Courts such as the West Africa Court of Appeal, in *Assampong v Amuaku and Others*.<sup>72</sup> The arbitration process involves the whole community, who bears witness to the award and ensures that it is enforced. Where this is not possible, awards are enforced by courts through the doctrine of estoppel.<sup>73</sup>

The Navajo people of North America resolve disputes by the process of ‘Peacemaking’, whereby a peacemaker oversees the process and all parties contribute to deciding an issue.<sup>74</sup> Tribal laws and indigenous customs are applied by the Navajo Tribal Courts to solve a vast array of cases including criminal offences, accident compensation and family marriage disputes. Customs are used in a similar manner to common law and are developed and applied on a precedential basis by Navajo courts.<sup>75</sup>

In Cambodia, indigenous communities appoint a mediator known as a *kanong* to represent each party and broker a settlement or reconciliation.<sup>76</sup> Where a *kanong* is incapable of settling a dispute, an adjudicator is appointed and decisions are enforceable where the

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<sup>68</sup> *Agu v Ikwibe* [1991] 3 NWLR (Pt. 178) at [395].

<sup>69</sup> *Okereke v Nwankwo* [2003] 9 NWLR (Pt. 826).

<sup>70</sup> *Agu v Ikwibe* [1991] 3 NWLR (Pt. 178).

<sup>71</sup> *Njoku v Ekeocha* [1972] 2 ECSLR 199 at 205.

<sup>72</sup> *Assampong v Amuaku and Others* [1932] 1 WACA 192.

<sup>73</sup> Nduka Ikeyi and Tochukwu Maduka “The Binding Effect of a Customary Arbitration Award: Exorcizing the Ghost of *Agu v Ikwibe*” (2014) 58 *Journal of African Law* 328 at 330.

<sup>74</sup> Ed Marianne O Nielson and James W Zion *Navajo Nation Peacemaking* (The University of Arizona Press, Tucson, 2005) at 4.

<sup>75</sup> Tom Tso “The Process of Decision Making in Tribal Courts: A Navajo Jurist’s Perspective” in Ed Marianne O Nielson and James W Zion *Navajo Nation Peacemaking* (The University of Arizona Press, Tucson, 2005) 29 at 34.

<sup>76</sup> Maria Backstrom, Jeremy Ironside, Gordon Paterson, Jonathan Padwe and Ian G. Baird *Indigenous Traditional Legal Systems and Conflict Resolution in Ratanakiri and Mondulakiri Provinces, Cambodia* (United Nations Development Programme, Bangkok, 2007) at 24.

consent of the parties and the elders has been granted.<sup>77</sup> In Bangladesh, disputes among indigenous people are resolved by the village headman who sits with social leaders and other village elders with the aim of bringing about reconciliation.<sup>78</sup> A similar approach is taken in Vanuatu, where Chiefs are charged with the role of resolving disputes when parties are unwilling to go to public solicitors,<sup>79</sup> and Samoa, where *Matai* (chiefs) are responsible for maintaining traditions and resolving disputes within their community.<sup>80</sup>

Where a dispute arises over the course of an international commercial transaction, indigenous parties may prefer to settle it according to such customs and practices.

### *C The Nature of Customary Law*

For customary law to be suited to govern international commercial contracts, it should qualify as law, rules of law, or in the least, principles embodying some authority or regulating power. If recognised as law, it can undoubtedly be used in all forms of dispute resolution. If it can be categorised as rules of law or legal principles it may not be applicable in litigation but could still be used in alternative dispute resolution mechanisms such as mediation or arbitration.

Black's Law Dictionary defines law as "the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them."<sup>81</sup> According to Cardozo, law is "a principle or rule of conduct so established ... that it will be enforced by courts if its authority is challenged".<sup>82</sup> According to these definitions, the classification of custom as law is merely subject to its recognition by courts; therefore customs which have been adopted by courts can qualify as law. This is comparable to tribal courts, such as the Court of the West African Ashanti tribe or the courts of the Yurok Indians of California, which routinely and primarily apply and give force to indigenous customary laws.<sup>83</sup> Law and custom are also comparable in other ways: both have regularity; both define relationships; and both are sanctioned.<sup>84</sup> Therefore indigenous customary law may qualify as a form of positive law.

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<sup>77</sup> Backstrom, Ironside, Paterson, Padwe and Baird, above n 76, at 24.

<sup>78</sup> Tobin, above n 56, at 71.

<sup>79</sup> Hassall, above n 66, at 6.

<sup>80</sup> Bruce Barnes "Conflict Resolution Across Cultures: A Hawaii Perspective and a Pacific Mediation Model" (1994) 12(2) *Mediation Quarterly* 117 at 126.

<sup>81</sup> Brian A Garner (ed) *Black's Law Dictionary* (10th ed, Thomson Reuters, Minnesota, 2014).

<sup>82</sup> B N Cardozo *The Growth of Law* (Yale University Press, New Haven, 1924) at 14.

<sup>83</sup> Hoebel, above n 22, at 24.

<sup>84</sup> Hoebel, above n 22, at 276.

Aristotle was of the view that customary law was a manifestation of natural law, and therefore absolute, making it superior to positive law. This approach is, to some extent, reflected in the constitutions of countries such as Papua New Guinea and Vanuatu, which have elevated customary law above English and French colonial law.<sup>85</sup> Alternatively, the Roman philosopher Cicero argued that custom lies between natural and positive law customary law and stems from rules of conduct which received the “support of religion and the fear of legislation”.<sup>86</sup>

Also within this category are scholars, such as Hartland, who have declared that custom and law are one and the same.<sup>87</sup> But these definitions imply that customs such as social etiquettes and norms which have no legal standing, are also law.<sup>88</sup> Such views are contrary to that of Tobin, who believes that “[the] nature of customary law is that it enshrines certain principles, and not any specific set of rules ... [which can be] adapted to various different situations”.<sup>89</sup> Furthermore, treating custom and law as being the same would “take everything that is customary out of custom”,<sup>90</sup> including its fluidity and adaptability.

Blackstone has identified seven criteria, all of which should be satisfied, to determine whether customary law should qualify as enforceable law: customs should be immemorial, continuous, peaceable, reasonable, certain, compulsory and consistent.<sup>91</sup> In this regard, the nature of customary law fails to satisfy the requirements of continuity, certainty and consistency, thus disqualifying its classification as ‘law’.

The above illustrated opinions demonstrate the varying and conflicting reception as to the nature of customary law. For the purposes of this paper, it is concluded that custom does not carry the same legal authority as positive law. This conclusion can be supported by the lack of (national) judicial recognition where it has not been incorporated into domestic law;

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<sup>85</sup> The Constitution of the Independent State of Papua New Guinea 1975, sch 2.2(c) and The Constitution of the Republic of Vanuatu 1980, art 95 respectively, states that common law may be applied only where it is consistent with customary law.

<sup>86</sup> J B Murphy “Habit and Convention at the Foundation of Custom” in A Perreau-Saussine and J B Murphy (ed) *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press, Cambridge, 2007) at 64.

<sup>87</sup> E S Hartland *Primitive Law* (Kennikat Press, London, 1924) at 5.

<sup>88</sup> Hoebel, above n 22, at 20.

<sup>89</sup> Tobin, above n 56, at 80.

<sup>90</sup> Zorn and Care, above n 12, at v.

<sup>91</sup> D Callies “How Custom became Law in England” in P Øreback, F Bosselman, J Bjarup, M Chanock and H Peterson (eds) *The Role of Customary Law in Sustainable Development* (Cambridge University Press, London, 2006).

if it is a form of positive law, it need not rely on legislation or constitution for recognition. However, the fact that it is highly regarded by renowned scholars and extensively used in a broad range of legal issues indicates that it does embody sufficient legal authority to qualify as rules of law.

### *III Why Recognise Indigenous Customs?*

#### *A Potential Reasons against Recognition*

##### *1 Indigenous people are unlikely to conduct international commercial transactions*

An argument that can be made against the recognition of indigenous law in the field of international commercial law is that indigenous people are unlikely to be involved in international commercial trade. They comprise of small, self-contained communities who can be reluctant to interact with unknown foreign traders from different cultures. However, evidence exists that ancient indigenous people conducted long distance trade with foreign communities and tribes from different cities and even other countries. For example, indigenous Mayans are believed to have traded turquoise and gold discs with foreign communities in New Mexico, Panama and Colombia.<sup>92</sup> Aboriginal Australians are also believed to have practised trade over vast distances, across different language groups and environmental regions to obtain stones, tools and ceremonial items which were not available within a particular locality.<sup>93</sup>

Furthermore, most indigenous communities are no longer reserved and closed to outside interaction. At present, there are around 350 million indigenous people in more than 70 countries around the world.<sup>94</sup> Some of their communities are located in developed countries such as Australia, South Africa and the United States, where international commercial transactions are frequent. Given the increasing rate of globalisation of trade and the growth of multinational companies conducting international commercial transactions, it is not surprising that such business conduct would have an effect on indigenous communities.

International commercial transactions are also important for the sustenance of certain indigenous communities. Most indigenous Aboriginal communities depend on trade to

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<sup>92</sup> Lynn V Foster *Handbook to Life in the Ancient Maya World* (Infobase Publishing, New York, 2002) at 319.

