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The mere fact that the 'societas mercatorum' has an interest in achieving commercial profits through cross border trade, does not suffice to justify the law-making power of the international community of merchants. The assumption of a transnational legal system requires more than a simple pragmatic policy of reasonable self-interest. It would be wrong to assume that there are transactions which have the transaction itself as their sole end, rather than, for example, the accomplishment of a useful step in a chain from producer to consumer.

Also, transnational law has to be distinguished from a mere social structure organized through conventional rules. In order to be recognized as the basis for a true legal system, the collective expectations of the members of that community with respect to compliance with certain rules of behavior have to be intensified in a way that these rules and principles are regarded as binding and mandatory upon each member. This requires a basic consensus of common values and convictions and the readiness of every member of that community to comply with the relevant rules and principles even at the risk of losing or doing damage to individual interests. From an individual perspective, the 'validity' of a legal system means nothing more than 'being motivated through the existence of legal principles and rules'. With this mandatory element, the law carries an 'unfriendly moment' in the regulation of social life.

This is also true in international trade where the businessmen's consciousness of the validity of trade usages, customs, contract practices and similar rules is guaranteed through 'black lists', withdrawal of membership rights, forfeiture of bonds and similar dangers to the commercial reputation. Above all, it is the inherent danger of losing commercial good will and standing within the community of merchants - and with it the 'membership' of this closely knit community - which provides the necessary incentive to adhere to the self-made law of international business. The necessary coordination of the wills of the individual market participants is brought about in the context of 'conflict avoidance' during the drafting of the contracts themselves. In participating in the contractual consensus ('consensus ad idem'), each party expresses the confidence that its counterpart will comply with the terms and conditions of the contract. Thus, the contract becomes the most important means to implement the will of the parties in practice because, in the absence of any need to ensure consumer protection, international trade and commerce constitutes an ideal climate for the free development of contractual structures. The notion of 'private governance' is thus extended at the level of society, in our context within the society of merchants who take part in the global exchange of goods, services and money. The contract becomes the means of 'auto-regulation' within the de-territorialized and, by virtue of modern IT-technology, de-materialized global marketplace.

The realization of this eminent force of the contractual consensus goes back to Grotius and Pufendorf, who realized that the keeping of one's word is in harmony with the social nature of men and the principle of good faith. Through these authors, this realization then penetrated into classical contract law doctrine. The ancient lex mercatoria of the middle-ages was thus built on the faith in a given word, thereby allowing the actionability of pacta nuda 'in curia mercatorum'. At the fairs, seaports and market towns of the Middle Ages, "purchase and sale of merchandise was continually made" and "the law merchant or law of the market was always followed there continuously".

Today, this ancient contract practice forms the basis of the 'promise principle' as the underlying idea of modern contract law. The trust of one side in the promise of the other ('my word is my bond') provides the essential basis for modern international trade transactions. The morality of business turns the promise into a categorical imperative. The legal obligation that requires performance from every party to a contract is nothing other than the moral duty to respect one's word. This notion of the contractual consensus, like the classical contract doctrine, is characterized by a lack of concern with distributive questions. However, the new lex mercatoria only applies outside the consumer context. Also, international merchants bear an increased responsibility for the conduct of their business affairs, resulting in a transnational principle which presumes their professional competence. It is thus in the field of transnational business
activities, where the force of the contractual consensus can flourish and develop its law-making quality, unhampered by consumer protection laws and notions of distributive justice that go beyond the general principle of "good faith and fair dealing in international trade".

A typical example of this process, albeit in a closely knit commercial community, is the diamond trade in Antwerp, Belgium and other places of the world\(^\text{530}\). Each day, diamonds worth thousands or even millions of US dollars are traded there. The contracts between the diamond traders, frequently concluded through professional intermediaries, are based solely on the consensus of the parties, the mutual trust in the other party's performance, a handshake and a special trading formula. Breach of these informal, unwritten contracts, however, will result in worldwide suspension from trading which will be publicly announced. This provides a strong incentive for the parties to meet their contractual obligations. Similar examples of informal, trust-based contract practices can be found in the commodity trade. When written contracts are required in international, arm's length transactions, the mutual trust of the parties is made possible and enhanced by the multitude of standard form contracts and uniform contractual models that are circulated in the worldwide business community.

This understanding of the transnational legal process requires the redefining of the traditional theory of legal sources. In modern business relationships, it is the contract which assumes the genuine function of a source of law:

> "It is the contract which now constitutes a legal change. Traditional legal concepts do not include the contract among the sources of law. But if we continue to conceive of the contract as a mere application of the law, and not as a source of law, we will preclude the possibility of understanding how the law of our times is changing. The contract is taking the place of the law, even in the organization of society. Some decades ago Millibad wrote that, more than ever, people considered the state as source of all provisions and even as a source of their happiness. Today we must say that this notion is disappearing. Society now looks after itself and tends towards self-organization... The inadequacy of the law to make changes derives from two characteristics of contemporary economy. The first is the meta-national nature of the economy which is antithetical to the national character of the legal systems. The second is that the economy is in continuous change which demands flexible instruments of adaptation from the law to change, in antithesis to the rigidity of the laws\(^\text{531}\).