<sup>93</sup> "Aboriginal Trade Routes" Indigenous Australia <[www.indigenoustrade.info](http://www.indigenoustrade.info)>.

<sup>94</sup> United Nations Permanent Forum on Indigenous Issues *Report of the Secretariat on Indigenous Traditional Knowledge* (United Nations, E/C.19/2007/10, 2007).

improve their quality of life by serving as a means of income.<sup>95</sup> For instance, indigenous communities in Guatemala source their income through trade involving small-scale agriculture and craft production.<sup>96</sup> Where communities are unable to source sufficient income through local trade, they may be inclined to trade in other cities. Trade beyond a tribe's locality also allows communities with cultural and language differences to learn about and respect the rights and customs of other tribes.<sup>97</sup>

The fact that indigenous communities do not involve themselves in modern international trade could be due to the very fact that they are unfamiliar with foreign laws and prefer to govern commercial matters by customary law. In 2009, statistics found trade to be the second highest category of employment for Canadian Aboriginal people (North American Indians, Métis and Inuit), but the average employment rate was 57%.<sup>98</sup> This implies that 43% of Canadian Aboriginal people could not find employment in this sector. Although no hard evidence exists to link the lack of recognition of their customs to the employment rate, it is possible that recognition could encourage employment in the trade sector. In African indigenous societies, commercial production of goods is dependent on social status, which has been derived from customary law.<sup>99</sup> This too indicates that custom plays a vital role in economic aspects of indigenous life. Hence, recognising such laws and customs could encourage indigenous communities to take part in international commerce and improve the economy and welfare within their locality.

It is speculated that indigenous traders are most likely to conduct business which falls within the category of small and medium-sized enterprises (SMEs),<sup>100</sup> which are firms with fewer than 250 to 500 employees.<sup>101</sup> SMEs account for 60% of the world's global workforce, and are vital to the economic growth of a country.<sup>102</sup> A world SME Forum has

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<sup>95</sup> "Aboriginal Trade Routes", above n 93.

<sup>96</sup> Mark Camp and Jenn Goodman "Fair Trade & Indigenous Peoples" (2005) Cultural Survival <[www.culturalsurvival.org/publications](http://www.culturalsurvival.org/publications)>.

<sup>97</sup> "Aboriginal Trade Routes", above n 93.

<sup>98</sup> "Aboriginal peoples" Canada Year Book (30 September 2011) Statistics Canada <[www.statcan.gc.ca](http://www.statcan.gc.ca)>.

<sup>99</sup> George Dalton "Traditional Production in Primitive African Economies" (1962) 76 Q J Econ 360 at 367.

<sup>100</sup> Case studies performed in New Zealand, Canada, Australia and the United States examined various businesses which are owned or operated by indigenous people from these countries, and all participating businesses appear to be SMEs. For more information, see Naomi Smyth, Miriana Ikin and Liz Norman *Taking Care of Business: Indigenous Business Case Studies* (Aotahi, Te Kuiti, 2008) and <[www.aotahi.com](http://www.aotahi.com)>.

<sup>101</sup> <<https://stats.oecd.org/glossary>>.

<sup>102</sup> <<http://worldsmeforum.org/about>>; <[www.iccwbo.org/News/Articles](http://www.iccwbo.org/News/Articles)>.

also been launched at the G20 Forum in Turkey in 2015, with the aim of stimulating global economic growth.<sup>103</sup> This underlines the importance of SMEs and the need to encourage individuals who are likely to be involved in this business sector. It would therefore be in the interests of governments and international organisations (such as the International Chamber of Commerce) to support and encourage indigenous traders who make up a part of this SME sector. The legal and international recognition of indigenous customary law could play an important role in this regard as it can encourage indigenous traders to conduct business more frequently, beyond their locality. Successful international trade in this regard could also encourage other indigenous traders to engage in similar trade by starting up their own SMEs, creating a ripple effect of economic development.

## *2 Customs may embody inappropriate sanctions and rules*

A primary argument against the recognition of indigenous customs is due to the belief that it is violent and uncivilised. Some academics have pointed out that the indigenous legal system is a “largely patriarchal system, oppressive to women and children and susceptible to bias and abuse by elder elites”.<sup>104</sup> Customary laws may comprise of punishments and sanctions unacceptable to the general society. For instance, indigenous tribes in some Pacific Island countries presently engage in conflict resolution by endemic warfare, where parties from other villages or tribes are involved.<sup>105</sup> However, in the context of international commercial transactions, these sanctions and rules will have no effect, as national courts and arbitral tribunals will not recognise or enforce them. Even in the very rare occasion where they have been incorporated into the substance of a contract, they will not be enforceable if they violate domestic laws of the chosen legal system. For instance, the New York Convention provides that recognition and enforcement of arbitral awards may be refused in a country where it would be contrary to the public policy of that country.<sup>106</sup> Customary laws may violate domestic laws and public policies of a country if they are

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<sup>103</sup> <<http://b20turkey.org/smes-and-entrepreneurship>>.

<sup>104</sup> Tobin, above n 56, at xvi.

<sup>105</sup> Hassall, above n 66, at 1.

<sup>106</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York 330 UNTS 38 (opened for signature 10 June 1958, entered into force 7 June 1959), art V.

contrary to provisions of human rights conventions ratified by that country, including conventions of the United Nations,<sup>107</sup> or the European Convention on Human Rights.<sup>108</sup>

### *3 Difficulties in ascertaining customs*

Indigenous customs are largely unwritten, and are verbally passed down among generations. As a result, it could be difficult to determine the laws comprised within a particular customary legal system. Individuals outside an indigenous community may not be aware if and how a particular custom may apply in a commercial transaction, of whether an applicable custom even exists. Furthermore, in countries such as Vanuatu and the Solomon Islands, customs vary even among communities on the same island, making it difficult to accurately ascertain a particular custom.<sup>109</sup> This could lead to uncertainty and miscommunication, unless all applicable customs are discussed in detail before the contract has been finalised.

### *4 Indigenous traders may be unfamiliar with modern trade*

A practical disadvantage of using customary law in international commercial contracts is that it may be unsuited to deal with current issues and problems that may arise over the course of performance of a contract. For instance, contemporary contracts largely differ from contracts formed within indigenous communities in that they employ modern means of communication (such as email or social media) and payment methods (for example, online payments via credit cards, internet banking or PayPal). Where an international contract is to be negotiated and finalised via email communication, or where payment is to be made online, problems may arise as most indigenous communities may not have access to these facilities. Indigenous customary law may also not provide sufficient guidance if disputes relating to such matters arise. Therefore traders may have to resort to less contemporary methods of conducting contractual obligations.

### *5 Legal pluralism*

The recognition of customary law in international commercial law would inevitably result in legal pluralism. Contracts could subsequently not only be governed by respective national and international legal systems, but also by unwritten and variable customs and

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<sup>107</sup> For example, United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/61/L.67 (2007); International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976); International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

<sup>108</sup> Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into for 3 September 1953).

<sup>109</sup> Corrin and Paterson, above n 54, at 40.

practices. Legal pluralism could lead to conflicting laws and inconsistencies, especially with regard to older customs and practices. Although this could be inconvenient in other areas of law, legal pluralism should not be problematic in contract law due to the doctrine of party autonomy. If parties choose to have their contract governed solely by customary law, problems of conflicts and inconsistencies need not arise. Within the contract, parties could specify all the customs and practices which would be applicable (although this may result in a lengthy contract). Furthermore, legal pluralism already exists within international commercial contract law, given the numerous applicable national laws, as well as international instruments such as the CISG and UNIDROIT Principles. Legal pluralism also exists in South Pacific countries, where custom is acknowledged and endorsed by formal law.<sup>110</sup> In countries such as South Africa and Sri Lanka, indigenous law sits alongside colonial law to form “a system of intercultural justice and equity”.<sup>111</sup> From this perspective, pluralism would serve to benefit contracting parties by offering them a greater choice of applicable law, as opposed to being detrimental.

#### *6 Customs may not be applicable to non-indigenous people*

An argument could be made that indigenous laws are not applicable to non-indigenous individuals. This approach is supported by cases such as *Semens v Continental Airlines*,<sup>112</sup> where the Supreme Court of Micronesia refused to apply customary law as the defendants in the case were not indigenous Micronesians. However, in the Solomon Islands case of *Rebitai v Chow and Others*,<sup>113</sup> it was held that customary law could apply to non-indigenous individuals. This case only examined indigenous customs regarding marriage, but a similar approach could be taken to commercial and contractual matters.

#### *B Reasons for Recognition*

Despite the seeming shortcomings in indigenous customary law, there are a number of reasons which require its recognition. Some reasons for recognition have been discussed below.

##### *1 Human rights obligations*

The revival of indigenous customary law in post-colonial times can be associated with global advances in human rights law. The introduction of various legal instruments have

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<sup>110</sup> Jennifer Corrin “Accommodating Legal Pluralism in Pacific Courts: Problems of Proof of Customary Law” (2011) 15 IJE & P 1 at 5.

<sup>111</sup> Tobin, above n 56, at 59.

<sup>112</sup> *Semens v Continental Airlines* 2 FSM Intrm 131 (Pon 1985).

<sup>113</sup> *Rebitai v Chow and Others* [2002] 4 LRC 2266.



brought to light the need for recognition and protection of indigenous customary law, and require contracting States to respect and protect such laws.

The right to culture has been recognised in the constitutions of more than 60 countries in Africa, Asia, the Pacific, Europe and Latin America.<sup>114</sup> The ILO Convention No 169 and the UN Declaration on the Rights of Indigenous Peoples require countries to take measures to protect indigenous rights and cultural practices, and recognises rights to practice customs and develop indigenous decision making institutions.<sup>115</sup> The International Covenant on Civil and Political Rights establishes indigenous peoples' right to culture as a civil right.<sup>116</sup> The Nagoya Protocol on Access and Benefit-Sharing imposes obligations on all parties to take indigenous customary laws into consideration when implementing their obligations under the Protocol.<sup>117</sup>

Despite this vast array of national and international instruments, custom does not appear to be recognised in the context of international commercial contract law. Although there is a possibility that a legal provision recognising indigenous customary law exists, no evidence of such recognition or use has been found over the course of this research. It is therefore proposed that international recognition may serve to further protect indigenous culture and the rights of indigenous peoples in relation to their culture. Recognition may also promote the process of reconciliation between indigenous and non-indigenous communities, especially in post-colonial territories.

## *2 Promotion of globalisation and economy*

As discussed at the beginning of this chapter, the recognition of indigenous laws could promote the conduct of business among indigenous communities and international businesses. Where indigenous communities give consent, native tribal goods could be exported, generating income to the community and improving the economy of the nation. The livelihood and welfare of such communities could also be improved where they opt to import various products and services from international companies. At present, market

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<sup>114</sup> Tobin, above n 56, at 57.

<sup>115</sup> Indigenous and Tribal Peoples Convention, Convention No 169 72 ILO Official Bull 59 (adopted 27 June 1989, entry into force 5 September 1991), art 8; United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/61/L.67 (2007), arts 11, 18 and 27.

<sup>116</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 27.

<sup>117</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity (opened for signature 29 October 2010, entered into force 12 October 2014), art 12.

exchange of goods take place in various parts of indigenous Africa, but they only provide traders with a minor portion of their income.<sup>118</sup> Expanding their trade beyond their locality and continent could thus have a significant impact on national and global trade and economy.

### *C Indigenous Peoples' Position on Recognition*

Indigenous people are keen to govern matters relating to them by customary law. For example, the Nagoya Protocol was introduced upon the insistence of indigenous communities that the protection of traditional knowledge must be based upon customary law.<sup>119</sup> However, some communities fear that recognition would allow non-indigenous people to appropriate their customs and traditions, as the ownership of the law could then pass on to non-indigenous individuals and law-makers.<sup>120</sup> This is especially relevant where international judges and adjudicators would apply customary law if it were to be used in international dispute resolution for breach of an international commercial contract.

Exposing indigenous customs to the international community also runs the risk of cultural appropriation by contracting parties. Traditional customs and practices which are highly valued within the community could be exploited by large businesses where convenient, and it would be difficult to monitor and prevent it.

Nonetheless, it is determined that benefits of recognition outweigh the disadvantages outlined above. Where recognition is overseen by relevant authorities and indigenous communities are involved in the incorporation process, the disadvantages could be minimalised to achieve results which are equally favourable to all.

## *IV Areas of Conflict within the Contract Lifecycle*

In order to identify areas of conflict between customary law and commonly used contract law, the basic lifecycle of a contract should be established. The lifecycle of an international commercial contract can commonly be categorised into formation, performance and, in the event of non-performance, dispute resolution and remedies. Contractual terms and conditions are typically negotiated before performance, so that a binding contract is formed

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<sup>118</sup> Dalton, above n 103, at 361.

<sup>119</sup> Tobin, above n 56, at 4.

<sup>120</sup> Harry Blagg "A new way of doing justice business? Community justice mechanisms and sustainable governance in Western Australia" in Law Reform Commission of Western Australia *Aboriginal Customary Laws: Background Papers*, Project No 94 (December 2005) 317 at 319.

between the parties. Parties are also required to choose the governing law, the preferred dispute resolution method and the preferred seat of dispute resolution. If a dispute subsequently arises, it could be resolved according to the governing law, by the chosen dispute resolution mechanism at the chosen locality.

Where indigenous parties are involved, conflicts could arise regarding the substance and the interpretation of the contract. If one of the parties wishes to create and perform a contract according to indigenous customs, problems may arise where these customs conflict with governing common or civil law systems. Similarly, where a contract is expected to be formed and performed according to common or civil law, indigenous parties may have difficulty interpreting various terms and conditions contained in the contract.

Where conflicts arise, it is necessary to determine if this causes a breach of the contract, resulting in a penalty for the breaching party. Remedies awarded subsequent to a breach must meet indigenous cultural and community requirements for fair treatment of both parties.

Conflicts could arise in all the above mentioned stages within the lifecycle of a contract. Each stage will be separately examined in each of the following chapters. For the purposes of this paper, only the contract laws of commonly chosen legal systems identified in recent surveys will be examined,<sup>121</sup> and all domestic legal systems will not be canvassed. Accordingly, common law legal systems will include English and United States law. Swiss, German, French and Dutch civil law will be used for comparison with civil law systems. The CISG and UNIDROIT Principles will also be examined for a non-domestic legal perspective.

## *V Conflicts in the Formation of a Contract*

The requirements for the formation of a valid contract are more or less similar under domestic legal systems and international legal instruments, with only minor differences. What these requirements constitute may be interpreted differently by indigenous communities. Where they are interpreted differently, it is questionable whether a contract formed under such circumstances is valid and enforceable. Such questions can be addressed

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<sup>121</sup> Legal systems have been selected based on material found in Gilles Cuniberti “The International Market for Contracts: The Most Attractive Contract Laws” (2014) 34(3) *Nw J Int’l L & Bus* 455 at 459.

by examining the requirements for formation and addressing any conflicts that may arise in each case.

### *A Parties to a Contract*

Contract law generally recognises ‘parties’ to a contract as the individuals who take part in the legal transaction and enter into an agreement.<sup>122</sup> Under customary law however, the term ‘party’ could be interpreted somewhat differently.

A ‘party’ to a contract could include people who are not actually involved in performing the contract, or exclude those involved by replacing them with others. For instance, parties to an African customary contract include the immediate parties as well as members of their respective families, terms and other contractual matters are deliberated and negotiated among all of them.<sup>123</sup> In Aboriginal communities, the “Skin System” determines if and when people may or may not speak to others.<sup>124</sup> In a contractual context, this could determine whether or not an Aboriginal individual could be a party to a contract involving certain people they are not allowed to speak to. Where they are not allowed to do so, someone else (perhaps a non-Aboriginal person) may be required to contract on their behalf. This could cause problems as it would be difficult to hold the Aboriginal person responsible for a breach of the contract if they are not a direct party to the contract. It could also raise issues regarding whether the Aboriginal person is actually involved in the contract and whether the person acting on their behalf is merely acting as an agent or is an actual party to the contract.

The CISG requires an offer to be made to “one or more specific persons”.<sup>125</sup> If not, it is merely deemed to be an invitation to make an offer. Where an indigenous offeree’s family or tribe is involved in negotiating terms and conditions of the contract, it may not be clear who the parties to a contract are, and the offer may not be recognised as being valid.

### *B Offer and Acceptance*

In civil and common law systems, a contract is usually conceived as a result of the acceptance of an offer that has been made by the offeror to the offeree.<sup>126</sup> Where these

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<sup>122</sup> Daniel Greenberg *Jowitt’s Dictionary of English Law* (3rd ed, Thomson Reuters (Legal) Limited, London, 2010) at 1665.

<sup>123</sup> Niekerk, above n 23, at 375.

<sup>124</sup> Trees, above n 59, at 220.

<sup>125</sup> CISG, art 14(2).

<sup>126</sup> Some jurisdictions expressly require the existence of an offer and acceptance (see, for example the Dutch Civil Code, art 6:217).

general trends of offer and acceptance are not followed, or are interpreted differently by indigenous parties, problems can arise as to the existence of the contract itself. Some potential areas of conflict in this regard have been examined below.

### *1 Offer*

An offer is defined as the willingness of one party to contract, with the intention that it will be legally binding if accepted by the other party.<sup>127</sup> It is this intention to be bound which distinguishes an offer from a mere promise. In jurisdictions such as Germany, Austria and Greece, the offeror is bound by the offer, unless it is declined by the offeree.<sup>128</sup> At this point, it is important to note that the intention to be 'legally bound' may not have the same meaning to an indigenous party. While foreign jurisdictions expect the offeror to be bound by the governing law, an indigenous individual may infer this to mean that they are bound by the laws of their clans or tribes, or by spiritual or natural laws, which may not carry strict legal consequences. They may then be inclined to revoke an offer that has been made, should they change their mind.

English common law and the CISG are more favourable in this regard, as they allow the offeror to revoke the offer at any point before acceptance.<sup>129</sup> However this may also cause difficulties where an offer has been made to an indigenous individual, who may deem the offer to be sacred or spiritually important according to custom. Revocation could then be seen as being offensive to their custom and the indigenous party may attempt to enforce the offer without success.