This process implies that the contractual consensus which assumes a law-making force of its own, is shaped, influenced and validated by external criteria other than the parties' self-interest in making a profitable deal. This process of external validation may be effected by the parties' adhesion to certain general or sector-specific market standards, by the reconciliation of the contract with unwritten cultural and/or ethical standards existing in the parties' home jurisdictions, in third countries (e.g. the place of performance) or on the regional and global level, or by the transformation of written standards contained in soft law instruments such as Codes of Conduct of the relevant industry in which the parties' subjective contractual consent receives additional force if they base their contract not (only) on terms wish they negotiate on an \textit{ad hoc} basis, but on standard forms prepared by industry organizations or formulating agencies operating at the regional or global level, such as the 'United Nations Economic Commission for Europe (ECE)-General Conditions for the Supply of Plant and Machinery For Export (LW 188)' or the International Federation of Consulting Engineers (FIDIC) Conditions for the model contracts for distributorship, agency and international sales issued by the ICC.
competence guarantees the homogenous character of the transnational legal process in that not only the participation in it but also the compliance control is based on the same legal notion, i.e. the contractual agreement as such. It is not surprising, therefore, that both general contract law and arbitration, are characterized by the same principle: ‘in favorem validitatis’.

Again, the consensus-based dispute settlement system has important repercussions on the development of transnational law. The drafting practice of international trade, geared towards the ideal of conflict avoidance, reacts to the case law of international arbitral tribunals and thereby consolidates and stabilizes the general structure of the new lex mercatoria which, in turn, is shaped and influenced by international drafting practice. This phenomenon of ‘consensual regulation of international commerce’ is well known from the field of investment contracts:

of the law. One should not be impatient. The ‘actors’ generally know about the consequences of their conduct. Irrational conduct from one or the other side will always have catastrophic consequences for the party... there is a major chance for the consolidation of public international law of expropriation because the parties usually behave in a rational manner’.

541. It is at this juncture that the circle of consensual law-making is closed. Dispute settlement through arbitration or other dispute resolution techniques forms the vital link between spontaneous and reactive drafting techniques and the formation and evolution of the new lex mercatoria. Transnational law may therefore be traced back to the consensus of the participants of international trade 542. This consensus has a legal force of its own without the need of a prior acknowledgment by domestic legislatures.

PART II - THE NEW LEX MERCATORIA IN PRACTICE: NEW APPROACHES TOWARDS THE CODIFICATION OF TRANSNATIONAL COMMERCIAL LAW

CHAPTER IV INFORMAL APPROACHES TOWARDS THE CODIFICATION OF THE NEW LEX MERCATORIA

I. RESTATEMENTS OF INTERNATIONAL CONTRACT LAW

A. THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

7. Contents of the Principles

a. Structure

The 1994 edition of the UNIDROIT Principles consisted of 120 articles which were divided into seven chapters. The 2004 edition of the Principles has not changed this basic structure but has lead to the addition of three new chapters and new subsections in Chapters 2 and 5. The 2004 edition consists of 185 articles. The first chapter (‘general provisions’) of the UNIDROIT Principles contains basic legal notions and principles that deal with such fundamental notions as freedom of contract, freedom of form and proof, pacta sunt servanda, good faith and fair dealing and the primacy of usages and
practices in international trade. The other chapters contain provisions relating to the conclusion of contracts, the effect of contracts, the construction of contractual stipulations, the content of contracts, performance and the legal consequences of non-performance. The structure of the Principles follows the American Restatement of the Law of Contracts in that a basic rule or a general legal principle formulated as black-letter-law is followed by a short commentary-like explanation and explanatory examples. However, in contrast to the Restatement (2nd.) of the Law of Contracts, there are no ‘notes’ specifying the comparative references (statutory provisions of domestic laws, court judgments, arbitral awards, conventions, doctrinal writings, etc.) on which the wording of the relevant rule or principle is based. The drafters intentionally left out such references to national legal systems in order to emphasize the international character of the UNIDROIT Principles.

which are detached from any domestic legal system. Also, the omission of comparative references was intended to avoid highlighting the fact that in the preparation of the Principles, some legal systems played a more significant role than others. The first version of the American Restatement also did not contain any references to the practice of the common law in the various American states. However, in order to enhance its acceptance, such notes were included in the second edition of the Restatement. It was for this very reason that the ‘Principles of European Contract Law’ drafted by the Lando Commission contain comprehensive comparative references. A collection of comprehensive comparative references may attach increased legitimacy and authority to a list of general principles and rules of international commercial law and may serve as a starting point for their differentiation and diversification. This issue will be looked at in more detail when the ‘creeping codification’ through the drafting of lists of general principles and rules of the new lex mercatoria is discussed.

A particular characteristic of many of the provisions contained in the Principles is the attempt to uphold the contract as much as possible. The assertion of the Principle in favorem validitatis reflects a general concern of economic practice perceived in the general international law of contracts (‘favor contractus’) and also in the area of international commercial arbitration. Whether formulated as a comprehensive regulatory framework of the parties or drafted by reference to general conditions of trade, the contract detaches the legal relationship between the parties from the ‘otherwise’ applicable domestic law. Due to its self-sufficient character the contract becomes the ‘substitute law’ for the parties. Influenced by Anglo-American drafting techniques, the comprehensive contractual arrangements ‘autonomize’ the parties’ legal relationship from the direct application of substantive law. In both long term business relationships and arms’ length bargains, the parties therefore have a vital interest in upholding their contract. The validity of the contract becomes all the more important since aspects of consumer protection do not play any role in this context. From the perspective of legal theory the principle of favor contractus correlates with the general significance of the contractual consensus of the parties as the driving force behind the creation and evolution of transnational commercial law.