### *2 Acceptance*

Most jurisdictions allow acceptance to be made in writing, orally or by performance of a particular task, but silence or inactivity is not regarded as valid acceptance.<sup>130</sup> Within indigenous communities however, contracts are rarely expressed in writing. It would therefore be unreasonable to expect an individual from such a community to communicate acceptance expressly. Oral acceptance may be difficult in the context of an international transaction, as the parties are likely to be in different countries. It is also possible that the

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<sup>127</sup> Swiss Code of Obligations, art 3; *Bürgerliches Gesetzbuch* [Civil Code] (Germany) § 145; UNIDROIT Principles, art 2.1.2; CISG, art 14(1). See also G H Treitel *The Law of Contract* (7th ed, Stevens and Sons, Hampshire, 1987), Chapter 2.

<sup>128</sup> Jan M Smits *Contract Law: A Comparative Introduction* (Edward Elgar Publishing Limited, Gloucestershire, 2014) at 52.

<sup>129</sup> *Dickinson v Dodds* [1876] 2 Ch D 463; CISG, art 14(1).

<sup>130</sup> Principles of European Contract Law (PECL), art 2:204; CISG, art 18(1); UNIDROIT Principles, art 2.1.6; Louisiana Civil Code, art 1927.

indigenous party could be located in a rural or isolated area, without access to communication facilities such as telephones. It may also be customary for indigenous traders to expect an offeror to carry on with performance of the contract without any express acceptance, especially if they consider such offers to be binding. In this case, indigenous parties could be disadvantaged where they rely on performance but are denied a contractual remedy.<sup>131</sup> The reverse of this could also be detrimental to an indigenous offeror who does not hear from the offeree and assumes that the offer has been accepted. They may subsequently incur losses if they proceed to perform their contractual obligations, and may not be granted a remedy.

### *C Intention to Create Legal Relations*

All modern jurisdictions require both parties to have a common intention to create legally binding obligations. Different jurisdictions determine the presence of mutual intention in different ways. Civil law takes a subjective approach when determining the presence of a common intention between the parties, whereas common law takes an objective approach.<sup>132</sup> The CISG and UNIDROIT Principles take a neutral approach by providing that a subjective approach should be used, and where this is not possible, the objective approach of a 'reasonable person' should be used. Each approach has been examined below with regard to how it may conflict with indigenous customs and practices.

#### *1 What is intention to be legally bound?*

There is a general presumption that parties to a commercial agreement have the intention to create legal relations, unless expressly stated otherwise.<sup>133</sup> In the context of international commercial transactions, it is therefore possible that even indigenous parties would be expected to be legally bound by the contract. However, as previously discussed, the concept of being legally bound may have a different meaning according to indigenous practices. Indigenous parties could understandably infer this to mean that they are bound by laws practiced by their community or tribe, including spiritual and religious laws and laws relating to nature and the earth.

The means by which intention is indicated may also be entirely different from that of civil or common law. In some communities, intention is demonstrated by the exchange of gifts

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<sup>131</sup> A remedy may be obtained on the basis of promissory estoppel, but it will be contingent on whether the necessary requirements are satisfied.

<sup>132</sup> Smits, above n 128, at 64-66.

<sup>133</sup> Smits, above n 128, at 70; Ewan McKendrick *Contract Law: Text, Cases and Materials* (6th ed, Oxford University Press, Oxford, 2014) at 280.

between the parties (in addition to actual payment for the goods or services), and where no such exchange takes place, parties may not consider themselves bound by the contract.<sup>134</sup> A similar concept is found in rural Chinese customary law, whereby parties intending to enter into a commercial contract exchange obligatory reciprocal favours, known as *Guanxi*, to strengthen their contractual relationship.<sup>135</sup> Where *Guanxi* is not performed, parties may not intend to enter into a contractual relationship. In this context, if an international trader makes an offer to an indigenous party, the indigenous party may proceed to respond by presenting a gift to the offeror as a means of accepting the offer and expressing an intention to be bound by the contract.

According to Sri Lankan custom, parties entering into a contract must do so at a specific time on a specific day, known as an ‘auspicious time’. It is believed that contracting at the auspicious time brings good fortune and success, therefore some parties sign contracts only within a specific auspicious time.<sup>136</sup> Where a party then accepts an offer (for example, by signing a contract) within this auspicious time, this may be an indication that the party intends to be bound by the contract and expects it to be performed.

Rituals and ceremonies are also performed by some communities outside commercial transactions to indicate intention. For example, Aboriginal societies exchange gifts prior to marriage to ratify the marital contract.<sup>137</sup> Perhaps, it may be that such communities would also conduct similar practices to ratify commercial contracts.

Therefore, it is important to keep such cultural differences in mind when inferring the presence of a common intention to be legally bound.

## 2 *The subjective test*

The subjective test for determining the presence of a common intention requires one party to prove that the other party *reasonably believed*, or *could not have been unaware* that there was intention to be legally bound.<sup>138</sup> It should therefore be proved that the recipient of a statement or conduct (the addressee) had knowledge of the other party’s intention.<sup>139</sup>

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<sup>134</sup> Niekerk, above n 23, at 370.

<sup>135</sup> Kozolchyk, above n 2, at 84.

<sup>136</sup> Personal knowledge of the author.

<sup>137</sup> RM Berndt “Tribal Marriage in a Changing Social Order” (1961) 5 UWAL Rev 326 at 338-339.

<sup>138</sup> *K Speditionsgesellschaft mbH* [1956] BGHZ 21, 102 I. Civil Senate (I ZR 198/54); *Burgerlijk Wetboek* [Civil Code] (The Netherlands), art 3:35; CISG, art 8(1); UNIDROIT Principles, art 4.1.1.

<sup>139</sup> Ingeborg Schwenzer (ed) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd ed, Oxford University Press, New York, 2010) at 153.

It would be difficult for an indigenous party to prove that a non-indigenous party knew of his intention, if the manner in which this intention was expressed was different from generally accepted means. Whereas intention is normally indicated by statements or by conduct, indigenous traders may express intention differently as discussed above. In such instances, it would be unreasonable to expect a non-indigenous party to translate such conduct to mean intention to be bound.

Where it is difficult to infer the intention of the parties, factors such as negotiations, practices, usage, good faith and surrounding circumstances may also be taken into consideration.<sup>140</sup> Where negotiations and commercial transactions have taken place on previous occasions, indigenous parties may rely on similar conduct and practices which successfully relayed an intention to be bound. However, most of these factors may not be applicable where the parties have not previously conducted business with one another. The obscure nature of most indigenous customs would prevent most foreign traders from correctly interpreting customs and can cause misunderstandings regarding the other party's intention.

### 3 *The objective test*

The objective test allows the addressee's knowledge of intention to be proved by comparison to that of a reasonable person.<sup>141</sup> If it is proved that a reasonable addressee would have known of the other party's intention to be legally bound, it can then be assumed that the actual addressee also had knowledge of this intention.

This objective test is a more favourable approach as it may be easier to establish that a reasonable person understood the other party's intention. However, the test requires the third person to be of the same kind as the actual addressee. This means the reasonable person should have the same business background and must be engaged in the same occupation as the actual addressee.<sup>142</sup> The reasonable person is also required to have the same linguistic background and knowledge of prior dealings and negotiations.<sup>143</sup> In a

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<sup>140</sup> *K Speditionsgesellschaft mbH* [1956] BGHZ 21, 102 I. Civil Senate (I ZR 198/54); *Burgerlijk Wetboek* [Civil Code] (The Netherlands), art 3:35; CISG, art 8(3); UNIDROIT Principles, art 4.3.

<sup>141</sup> CISG, art 8(2); UNIDROIT Principles, art 4.1.2; *Smith v Hughes* [1871] LR 6 QB 597 (CA); Uniform Commercial Code § 2-204. Also see generally, McKendrick *Contract Law: Text, Cases and Materials*, above n 133 at 25-27.

<sup>142</sup> "Guide to CISG Article 8: Secretariat Commentary" <[www.cisg.law.pace.edu](http://www.cisg.law.pace.edu)> at [4].

<sup>143</sup> C Massimo Bianca and Michael Joachim Bonell *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè Editore, Milan, 1987) at 98.



contract involving an indigenous addressor and an international addressee, the reasonable person would then be in the position of the international addressee, with the same background and knowledge relating to the contract.

If a contract involves ambiguous statements or unorthodox conduct made by an indigenous party, the reasonable addressee should be able to interpret these statements or conduct as intention to be bound by the contract. It would be difficult for a reasonable person to do so if they have no linguistic or business background related to indigenous customs, as is often the case with foreign traders. While traders may be expected to be familiar with globally accepted business practices and commercial usage (such as the Incoterms), they cannot be expected to have adequate knowledge about indigenous customs (most of which are not even related to commercial transactions).

However, circumstances surrounding the statements and conduct relating to the contract could also be taken into consideration. Some examples include what is customary in a certain location, the meanings of a disputed term in everyday use and the place of contracting.<sup>144</sup> Therefore, if a contract is concluded at the locality of the indigenous party, a reasonable person may be expected to take any customs and practices particular to that community into consideration.