A survey of those provisions which reflect the principle favor contractus may give an indication of the significance which it has played in the drafting of the Principles. These provisions include acceptance of a contractual offer by performing an act without notice to the offeror (Art. 2.6), the modification of contractual terms by writings in confirmation (Art. 2.12), contracts with terms deliberately left open (Art. 2.14), the battle of forms (Art. 2.22), the validity of a mere contractual agreement without consideration (Art. 3.2), the validity of a contractual relationship in spite of initial impossibility (Art. 3.3), the rule of interpretation favor negotii (Art. 4.5), the rule to supply an omitted contractual term (Art. 4.8) and finally the right of the non-performing party to cure (Art. 7.1.4). Also, the principles on re-negotiation in case of hardship (Artt. 6.2.1 et seq.) and of excuse of non-performance in case of force majeure (Art. 7.1.7) are inspired by the principle of favor contractus. The last two principles are characterized by their inherent vagueness and lack of clarity. They are workable in practice, only when they are embedded in a comprehensive legal system which is based on such fundamental legal notions as pacta sunt servanda.

b. Constituent Elements of a Legal System: The Interaction Between ‘General Principles’ and ‘Rules’

aa. The Differentiation Between ‘General Principles’ and ‘Rules’

The differentiation between ‘general principles’ (‘principes générales’; ‘allgemeine Rechtsgrundsätze’) and ‘rules’ (‘règles’, ‘Regeln’) or between ‘general principles’, ‘rules’ and ‘standards’ is an integral part of legal theory. According to the doctrine of legal sources, all these terms may be grouped under the heading of ‘norm’. This does not mean, however,
that the UNIDROIT Principles obtain

the quality of a norm. Like the American Restatement\textsuperscript{168} they are merely drafted like norms so that the principles relevant
to the drafting of norms of domestic law may always be applied here by analogy.

Whereas with respect to a rule, there are definite guidelines directing what conditions must be met before the rule can be
applied and there is a determined central area of application surrounded by a fringe of vagueness, i.e. a more or less
wide, less distinct peripheral scope of possible applications.\textsuperscript{169} General principles are much less precise even at their
core, the guidelines for their application are unclear and formulated in a general and vague manner.\textsuperscript{170} General
principles do not necessarily have pre-set conditions for application. Instead, they merely constitute 'rules of optimal
application' which means that they may be complied with in varying degrees. The required degree of compliance depends
not only on the actual but also on the legal options open to the target group. Application of general principles therefore
requires a substantial process of weighing up contradictory principles and rules\textsuperscript{171}. General principles are therefore
always subject to a continual discussion about their effectiveness and scope\textsuperscript{172}.

General principles of law thus express a general truth which serves as a basic guideline for the application of the law,
whereas rules are the practical formulation of the principle and, for reasons of expediency, may vary and depart, to
greater or lesser extent, from the principle from which they spring. This teleological aspect reduces the level of
foreseeability with respect to cases in which general principles are applied as well as their practical workability. However,
general principles of law also have the important task of explaining the function of individual legal institutions in the
context of a legal system. They assist the legal institutions in that they appear not only as a (simple) group of standards
and rules but as a group with meaning and therefore as a 'system'.\textsuperscript{172} Reference to general principles of law therefore
allows for a certain degree of self-control of the decision-maker in that the solution found for an individual legal problem
has to be integrated into the network of coherent general principles enunciated so far, at 409. It is for this reason that
in the judgments of domestic courts, general principles of law today take the place of standard references to vague
blanket clauses of substantive law, thereby investing the courts with a kind of 'quasi-law-making power', enabling

them to find more modern, more contemporary solutions for the legal problems of today.\textsuperscript{175}

\textbf{bb. Consequences of this Differentiation for the UNIDROIT Principles}

The UNIDROIT Principles make use of this dialectic between a rule and a general principle of law. They keep to very
definite rules with a clearly defined scope of application. In addition to the provisions relating to the conclusion of
contracts (Artt. 2.1 \textit{et seq.}), the following articles should be mentioned in this context: Articles relating to the mode
of payment (Art. 6.1.7 \textit{et seq.}), to the currency of payment (Art. 6.1.9.9), to the costs of performance (Art. 6.1.11), to
the right to withhold performance (Art. 7.1.3), to a party's right to require payment (Art. 7.2.1), to a party's right to claim
damages for non-performance (Art. 7.4.1), to the calculation of damages (Art. 7.4.6) and to the rules governing the
calculation of interest claims (Art. 7.4.9), the latter provision being of utmost economic relevance, given the enormous
amounts that are frequently in dispute in international commercial cases.\textsuperscript{176} However, the UNIDROIT Principles are not
restricted to the reproduction of the technicalities of conclusion of contracts by offer and acceptance\textsuperscript{177} and the
performance of contracts and possible secondary claims. Instead, a number of general principles in the form of general
clauses take precedence in the first chapter over the specific provisions in chapters 2 to 7 and are then worked through
by the UNIDROIT Principles as a central theme, making assessments and comparisons between rules and general
principles possible. This is in accordance with the general experience that in the field of law of contracts, the application of
the law always oscillates between the strict principle '\textit{pacta sunt servanda}' and general fairness considerations and is
therefore largely dependent on the consideration of a number of flexible principles.\textsuperscript{178}

In addition, general principles perform an important gap-filling function.\textsuperscript{179} Art. 1.6 (2) of the Principles takes up this idea
and states that issues within the scope of the Principles but not expressly settled by them 'are as far as possible to be
settled in accordance with their underlying general principles'. These general principles are either expressly contained in
the individual articles of the Principles ('good faith', 'reasonableness' etc.) or must be derived from specific provisions by
way of autonomous interpretation, detached from any domestic laws.\textsuperscript{180} This concept of an autonomous uniform
interpretation without reverting to any domestic law, constitutes an important leading principle in international uniform law.
It formed the basis of Art. 17 of the Uniform Sales Law and Art. 7 Sec. 2 of

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the Vienna Sales Convention¹⁸¹ both of which were drafted on the basis of corresponding provisions of domestic legal systems¹⁸². UNIDROIT’s official commentary to the Principles accordingly makes it clear that in order to promote uniformity in the application of the principles, gaps should be filled ‘whenever possible, within the system of the principles itself before resorting to domestic laws’¹⁸³. Through this statement, the Working Group directly recognized the ‘openness’ of the ‘system’¹⁸⁴ and the important function of the general principles contained therein.

Legal principles have to be weighed against legal rules when such provisions in the UNIDROIT Principles are applied which, though having the characteristics of rules, allow wide scope for teleological considerations by using broad legal language which requires extensive interpretation and elaboration. The following are examples of such provisions: Duty to pay damages in case of breaking off of negotiations in bad faith (Art. 2.15 (2)), supplying an omitted contract term (Art. 4.8), possible sources of implied contractual obligations (Art. 5.2), the duty to cooperate with the other party in the performance of that party's obligation (Art. 5.3), which, if it can reasonably be expected under the circumstances, may even amount to a duty of active cooperation notwithstanding contractual provisions to the contrary¹⁸⁵ and the duty to re-negotiate in the event of hardship (Art. 6.2.3)¹⁸⁶.

The general principles which serve as important reference points for the assessment process described above are: The principle of party autonomy as the Magna Charta of international contract law (Art. 1.1), the principle of ‘pacta sunt servanda’ (Art. 1.3), the notion of ‘good faith and fair dealing in international trade’ which the parties have to observe during the negotiations of the contract and for the whole duration of the contract and which may not be excluded or limited by them according to Art. 1.7 of the UNIDROIT Principles¹⁸⁷.

The notion of good faith in particular belongs to the common core of the legal systems of the civil law countries¹⁸⁸ and is also acknowledged by the American Uniform Commercial Code and the Restatement (2nd.) of Contracts¹⁸⁹ and other common law jurisdictions such as Australia¹⁹⁰. The German Federal Supreme Court has stated ‘that the notion of good faith is a supra-national legal principle that is inherent in all legal systems’¹⁹¹.

English courts, however, have always rejected the idea of a general principle of good faith ever since Lord Mansfield described the notion of good faith as ‘the governing principle...applicable to all contracts and dealings’ in 1766¹⁹². In their view, such a general principle of law would run counter to the parties’ respective positions during contract negotiations and over the duration of the contract and would also be impracticable¹⁹³. Thus, the English House of Lords has ruled that an express agreement that parties must negotiate in good faith is unenforceable¹⁹⁴. From the perspective of a functional comparative analysis¹⁹⁵, however, the assumption of a general principle of good faith and its inclusion in the UNIDROIT Principles is justified¹⁹⁶ and has also found its way into Art. 7 of the Vienna Sales Convention. The reason for this is that English courts have applied the principle of good faith as an ‘implied term of the contract’ in individual cases¹⁹⁷, thereby indirectly acknowledging the existence of a principle of ‘good faith in the performance of the contract’¹⁹⁸*. Also, the principle of good faith lies at the roots of such important legal institutions of the common law systems as ‘promissory estoppel’ or ‘estoppel in pais’¹⁹⁹. Finally, it seems that under the influence of European law, especially with respect to the EU- Directive on Unfair Terms in Consumer Contracts, implemented in the Unfair Terms in Consumer Contracts Regulations 1994, and continental legal traditions, the long-standing hostility against the principle of good faith will soon be overcome by English lawyers and courts²⁰⁰.

Thus, it may be said that the principle of good faith is a perfect example for the basic drafting approach of the UNIDROIT Working Group, which has always been rather pragmatic than purely dogmatic²⁰¹.

In any event, the influence of the Principles in this respect has already been felt. In an unpublished award of 1996, an arbitral tribunal made reference to the Principles in order to demonstrate to the parties that the enforceability of the parties’ agreement to negotiate in good faith under the applicable New York law was in line with international contract practice²⁰².