Regardless of whether a subjective or objective approach is used, establishing the presence of intention would be difficult where indigenous parties resort to customary practices. This problem could only be avoided if indigenous parties take measures to clearly express their intention, and indigenous customs are widely recognised by international contract law.

#### *D Consideration*

Consideration is an important requirement for valid formation under English common law but is not a requirement under civil law, the CISG and the UNIDROIT Principles.<sup>145</sup> It is nevertheless relevant as English common law is one of the most frequently used legal systems in international commercial contracts.<sup>146</sup> Consideration requires the receiving party to give or do something in return for the goods or services offered under the contract. In a commercial context, this often takes the form of monetary payment, although this need not always be the case.

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<sup>144</sup> Smits, above n 128, at 68.

<sup>145</sup> UNIDROIT Principles, art 3.1.2.

<sup>146</sup> Previously explained on page 6.

Consideration is also the sole factor that customary law wholly appears to have in common with a Western legal system. Manifestations of the concept of consideration are evidenced by, for example, the Kula Ring practices in Papua New Guinea, exchange of goods among Australian Aboriginal communities and the Barter System practised among numerous indigenous communities.<sup>147</sup>

This evidence indicates that the consideration requirement appears to be more or less consistent with customary law practices examined in this paper. The possibility that conflicts may arise regarding consideration is therefore unlikely.

### *E The Form of the Contract*

#### *1 Written or unwritten contract?*

Most contemporary legal systems require commercial contracts to be in writing,<sup>148</sup> and “[there] is a tendency to believe that if things are not written down, they do not exist”.<sup>149</sup> This approach is also complemented by the parol evidence rule which specifies that previous oral negotiations and evidence may not be used to alter or refute any terms of a written contract.<sup>150</sup> Most domestic legal systems (including countries with a significant indigenous population, such as South Africa),<sup>151</sup> adhere to the parol evidence rule and only allow departure in a few exceptions.<sup>152</sup>

Indigenous contracts, on the other hand, are mostly unwritten. Contracts are concluded following oral negotiation of the subject of the contract as well as terms such as price and quantity.<sup>153</sup> Therefore, problems can arise where an indigenous party enters into a contract governed by laws which require a written contract or follow the parol evidence rule. Proving the terms of the contract or even the very existence of a contract may be difficult as no physical evidence exists. Within indigenous communities, individuals rely on family

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<sup>147</sup> See generally, Janet Landa “The Development of Trading Networks among Spatially Separated Traders as a Process of Proto-Coalition Formation: The Kula Trade” (1983) 5 *Social Networks* 347 and Law Reform Commission of Western Australia *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (January 2006) at 274.

<sup>148</sup> See, for example, Uniform Commercial Code § 2-201 (USA).

<sup>149</sup> Tso, above n 75, at 35.

<sup>150</sup> Tadas Klimas *Comparative Contract Law: A Transsystemic Approach with an Emphasis on the Continental Law* (Carolina Academic Press, North Carolina, 2006) at 517.

<sup>151</sup> See *KPMG Chartered Accountants (SA) v Securefin Limited and Another* [2009] ZASCA 7 at [39].

<sup>152</sup> For instance, where a contractual term has been inserted by mistake.

<sup>153</sup> Niekerk, above n 23, 370.

and tribal members to bear witness to the existence and negotiation of a contract. But the parol evidence rule would prevent parties from presenting or relying on such evidence.

In this respect, the CISG and the UNIDROIT Principles are more accommodating as they do not require a contract to be evidenced in writing, and allow proof by any means including witnesses.<sup>154</sup> These legal instruments endorse certain customary practices such as those practiced by the Navajo people. Within their community, Navajo people who are not directly involved (such as relatives) are also allowed to participate as witnesses, so that even the silent and the weak are not oppressed.<sup>155</sup>

## 2 *Language*

Written international commercial contracts require an official language.<sup>156</sup> Where the contract is drafted in a non-indigenous language, indigenous parties may be reluctant and even suspicious to enter into a binding agreement. The contract could be originally drafted in the native language and later translated into a more commonly known language but this poses the risk of incorrect translations, due to mistakes or inability to accurately translate certain native terms. Inaccurate translations could hamper with the interpretation of express and implied terms contained in the contract, making dispute resolution mechanisms less reliable.

Furthermore, illiteracy rates among indigenous communities may be high, and most individuals within a community may not even be able to read or write their own language.<sup>157</sup> A written contract could then hinder communication and understanding between the parties. It may be best, therefore, for contracts involving indigenous parties to be left unwritten and governed by international instruments such as the CISG or the UNIDROIT Principles.

## 3 *Terms of the contract*

Where indigenous traders are a party to a contract, it is important that they have the same understanding of the contractual terms as the other party. Terms of a contract can be expressly stated or implied between the parties. Where terms are clearly expressed in a contract, there is little room for confusion, especially if all relevant meanings and

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<sup>154</sup> CISG, art 11; UNIDROIT Principles, art 1.2.

<sup>155</sup> Nielson and Zion, above n 74, at 4.

<sup>156</sup> Fox, above n 7, at 98.

<sup>157</sup> National Alternative Dispute Resolution Advisory Council *Indigenous Dispute Resolution and Conflict Management* (January 2006) at 9.

interpretations have been agreed upon by the parties. However, it would be practically difficult to expressly include every single term and condition relating to the transaction. Therefore, some terms or meanings of terms are inevitably left to be implied. Given the cultural, social and lingual differences between indigenous and non-indigenous parties, confusion and misunderstanding may arise in such instances. Therefore it is important to take such differences into consideration when a contract is being deliberated and drafted between such parties.

In most civil jurisdictions as well as the CISG and the UNIDROIT Principles, a requirement of good faith is imposed on contracting parties.<sup>158</sup> Where an indigenous trader is a party to a contract, it is possible that they may interpret a condition of ‘good faith’ to mean something different from what the governing law intended it to mean. Concepts similar to good faith principles are found in indigenous customary law. One such example is the indigenous South African concept of *Ubuntu*.<sup>159</sup> *Ubuntu* is defined as embodying the values of “humaneness, social justice and fairness”.<sup>160</sup> The civil law concept of good faith has a somewhat similar meaning and is “in essence a principle of fair and open dealing”.<sup>161</sup> Although it may appear that the two concepts correlate, the meaning of ‘fairness’ and reasonableness may vary among different cultures. Therefore it could be assumed that good faith requirements may, in some instances, be misinterpreted by indigenous parties to mean something else within the context of a contract.

Under certain laws, parties also are bound by prior usage and practices which have been established between them.<sup>162</sup> Even express boilerplate clauses may contain contractual terms with meanings acquired through usage or practices of the parties.<sup>163</sup> In such instances, it may be of interest to indigenous parties, or parties contracting with indigenous traders, if indigenous customs and practices can then bind the parties. For example, if an indigenous party has regularly performed a particular ceremony before signing a contract with a regular international trading partner, they may come to associate the ceremony with indicate intention to be contractually bound. If the trading partner fails to attend one of these ceremonies, the indigenous party may then infer this to mean that there is no contract

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<sup>158</sup> Swiss Civil Code, arts 2 and 3; *Bürgerliches Gesetzbuch* [Civil Code] (Germany) § 242; *Code civil* [Civil Code] (France), art 1134 (3); CISG, art 7(1); UNIDROIT Principles, art 1.7(1).

<sup>159</sup> Previously discussed on page 14.

<sup>160</sup> *S v Makwanyane and Another*, above n 49, at [237].

<sup>161</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

<sup>162</sup> CISG, art 9(1); UNIDROIT Principles, art 1.9.

<sup>163</sup> Greenberg, above n 122, at 275.

in effect, and may refuse to perform. In such an instance, a court or arbitral tribunal would have to decide if the international trader is bound by the customary ceremony to indicate intention to contract.

Usage is defined as “any practice or method of dealing having such regularity of observance in a ... trade”.<sup>164</sup> However, usage need not always relate to trade practices. The UNIDROIT Principles provide that usage can also be that which related to a different type of contract.<sup>165</sup> However, English common law specifies that usage must be well-known, certain and reasonable.<sup>166</sup> Most indigenous customs are confined to a particular community or tribe and are rarely known beyond their locality. Therefore, it is highly unlikely that indigenous usage will be recognised by foreign courts or arbitral tribunals. Where contracting indigenous parties are unaware of this, they will be denied access to remedy if they rely on such usage.

## *VI Non-Performance of the Contract*

A breach of contract occurs when a party fails or refuses to perform required contractual obligations without a lawful excuse for doing so,<sup>167</sup> and entitles an aggrieved party to seek a legal remedy. Accordingly, a breach would not occur where the breaching party provides a lawful excuse for doing so. This justification could be important to an indigenous party who has failed to perform a contract but provides what they believe is a lawful excuse. However, it is possible that an indigenous party may have a different interpretation of what constitutes of a ‘lawful excuse’ from that of a foreign Court. In such circumstances, is important to examine whether excuses related to indigenous matters can qualify as ‘lawful excuses’ under the governing law. If such excuses can be deemed lawful, no remedies will be granted and the indigenous party will not be penalised for following cultural customs and practices.