Within the UNIDROIT Principles the notion of good faith is qualified in that it is mentioned in Art. 1.7 (1) simultaneously with the idea of ‘fair dealing in international trade’²⁰³. This was done in order to make it clear from the outset that the
conduct of the parties is not to be measured according to the subjective standards of their bilateral (or multilateral) contractual relationship, nor according to the standards of their respective domestic legal systems but according to a far-reaching, objective standard to be found among businessmen in international trade, amounting to a 'fairness in the market place'. This objective understanding of the notion of good faith in international business is not only in line with the approach taken in Sec. 2 - 103 (1) (b) UCC but is also reflected in English legal practice where the principle of good faith is always seen in the context of the standards of honesty, fairness and reasonableness that prevail in the relevant legal community. In any event, the standard reflected in Art. 1.7 of the UNIDROIT Principles has to be understood in a transnational sense. It is detached from the particularities of domestic legal systems and has to be seen in the socio-economic environment in which multinational enterprises usually operate. This confirms the general observation that it is impossible to compile a common stock of concrete rules, principles and applications that are related to the principle of good faith. Instead, this broad and vague notion always has to be interpreted and applied in a context-oriented manner.

In spite of its general and vague character, Art. 1.7 of the UNIDROIT Principles may rightly be characterized as the Magna Charta of international commercial law. The principle of good faith and fair dealing performs a central function in the interpretation of the Principles and in transnational commercial law in general. By stating in general terms that each party must act in accordance with this standard, the article makes it clear that even in the absence of special provisions in the Principles the parties' behavior throughout the life of the contract, including the negotiation process, must meet certain requirements which are generally accepted within the international business community.

The Magna Charta of international trade law does not stand alone within the system of the UNIDROIT Principles. It is supplemented by the parties' commitment to trade usages to which they have agreed or which are widely known to and regularly observed in international trade by parties in the particular trade concerned and to practices which they have established between themselves (Art. 1.8).

This principle of 'reasonableness' plays a dominant and recurrent role in almost all of the provisions of the UNIDROIT Principles even though, contrary to the 'Principles for European Contract Law' of the Lando-Commission, the UNIDROIT Principles do not contain a blanket clause which defines the notion of reasonableness. Under the Uniform Sales Law and the Vienna Sales Convention, the 'reasonableness-test' ('reasonable person'; 'reasonable time'; the juxtaposition of 'reasonable' and 'unreasonable') has been used as a general criterion for the evaluation of the parties' conduct in those cases where there is no specific provision to be applied to their legal relationship. The new Dutch Civil Code also contains specific provisions on the standard of reasonableness which it links to the principle of good faith ('redelijkheid en billighheid', Artt. 6:1, 6:248, 6:285 NWB). The notion of 'reasonableness' thus provides the classical standard which attaches an objective quality to the principle of good faith. The standard thereby performs an important prohibitive function which attaches, under German law, the prohibition of the improper exercise of legal rights under the blanket clause of good faith contained in Sec. 242 of the German Civil Code. Inclusion of this standard in the general section of the UNIDROIT Principles reflects the particular character of international commercial law. It is composed not only of clearly defined legal duties but also and to a large extent of general standards and duties of conduct ('obligations de comportement') which allow for the adaptation of the law to the changing circumstances of international trade and commerce. Under the standard of 'reasonableness', it is irrelevant whether or not a party has acted upon what it honestly believed to be reasonable rather, it is decisive that one has put forth his best efforts, exercised due diligence in performing his contractual obligations, upheld the common contractual goals, avoided abuse of rights required under the
contract and facilitated the other party's performance. The flexibility and 'souplesse' of the standard of reasonableness also reflects its major virtue: It allows arbitrators and judges to focus on the search for a fair and 'equitable' solution of international commercial disputes. At the same time, the standard provides a further indication for the 'openness' of any legal system in general and of the lex mercatoria in particular, proving the quality of transnational commercial law as a 'law in action'. The standard of reasonableness has its origin in a sociological understanding of the contract. The idea of reasonable conduct is therefore inextricably linked to the principle of 'pacta sunt servanda' and to the notion of a general transnational liability for breach of confidence as a basic pillar of the lex mercatoria.

In the context of the UNIDROIT Principles, the reasonableness test is of particular relevance for all those provisions which require a flexible interpretation and application in individual cases. They include those relating to the application of usages and practices (Art. 1.8 (2)), to the time of acceptance in case no time has been fixed by the offeror (Art. 2.7), to the interpretation of the contract in cases where no common intention of the parties can be determined (Art. 4.1 (2)), to the determination of the quality of performance which is neither fixed by, nor determinable from, the contract (Art. 5.6), to the determination of the contract price where the contract does not fix or make provisions for determining the price (Art. 5.7), to the determination of the time of performance absent an agreement by the parties (Art. 6.1.1 (c)) and in the context of those articles dealing with 'hardship' (Art. 6.2.2) and 'force majeure' (Art. 7.17). In the context of these provisions, the standard of reasonableness frequently takes the place of party agreements thereby reflecting the drafters attitude of the existence of a general standard of conduct in international trade. However, the abstract and general provisions contained in the UNIDROIT Principles do not themselves provide this standard. Therefore, the construction of international contracts and the determination of the conduct of the parties depends upon a close interaction between the criterion of good faith (Art. 1.7) and the objective test of fair dealing in international trade and reasonableness on one hand and the usages and practices of international trade (Art. 1.8) on the other. A contract as well as a unilateral statement or conduct of a party shall be interpreted under the UNIDROIT Principles according to the intention of the party or parties and, where no such intention can be established, according to the meaning that a reasonable person of the same kind as the parties or party would give to it under the circumstances (Artt. 4.1 and 4.2). Art. 4.3 of the Principles states that in applying the standard, regard shall be had to all the circumstances, including preliminary negotiations between the parties, practices which the parties have established between themselves, the conduct of the parties subsequent to the conclusion of the contract, the nature and purpose of the contract and, most important, 'the meaning commonly given to terms and expressions in the trade concerned'. With this latter provision the UNIDROIT Principles refer to Art. 9 Sec. 3 of the Uniform Sales Law. The UNIDROIT Principles refer the judge or arbitrator who has to interpret the contractual stipulations to the meaning of typical trade clauses as reflected in the INCOTERMS issued by the ICC. The Principles are therefore even more detailed than the Vienna Sales Convention which contains a reasonableness test in Art. 8 Sec. 2 but has not adopted a provision such as Art. 9 Sec. 3 of the Uniform Sales Law which refers the judge or arbitrator to the meaning of contractual stipulations commonly given to terms and expressions in the trade concerned.

Further examples from commercial reality may serve to illustrate the functioning of this principle. Schlechtriem provides the example of internet communication not envisaged by the drafters of the Principles. In this case, the question may arise as to the time within which the recipient of an internet sales confirmation has to object. Does it run only from the time the internet message is reproduced in tangible form or from the moment of receipt in the addressee's computer? In this case, good faith and fair dealing require that the 'undue-delay-requirement' of Art. 2.12 has to be interpreted so as to give the recipient a reasonable opportunity to take notice of the recorded message regardless of whether and when it is printed.

It is also said that from the perspective of international business practice, Art. 3.10 of the Principles, dealing with a party's right to avoid the contract or individual terms of it in case of excessive advantages for one party, would allow a seller who offered products at a low price because it had temporary cash-flow problems to ask the court at a later date to increase the contractually agreed price on the grounds that when the contract was made, this party was under 'economic distress' and had an 'urgent need' for cash (Art. 3.10 (1) (a)). This view would indeed...
go against free market principles and the fundamental rule of pacta sunt servanda in that it overrules the natural distribution of bargaining powers within each contractual equilibrium. However, Art. 3.10 is not intended to provide the parties with a means to escape their contractual commitments. Even a considerable disparity in the value of the price of performance and counter-performance is not sufficient to permit avoidance of the contract. The application of this provision requires much more than this. Under the circumstances of the case and in the light of reasonable business practice, the disequilibrium has to be so great as to shock the conscience of a reasonable (business) person. This, of course, does not apply to mere cash-flow problems of one of the parties to the contract.

The same is true for the hardship-provision of Art. 6.2.2. It is alleged that this provision allows the adaptation of the contract in case of currency fluctuations or because of an unexpectedly high failure rate under warranty. Again, this would contravene usual business practice and again, the answer to these objections must be that the hardship-provision has to be read and construed in a context-oriented manner. Thus, Art. 6.2.1 expressly states that 'where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship'. In other words, in cases of doubt, the principle of pacta sunt servanda prevails and performance must be rendered as long as it is possible and regardless of the economic burden it may impose on the performing party. This principle is a constituent element of international commercial contract practice and is also reflected in the 'ICC Guide on Force Majeure and Hardship'. Currency fluctuations are a common element of commercial reality. They are usually regarded as typical business risks which cannot be shifted to the other party in case the contract does not contain a special provision and the pricing structure does not imply a certain 'currency risk-premium'.

Finally, it has been argued that the provisions on public permissions (Artt. 6.1.14 et seq.) are impracticable and not in line with international business practice. Art. 6.1.17 (1), which states that the refusal of a permission affecting the validity of a contract renders the contract void, is alleged to be unacceptable since it would enable a state-controlled entity to evade its contractual duties simply by arranging for the refusal of the public permission. Also, it is claimed that in such cases there should be some claim for non-performance for the aggrieved party. This objection is unjustified for two reasons. First, the public entity's conduct in this case would violate the general principle of good faith (venire contra factum proprium) which has to be observed in the interpretation of the Principles according to Art. 1.7. Also, Art. 6.1.7 (2) calls for the application of the rules on non-performance in cases of refused public permissions that render the contract void, thus opening the way for a claim for damages under Art. 7.4.1.

These examples reveal that the black-letter-law of the Principles cannot be applied in a mechanical way without having regard to the general framework and thrust of the Principles as clarified in the official commentary. Instead, the provisions always have to be construed in the light of their underlying guiding notions, of which 'pacta sunt servanda' and 'reasonableness' are the most important. The generality of the principles and rules contained in the UNIDROIT Principles and the complex assessment process and the weighing of interests that is necessary for their proper application are by no means proof of a lack of practicability. Rather, they are indications for the quality of international commercial law as a 'law in action' which is in a state of constant evolution through international practice. In the context of international commerce and trade this important function is performed by international arbitrators striving to reach equitable and reasonable solutions for commercial disputes. It is through their decision-making that the UNIDROIT Principles 'are filled with life'. This reflects the general experience that general principles of law and standards of conduct do not have legal effects in abstracto, but have to be integrated into a law-finding and norm-creation process. In the context of transnational commercial law this is the functional comparative methodology and the institutional creation of the law.