An obligor may not be penalised for inadequate performance if the contract is deemed void for mistake or frustrated for force majeure. These two issues have been identified as being most likely to conflict with indigenous customs and practices. Accordingly, both these areas are explored to compare and identify any inconsistencies in the interpretation of the

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<sup>164</sup> Uniform Commercial Code § 1-303 (c).

<sup>165</sup> UNIDROIT Principles, art 1.9 comment 3.

<sup>166</sup> *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421 at 1438.

<sup>167</sup> GH Treitel *The Law of Contract* (11th ed, Sweet & Maxwell, London, 2003) at 832.

terms ‘mistake’ and ‘force majeure’. If an indigenous party interprets these terms differently, it can be concluded that a breach of contract occurs.

#### *A Mistake*

A mistake is defined as an erroneous belief regarding the facts or the law relating to the contract.<sup>168</sup> Mistakes can therefore relate to the subject matter of the contract (regarding the goods or services provided, and the quality and quantity of the goods) or to the terms of the contract (for example, terms dictating the price, delivery time and method of delivery). Where a party concludes a contract mistakenly, they will not be bound by their contractual obligations.<sup>169</sup> Where a contract is negotiated with an indigenous party, mistakes could easily arise regarding these terms, due to cultural and lingual differences.

In indigenous communities where trade is primarily used to acquire goods for sustenance and survival, traders may find it acceptable to substitute one product with another if stocks of the original goods are unavailable. Take, for example, a contract between an indigenous farmer and an international agricultural trader, which requires the farmer to sell ten kilograms of yams to the international trader. If the farmer cannot procure any yams, he may believe that it is appropriate to substitute it with cassava or sweet potato instead, as they both serve a similar purpose. However, this would be regarded as a breach of contract by the international trader, if he specifically required yams to have them supplied to local supermarkets.

Another example could be where an international souvenir trader contracts with an Aboriginal Australian craftsman to purchase authentic boomerangs for sale in a souvenir shop targeted at tourists. The trader may have hoped to acquire boomerangs with elaborate designs and patterns, which are more appealing to tourists and could be sold for a higher price. However, the Aboriginal craftsman may mistakenly believe that the boomerangs are required for hunting or sports and provide plain unadorned boomerangs, which may not be as appealing to tourists. In such instances where an indigenous party is mistaken as to the purpose of the contract, courts may have to determine if such a mistake renders the contract void.

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<sup>168</sup> *Great Peace Shipping Limited v Tsavliris (International) Limited* [2003] QB 679 at [28]; UNIDROIT Principles, art 3.2.1.

<sup>169</sup> See, for example, Swiss Code of Obligations, arts 23 and 24.

English common law generally requires performance to be precise, and mirror the requirements set out in the terms of the contract.<sup>170</sup> However this strict position has been softened with regard to commercial contracts relating to the sale of goods. Where performance is faulty, a breach of condition will not exist where the breach is so slight that it is unreasonable to reject the goods.<sup>171</sup> Nonetheless, goods are required to be of satisfactory quality, and the quality of the goods can be determined by the fitness of the goods for the purposes for which they are supplied, and the appearance and finish of the goods, among other factors.<sup>172</sup>

The CISG also requires goods to match the quality, quantity and description given in the contract,<sup>173</sup> and the seller will be liable where such requirements are not satisfied.<sup>174</sup> Similar to common law, the CISG also provides that goods may be of satisfactory quality if they are fit for the purposes that goods of the same description would ordinarily be used for, or if they are fit for purposes made known to the seller, except where it is unreasonable for the buyer to rely on the seller's skills and judgement.<sup>175</sup>

With regard to the examples above, indigenous parties may argue that the goods they have supplied are fit for what they believe are their respective purposes (as a source of food and hunting tool respectively). However, the manner in which they regard whether the goods are fit for a particular purpose may differ from that of non-indigenous individuals, who use the goods for different purposes. Whereas indigenous people cultivate crops primarily for sustenance, non-indigenous traders require specific crops to meet specific consumer demands; whereas Aboriginal people use boomerangs primarily for hunting, tourists use them for entertainment purposes. Even if the purposes of the purchased goods are made known to the indigenous seller, it would be unreasonable for the buyer to rely on the seller's skills and judgement (as provided for by in the CISG), due to the significant cultural differences and variations in lifestyle. Indigenous people may be unaware of how their goods and exported products are used outside their community and may not be able to comprehend that goods such as vital food sources and hunting tools are merely a matter of choice for most people.

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<sup>170</sup> *Randall v Newson* [1876] LR 2 QBD 102 (CA); *Arcos v Ronaasen* [1933] AC 470 (HL).

<sup>171</sup> Sale of Goods Act 1979 (UK), s 15A.

<sup>172</sup> Sale of Goods Act, ss 2 and 2B.

<sup>173</sup> CISG, art 35(1).

<sup>174</sup> Article 36.

<sup>175</sup> Article 35(2).

These cultural differences may prevent indigenous traders from understanding the true purpose behind certain commercial transaction and therefore could cause them to mistakenly misinterpret terms and conditions of the contract. If courts and tribunals do not recognise such mistakes as lawful excuses, indigenous parties may, unfortunately, be held liable for breach.

### *B Frustration*

A contract is frustrated if something occurs which causes performance to become practically impossible, illegal or fundamentally different from what was agreed by the parties.<sup>176</sup> The doctrine of frustration has been recognised in common and civil law, as well as the CISG and UNIDROIT Principles.<sup>177</sup> Most events of frustration are included in a *force majeure* clause of a contract and include unforeseen circumstances such as war, acts of God, disease, fire and official restrictions and prohibitions. Some circumstances which are most relevant to indigenous traders are examined below.

#### *1 War*

War is generally defined as hostile conflicts involving armed forces, and is carried out between countries, states, or distinct parties within a country.<sup>178</sup> To indigenous communities, however, wars could also include endemic warfare between different tribes or clans. Where an endemic war renders performance impossible, an indigenous trader may deem the contract to be frustrated. However, if such a form of war is not recognised by a court or tribunal, the indigenous party may be forced to perform the contract, despite being unable to do so.

#### *2 Acts of God*

Acts of God include events which are overwhelming and unpreventable, and occur independently of any human action.<sup>179</sup> However, where the term ‘acts of God’ is included in a *force majeure* clause, this could be interpreted differently by an indigenous party. Indigenous customs are greatly intertwined with spirituality, and nature, the earth and the sun are all revered by indigenous people.<sup>180</sup> Therefore, it is possible that indigenous parties

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<sup>176</sup> McKendrick, above n 133, at 696.

<sup>177</sup> See *Bürgerliches Gesetzbuch* [Civil Code] (Germany) § 313; *Burgerlijk Wetboek* [Civil Code] (The Netherlands), art 6:258; *Taylor v Caldwell* [1863] EWHC QB J1; CISG, art 79; UNIDROIT Principles, art 7.1.7.

<sup>178</sup> Garner, above n 81, at 1816; Jonathan Law and Elizabeth A. Martin *A Dictionary of Law* (eBook ed, Oxford University Press, Oxford, 2014).

<sup>179</sup> Greenberg, above n 122, at 36; Garner, above n 81, at 41.

<sup>180</sup> Cane, above n 27, at 69.



may deem various circumstances, including illness, lack of resources or unfavourable weather (which may not have been included in the contract) to be an act of God.

### 3 *Restrictions and prohibitions*

If a State imposes certain restrictions or prohibitions on the import or export of goods traded by the parties, performance becomes illegal and the contract is subsequently frustrated. However, indigenous communities are often governed by tribal chiefs or community elders, and laws which regulate trade are also dictated by such authorities. This may also be the case in stateless communities such as Somali tribes or Inuit people.<sup>181</sup> Where goods are to be exported or sold outside the community, it is possible that the chief or the village headman may impose restrictions or prohibitions on these goods in certain circumstances.

Take, for example, the case of an indigenous trader who has contracted to sell rice grown within the village. If this rice also serves as a source of food for the people within the community, its export may come second to feeding the community. If there is insufficient rice for the community, the community chief may restrict the quota for sale or prohibit the trader from selling it altogether. Some restrictions may also be imposed if the chief deems the export of certain goods to be inappropriate. For, example, if a trader wishes to sell certain types of tribal art which are regarded to hold sacred value, the village headman may prohibit them from being sold to individuals who are not a part of the tribe. In such instances, courts and tribunals may be required to determine if such restrictions would lawfully render performance impossible.

### 4 *Sorcery*

In addition to the above mentioned factors which may frustrate a contract, there may be other circumstances which could prevent an indigenous party from performing a contract.

One main factor which may affect or hinder performance is the belief and fear of sorcery among certain indigenous tribes. For instance, in Papua New Guinea, the Elema community believe in magic known as *Puripuri*, which is primarily practised for the purpose of causing harm to others.<sup>182</sup> Most communities believe that disease and death are

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<sup>181</sup> Previously discussed on page 15.

<sup>182</sup> Alastair I McIntosh "Sorcery and Its Social Effects amongst the Elema of Papua New Guinea" (1983) 53 (3) *Oceania* 224 at 225.

also caused by sorcery.<sup>183</sup> If an indigenous trader wishes to perform a contract which is not well-received by certain other members of the community, they may fear that they would be harmed or killed by sorcerers. Although such beliefs may be disregarded by international traders and non-indigenous courts, indigenous traders would regard them as legitimate reasons which can frustrate a contract. If they are forced to perform the contract or pay damages, it would be unreasonable to such parties and disrespectful of indigenous beliefs.

### 5 *Disease*

Disease is often acknowledged as a factor which could legally frustrate a contract, and includes any deviation from the normal functioning of a healthy body.<sup>184</sup> However, as discussed above, the indigenous perception of what causes a disease or illness may differ from globally accepted notions. An indigenous trader may be incapacitated due to a well-known disease but if he informs the other party that his condition has been brought about by sorcery or a curse, this may not be accepted by an international party. In such an instance, the indigenous party may not be excused from performing the contract, although the same condition may have been excused if it were described differently. In such instances, the indigenous parties would be discriminated against if they are not excluded from liability.

### 6 *Death*

Most indigenous communities commemorate a death with elaborate ceremonies and rituals. Aboriginal people, for instance, perform extensive death ceremonies which can last for many days.<sup>185</sup> These ceremonies require the attendance of family members as well as unrelated members of the community who are under social obligations to attend.<sup>186</sup> Where an indigenous trader is a part of such a community, there may be social obligations to attend such ceremonies which could hinder or delay performance. However, this may not amount to valid frustration as it does not render performance impossible.

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<sup>183</sup> Maria Lepowsky "Sorcery and penicillin: Treating illness on a Papua New Guinea island" (1990) 30 (10) *Social Science and Medicine* 1049 at 1049.

<sup>184</sup> Garner, above n 81, at 567.

<sup>185</sup> Pam McGrath and Emma Phillips "Insights on end-of-life ceremonial practices of Australian Aboriginal peoples" (2008) 15 (4) *Collegian* 125 at 131.

<sup>186</sup> Jeanie Dineen, Darren Wake and Kathy Martin "Yarlparu: on sorrow and grief" (1999) 6 (9) *Australian Nursing Journal* 16 at 16.

## VII Remedies for Breach

### A Specific Performance

Specific performance entitles a claimant to compel the defendant to perform their contractual obligations.<sup>187</sup> Specific performance is routinely granted in civil law jurisdictions,<sup>188</sup> but common law only allows it to be granted at the discretion of the court, as an exceptional remedy if an award of damages is insufficient.<sup>189</sup> The UNIDROIT Principles allow specific performance, subject to some exceptions,<sup>190</sup> but the CISG only allows specific performance if it is generally allowed under national law of the court's jurisdiction.<sup>191</sup>

Regarding international commercial contracts involving indigenous parties, specific performance may serve to be an advantage or a disadvantage, depending on the circumstance. Where a contract requires the obligor to produce certain goods or perform certain services that are unique and cannot be obtained elsewhere, specific performance may be awarded as the appropriate remedy (as opposed to damages).<sup>192</sup>

One such example could be where an international garment trader contracts with an indigenous dressmaker from Guatemala to purchase 100 handwoven dresses which are traditionally only worn by members of her community and are distinct to her tribe. Another instance could be where an indigenous craftsman from Peru offers to provide his services to craft Peruvian pots for an international arts and crafts dealer over a period of two years. In each case, the goods and services provided are distinct to a particular group of indigenous people, and they cannot be obtained elsewhere (in a different country or from a different indigenous community). Supposing these indigenous traders were to breach their contractual obligations and halt production, the respective buyers would be deprived of the promised goods and would have no means of obtaining authentic goods by other means. In such instances, specific performance would be useful in securing performance,

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<sup>187</sup> Mindy Chen-Wishart *Contract Law* (5th ed, Oxford University Press, Oxford, 2015) at 563.

<sup>188</sup> See, for example, Swiss Code of Obligations, arts 68, 97 and 98; *Bürgerliches Gesetzbuch* [Civil Code] (Germany) § 241, *Code civil* [Civil Code] (France), art 1184, *Burgerlijk Wetboek* [Civil Code] (The Netherlands), art 6:38 and Civil Code of Québec § 1590.

<sup>189</sup> Uniform Commercial Code § 2-716; Smits, above n 128, at 193.

<sup>190</sup> UNIDROIT Principles, art 7.2.2.

<sup>191</sup> CISG, art 28.

<sup>192</sup> See, for example, Sale of Goods Act, s 52; Uniform Commercial Code § 2-716 (1); UNIDROIT Principles, art 7.2.2 (c).

especially as it may be unlikely that the breaching indigenous party would have sufficient financial resources to comply with alternative remedies such as damages.

Whilst specific performance could be advantageous in enforcing unique contracts involving indigenous communities, it may be disadvantageous to the indigenous party. If, for instance, the above discussed contracts were breached as a result of tribal warfare within a community, or an act which the indigenous party believes is caused by sorcery, they may wish to cease performance, even though performance is not impossible. If this is not recognised as a valid cause for frustration (as discussed in the previous chapter) and specific performance is awarded, the indigenous party may be forced to perform their contractual obligations contrary to indigenous customary and personal beliefs. In such instances, a court or tribunal would have to attempt to balance the interests of an aggrieved buyer who has been denied performance against that of an indigenous trader who is reluctant to disregard their spiritual and cultural practices and beliefs. Most jurisdictions prohibit the award of specific performance in circumstances of hardship and burden, but it is uncertain if cultural beliefs and practices would be recognised as legitimate causes of hardship, and no evidence of such recognition has been found.<sup>193</sup>

However, some indigenous communities may find specific performance an attractive form of remedy. Specific performance is a means of enforcing the moral obligations attached to a contract.<sup>194</sup> This may therefore be appropriate where a contracting indigenous party has performed certain ceremonies or rituals (such as the exchange of gifts), or regards the contractual relationship as being sacred or particularly important.

### *B Damages*

Damages consist of monetary compensation for failure by one party to perform their contractual obligations,<sup>195</sup> and are often recognised as a primary remedial measure within most civil and common law jurisdictions, as well as by the CISG and UNIDROIT Principles.<sup>196</sup>

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<sup>193</sup> Specific performance has been denied in instances of hardship in cases such as *Patel v Ali* [1984] Ch 283 and *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL). But it should be noted that these cases involved obvious or practical difficulties which could be widely accepted in foreign jurisdictions, unlike obscure cultural beliefs and practices.

<sup>194</sup> Smits, above n 128, at 193.

<sup>195</sup> Law and Martin, above n 178.

<sup>196</sup> Swiss Code of Obligations, art 98; *Bürgerliches Gesetzbuch* [Civil Code] (Germany) §280; *Code civil* [Civil Code] (France), arts 1147 and 1148; *Burgerlijk Wetboek* [Civil Code] (The Netherlands), art 6:74 and

Damages generally protect the expectation interests of the parties or serve as a means of restitution. In some cases, they may also include non-pecuniary awards which are granted where the breach has caused some additional loss or suffering to the aggrieved party.<sup>197</sup> Such awards may be particularly important to indigenous traders who rely on trade as their primary source of income. It may be possible that other family members and children also rely on the income earned from such trade for their livelihood. If an indigenous trader is denied payment for the performance of a contract which serves as the primary weekly or monthly income, these traders and their dependents may not be able to purchase food and other basic necessities during this period. As a result, they may suffer significant hardship and distress, in addition to the loss of profits and the denied value of the goods or services. Where such hardship results from the breach of a contract, non-pecuniary damages may play a vital role as a remedy for indigenous parties. At present, however, non-pecuniary losses are mostly taken into account in contracts formed for pleasure, relaxation or peace of mind, and not for commercial contracts.<sup>198</sup> However, English common law has made exceptions where the inconvenience or discomfort suffered by the claimant is a “sensory experience”.<sup>199</sup> It is possible that consequences involving hunger and the deprivation of basic necessities may be recognised as sensory experiences. If so, aggrieved indigenous parties may claim damages for such consequences.

But damages are not without its drawbacks. It is possible that an indigenous trader may have agreed to provide goods to an international buyer in exchange for certain other goods or services, as opposed to a monetary payment (similar to the barter system). In such an instance, damages would fail to adequately compensate an aggrieved indigenous party or serve any remedial purpose. Such an award may also fail to fulfil the expectations of the indigenous party who anticipated receiving specific goods or services in return.

Damages comprising of monetary compensation may not be of any use to indigenous people who do not use money in daily transactions within their community or tribe. As discussed in previous chapters, indigenous communities usually trade by exchanging goods or services among each other, rather than paying for them. In such communities, monetary awards may, in fact, be burdensome to indigenous parties as they may be forced to go out

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6:75; Uniform Commercial Code §2, part 7; Sale of Goods Act, ss 50 and 51; CISG, art 74; UNIDROIT Principles, art 7.4.1.

<sup>197</sup> Smits, above n 128, at 224.

<sup>198</sup> At 224.

<sup>199</sup> *Farley v Skinner (No 2)* [2001] UKHL 49 at [85].

of their way, to other communities or tribes, to exchange the money for any useful goods. It would be even more cumbersome if damages are awarded in a foreign currency (which may be the case in an international transaction), as foreign currency may not be accepted within their locality.