II. ESCAPING THE CODIFICATION DILEMMA: THE ‘CREEPING CODIFICATION OF THE NEW LEX MERCATORIA’

C. THE NEW CONCEPT: THE 'CREEPING CODIFICATION' OF THE NEW LEX MERCATORIA
4. Structure and Content of the List

The list reprinted in the Annex to this study is based on the methodological approach and comparative preparations described in this study. The functional comparative methodology on one side and the case law of international arbitral tribunals and the scientific discussions surrounding it on the other form the two pillars on which the legitimacy of this list is based. It contains legal principles, standards and rules as constitutive elements of a transnational commercial legal system.

The experience with the project of the American Cornell Law School, which focused solely on the technical issue of the formation of international contracts, and the judgment of the Vienna Supreme Court, which set aside an arbitral award that was based solely on the principle of good faith, has shown that transnational commercial law which is focused solely on general principles of law or on technically detailed legal rules is not viable. The structure of the list takes account of this experience. It starts with the general principles of 'good faith' and 'pacta sunt servanda'. These principles do not constitute vague formulas that are intended to invite decisions in equity that are totally detached from any legal considerations and that only take into account the particularities of the individual case. True it is that vagueness and flexibility do not necessarily constitute attractive elements of transnational commercial law. However, it has been emphasized above that it is impossible to regard transnational commercial law as a set of clearly defined, detailed legal rules. Rather, every attempt to codify the lex mercatoria involves a sound mixture of detailed legal rules and general principles as well as standards of conduct. In spite of their necessary vagueness and generality these general principles provide a vital function within the system of transnational commercial law:

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a. Genetic Function of General Principles of Law

The origin of many of the rules and principles contained in the list may be traced back to the basic notion of good faith. Thus, the right to set-off mutual claims is based on the idea that it would be against good faith if a creditor requires performance of an obligation from his debtor if the former would have to return immediately what he has required from the latter. The particularly important aspect of good faith is the prohibition of contradictory conduct. Even though the latter principle is 'still far away from a sufficient normative solidification', it lies at the roots of many of the more detailed rules and principles contained in the list. The principle thereby serves as a perfect example for the inductive development of special rules within the system of transnational commercial law. Thus, the principles of 'volenti non fit iniuria' as well as the general prohibition of a state or state-controlled entity to deny its contractual obligations with the reference to its internal law is based on the idea of 'venire contra factum proprium'. The latter principle does not only form part of public international law and is reflected in Art. 46 of the Vienna Convention on the Law of Treaties.
From the perspective of German law, this development finds further support in the strong interaction between the idea of confidence and faith of one party in the performance of the other party's obligation and the general prohibition of "venire contra factum proprium" 209. The development towards a transnational principle of liability related to this aspect of confidence is reinforced by the special role which confidence and faith plays in the doctrine of international contract law 210.

b. General Principles of Law as Reference Points for Valuation Processes Within the System of Transnational Commercial Law

Apart from the genetic function just described, the principles of 'good faith' and 'pacta sunt servanda' 211 also play a decisive role as reference points for valuation processes within the flexible system of an autonomous world trade law that is reflected in the list. Within the complex process of developing an autonomous system of transnational commercial law, general principles of law perform an important 'classifying function' 212 with respect to the legal character and application of rules and standards contained in that system. This phenomenon is exemplified by the duty to renegotiate. The origin as well as the contents and character of this duty is influenced by the principle of good faith and is also linked to other general principles such as the notion of 'clausula rebus'. A new rule that is being discovered as an element of the lex mercatoria therefore always has to be harmonized with the general principles that form the basic pillars of transnational commercial law 213.

It becomes clear at this juncture that the constant interplay between legal rules and principles described above in the context of the UNIDROIT Principles 214 is also decisive for the evolution of the lex mercatoria in general 215 and for the structure of the lists in particular. In the context of transnational commercial law, general principles of law perform a function that is similar to that of domestic legal systems - they provide the basis for the development of new legal rules 216. Frequently, the list will reproduce legal principles in their original Latin terminology. This 'Latin approach' is evidence that the dogmatic basis of these principles can be traced back to classical Roman law. The reference to the Roman origins of many of the rules and principles contained in the list provides another important aspect of the comparative research on which the list is based 217. This historic approach to the lex mercatoria finds support in the drafting process of the new Dutch Civil Code. Even though this code is based on substantial comparative research 218, the drafters have emphasized the Roman origins of many of the rules and principles contained therein 219. Also, reference to the Roman origins of the rules and principles that are part of the lex mercatoria provide an ideal complement to the various sources of contemporary law such as the case law of international arbitral tribunals, international contract forms, general conditions of trade and the scientific discussion of the lex mercatoria-doctrine. The historic references thereby add to the legitimacy of the lex mercatoria as an autonomous transnational legal system 220.

Apart from standards, general principles of law and rules, the list also contains generally recognized legal institutions such as the notion of prescription. To be workable in practice, these institutions need to be filled with concrete legal contents 221. Thus, the idea of prescription can only be applied in international legal disputes if it relates to clearly defined periods of time. However, even without such concrete workable legal contents, the inclusion of such a legal institution in the list performs an important function within the system of the lex mercatoria in that it avoids from the outset any discussion on the existence of such an institution on the transnational plane. Also, the inclusion of the institution on the list may ultimately lead to a consensus on the details of its content.