If an indigenous party has breached the contract, they may be ordered to pay damages, which could prove to be a heavy financial burden. Indigenous peoples are found to be among the world's poorest people and very few communities are financially well-off.<sup>200</sup> In such populations, obligations to pay large monetary awards could put entire families, and in some instances, entire communities in a difficult financial position. Such hardship may be an unreasonable penalty for a breach of a commercial contract. In such instances, courts or tribunals may need to take financial circumstances of indigenous communities into consideration, and perhaps order a smaller sum of damages or alternative remedies such as specific performance.

As illustrated above, both specific performance and damages have their advantages and disadvantages. Their suitability largely depends on the financial and cultural circumstances of the indigenous party involved. In such cases, it is proposed that courts and tribunals should take these factors into account when granting remedies for breach, in order to protect the cultural and traditional beliefs and needs of indigenous parties, and prevent discouraging them from trading in the future.

### *VIII Recognition in Dispute Resolution*

If a contract is formed and performed according to indigenous customs, it is reasonable for parties to expect similar customs to be applied where a dispute arises. Application of custom in dispute resolution depends on the type of dispute resolution mechanism chosen, as some may be more favourable than others. The three main dispute resolution mechanisms (litigation, arbitration and mediation) have been examined in this regard.

#### *A Litigation*

Where a contractual matter is to be determined by international cross-border litigation, a court may apply the laws chosen by the contracting parties, if it has been included as the choice of law within the contract. In jurisdictions such as the European Union, contracts

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<sup>200</sup> Gillette H Hall and Harry Anthony Patrinos (eds) *Indigenous Peoples, Poverty and Development* (Cambridge University Press, New York, 2012) at 363-365.

may only be governed by the ‘law of a particular country.’<sup>201</sup> In such jurisdictions, indigenous customs which are not nationally recognised as ‘law’ may not be applied. However, where the governing law is one that has been formally recognised as a source of law by constitution, legislation or judicial precedent, its application need not be contested.

Where national recognition has not been granted, its application in litigation may be restricted as it then does not constitute of ‘law’ but ‘rules of law’. The use of indigenous customs in international cross-border litigation is yet to be seen, as research has failed to identify any cases where indigenous law has been applied. But courts generally tend to honour the choice of law of the parties where there is some relationship between the chosen law and the substance of the contract.<sup>202</sup> Therefore, there is no reason why customary law should not be applicable in cross-border litigation, where all jurisdictional requirements have been met.

### *B International Arbitration*

International arbitration is a more viable option of dispute resolution as it allows the application of both ‘law’ and ‘rules of law’ as the substantive law of the contract.<sup>203</sup> This may allow the application of indigenous customs regardless of their recognition by national law. The arbitration process has also been expressly approved as being consistent with indigenous customs and traditions by the Micronesian Supreme Court in *E M Chen & Associates (FSM) Inc v Pohnpei Port Authority*, which enforced an arbitration agreement between two contracting parties.<sup>204</sup>

Indigenous customs may be applied as ‘law’ where the substantive law of the contract has been chosen as that of a legal system which formally recognises indigenous customary law.<sup>205</sup> Alternatively, it may be applied as ‘rules of law’, where indigenous customs have not been recognised in national law. However, this is dependent on arbitrators acknowledging uncodified indigenous customs as comprising of rules of law. It is worth

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<sup>201</sup> Regulation 593/2008 on the law applicable to contractual obligations (Rome I) [2002] OJ L177/6, arts 3 and 4.

<sup>202</sup> Fox, above n 7, at 184.

<sup>203</sup> See, for example, European Convention on International Commercial Arbitration 484 UNTS 349 (opened for signature 21 April 1961, entered into force 7 January 1964), art VII(1). This is also provided for in the arbitration rules of various arbitration institutions such as London Court of International Arbitration *LCIA Arbitration Rules* (2014), art 22.3 and International Chamber of Commerce *Arbitration Rules* (2011), art 21(1).

<sup>204</sup> *E M Chen & Associates (FSM) Inc v Pohnpei Port Authority* [2001] 10 FSM Intrm 400 at 408.

<sup>205</sup> For example, in countries such as Papua New Guinea, South Africa, Kiribati and Tuvalu.

noting here that although this paper did previously conclude that uncodified customs qualify as rules of law, this is merely the subjective opinion of the author, and could differ from how arbitrators choose to define the term ‘rules of law’. According to some sources, the term ‘rules of law’ is merely meant to “[broaden] the range of options available to the parties as regards the designation of the law applicable”,<sup>206</sup> and allows parties to use rules of multiple legal systems in one agreement.<sup>207</sup> It is possible that this may include rules of law that have not been incorporated into any national legal system,<sup>208</sup> such as indigenous customs that have not been recognised by a State. However, once again, research has not identified any cases where indigenous customs have been applied in such a manner, and therefore its use in this context is purely hypothetical.

Parties may also choose to resolve a dispute *ex aequo et bono*, which allows an arbitration tribunal to decide a case based on what is just and fair to the parties before it, as opposed to the application of conventional law. In such instances, indigenous customs relating to good faith (for example the South African custom of *Ubuntu*),<sup>209</sup> could be applied to settle the dispute and determine the arbitral award granted, without the need to refer to positive law.

The application of indigenous customs is more ideally suited for arbitration as Arbitral Tribunal panels are comprised of experts in the relevant area of law. This would bypass problems faced in courtrooms where judges and lawyers are unfamiliar with applicable indigenous customs and practices. Arbitrators may also be allowed to appoint experts to assist them with specific issues arising over the course of arbitration,<sup>210</sup> making arbitration a more favourable dispute resolution mechanism.

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<sup>206</sup> The secretariat of the United Nations Commission on International Trade Law *Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006* at 39.

<sup>207</sup> United Nations General Assembly *Report of the Secretary General of the United Nations Commission on International Trade Law ‘Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration’* (United Nations, 1985) at 61.

<sup>208</sup> United Nations Commission on International Trade Law *UNCITRAL Model Law on International Commercial Arbitration* (2006), art 28(1).

<sup>209</sup> Previously discussed on page 14.

<sup>210</sup> See, for example, London Court of International Arbitration *LCIA Arbitration Rules* (2014), art 26(1) and Singapore International Arbitration Centre *SIAC Arbitration Rules* (2013), Rule 23.



### *C Mediation*

The most convenient dispute resolution mechanism for the application of customary law appears to be mediation. Mediation allows parties to reach a mutual agreement regarding a problem, without the need to apply laws or rules of law.<sup>211</sup> This lack of the need to apply positive law could allow mediators to encourage parties to have regard to relevant indigenous customs and to resolve a dispute in accordance with such customary practices. The extra-judicial procedure of mediation is more appropriate for contracts governed by customary law, given its non-hostile manner of conduct and its solution-based approach as opposed to retribution. Solutions agreed upon by mediation procedures are more likely to be voluntarily complied with and would maintain a sustainable relationship between the parties, which is more suited to most indigenous practices.<sup>212</sup> The process is also similar to many customary dispute resolution methods (such as the 'Peacemaking' process practiced by the Navajo people).<sup>213</sup> Owing to this familiar procedure, indigenous parties may be more comfortable with mediation as a primary recourse for dispute resolution.

### *IX Conclusion*

Examining the content presented over the course of this paper, it is concluded that the recognition of indigenous law is viable, as custom can be incorporated into contract law at all examined stages within the lifecycle of a contract. It is evident that, at present, a number of conflicts and inconsistencies arise within all these stages. However, it is the opinion of the author that these conflicts will be eliminated once indigenous customs are legally and internationally recognised.

The use and recognition of indigenous law in contracts presents far-reaching benefits. Eliminating conflicts and inconsistencies within the lifecycle of a contract would encourage indigenous traders to conduct business in conformity with their cultural beliefs; contracts can be negotiated, concluded and conducted according to trade practices which are accepted by the community. Indigenous traders would no longer feel a need to abandon these practices when contracting with international parties, which would undoubtedly encourage more indigenous traders to tap into the field of international trading and

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<sup>211</sup> United Nations Commission on International Trade Law UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use (2002), art 1(3).

<sup>212</sup> Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters [2008] OJ L136/3.

<sup>213</sup> Previously discussed on page 17.

business. Expanding the scope of trade in this manner would serve to promote economic development within indigenous communities and improve indigenous welfare.

It is speculated that an increase in such international trade can have a significant effect on domestic and global economies. The escalation of indigenous trade may perhaps even bring about an increase in global awareness of indigenous cultures and traditions, which may further increase and improve trade.

It is therefore recommended that governments, international organisations and arbitration institutions should take measures to recognise and acknowledge indigenous law. Where possible, it is proposed that legal instruments should be introduced, which recognise indigenous customs as 'law' or 'rules of law', so that they may be chosen to govern contracts in cross-border litigation or international arbitration.

It is possible that the recognition and application of indigenous customs when drafting contracts and resolving disputes can result in some practical difficulties. Adjudicators may lack knowledge regarding applicable indigenous customs, and parties may be required to produce witnesses and evidence to explain how it may apply. This may result in more lengthy procedures and higher legal costs, which could be burdensome to indigenous parties. However, these problems should diminish with time, once precedents are established and legal professionals have familiarised themselves with the use and application of custom.

Accordingly, it is determined that the benefits of recognition outweigh any potential disadvantages. For the purposes of this paper, it is therefore concluded that indigenous customary law can and should be recognised in international commercial contracts.

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