For reasons of clarity and workability, the comparative material relevant to the rules and principles contained in the list have not been included in footnotes but in special 'notes' that are reprinted directly behind the black-letter text. The experience with the American Restatement of the Law of Contracts 222 reveals the tremendous significance which these notes have. It was for this reason that the Lando-Commission decided to include such notes in its Principles on European Contract Law and not to follow the example of the UNIDROIT Working Group 223. The notes guarantee the transparency which is necessary for a world-wide acceptance of the list and the rules and principles contained therein 224. Also, the comparative references contained in the notes may serve as starting points for the further evolution of the list in general and for the development of individual rules from mere 'candidates' to genuine components of the lex mercatoria.
Finally, the references contained in the notes prevent the danger of a 'battle of lists'.

5. Updating and Developing the List

In order to be workable and to give a reliable picture of the status quo of transnational commercial law, the list requires constant updating and development. This process starts with a concrete legal problem that appears in an international arbitration or before a domestic court. The corresponding legal principle or rule would then be developed on the basis of the functional comparative methodology, i.e. using a topical, problem-oriented comparative approach. This process has to take account of the dual nature of the list, embracing both general principles of law as an abstract set of principles and the legal and commercial convictions of the international community of merchants. It also has to take into account the plurality of legal sources which account for the development of the lex mercatoria and which include public international law, uniform laws, the general principles of law, the rules developed by international 'formulating agencies', uncodified customs and usages, standard-form contracts and published arbitral awards. These sources constitute the 'raw material which has to be distilled into formally enacted or declared rules in order to become binding', i.e. in order to become part of the lex mercatoria as an autonomous legal system.

As far as the discovery of general principles of law and legal rules is concerned, the UNIDROIT Principles and the Lando-Principles of European Contract Law reprinted in the Annex of this study may serve as a starting point for the comparative analysis. The restatements are not a source of the lex mercatoria in the proper sense but they provide an initial indication for the existence of certain legal principles and rules on the transnational plane. Other lists of principles such as that set up by the Cairo Regional Centre for International Commercial Arbitration (CRCICA) may also be included in the research. However, this requires a careful approach. Some of them, such as the one of the CRCICA, do not contain any comparative references. Others merely repeat the contents of other lists, such as the one set up by Mustill, himself an opponent of the lex mercatoria-doctrine, without verifying the comparative legitimacy of the individual rule, principle or standard.

In order to ensure this legitimacy, the research must also include classical legal systems from civil and common law countries and 'hybrid' laws such as the civil code of the Canadian province of Quebec and the special laws of foreign trade contracts of the countries of the former Eastern Bloc and of the People's Republic of China. Also, the comparative analysis will include Part I of the new Civil Code of the Russian Federation promulgated on January 1, 1995. The value of this law for comparative research is based on the fact that it is drafted upon the major codifications of civil law of continental Europe. The drafting process of the new Russian law was dominated not so much by Anglo-American legal notions and ideas but by the legal systems of Germany, the Netherlands and Italy. As a consequence of this comparative drafting approach, the new Russian law takes account of recent developments and statutes in the field of private law in Europe. Apart from its contents, the new Russian law is of particular significance for comparative research because it performs an important integrative function in the former Soviet Union. The law constitutes the beginning of a far-reaching codification movement in the field of private law. Uzbekistan and Kazakhstan have adopted the Russian draft and the Republic of Kirgistan has promulgated a new civil code that is based on a previous draft of the Russian law.

The results derived from this comparative research may then be verified on the basis of international conventions such as the Vienna Sales Convention and its predecessor, The Hague Sales Law an d with reference to conventions of public international law, such as the Vienna Convention on the Law of Treaties of 1969. The Vienna Sales Convention plays a pivotal role in this verification process for two reasons. First, the Convention is itself a first step towards the codification of the lex mercatoria in the field of international sales contracts. Secondly, many of the principles and rules contained therein have been derived from the practice of international arbitral tribunals which in turn are the driving forces behind the development of an autonomous and transnational commercial legal system.

The second aspect in the development of the lists relates to the question of whether general principles or rules are in fact supported by the conviction of the general community of merchants. Here, the verification process has to include not only the case law of international arbitral tribunals but also those legal instruments which have been drafted by reputable international institutions, such as the International Chamber of Commerce, and which constitute an amalgamation of
commercial competence and experience. These 'code-like' instruments include the 'Uniform Customs and Practices for Documentary Credits' issued by the ICC and in effect in a revised version since January 1, 1994 (ERA 500). 'Uniform Rules for Demand Guarantees' and the INCOTERMS. Reference can also be made to the various projects of UNCITRAL such as the Convention on Independent Guarantees or the work on a Standard Communication Agreement Pertaining to Electronic Date Interchange (EDI and EDI-Lite) as reflected in the UNCITRAL Model Law on Electronic Commerce. The various cross border payment-schemes such as SWIFT, CHIPS or CHAPS may provide important indications as to the existence of a commercial usage in the field of interbank payment. Standard Contract Conditions such as the "General Conditions For The Supply of Plant and Machinery For Export", drafted by the United Nations Economic Commission for Europe in March 1953 and the "ORGALIME General Conditions for the Supply of Mechanical, Electrical and Related Electronic Products" must also be included in the comparative research. Finally, the verification process has to focus on international standard form contracts and general conditions of trade such as the FIDIC-Conditions contained in the FIDIC-Red Book. This Book has greatly influenced the shaping of international construction law as the new World Bank guidelines for procurement, which are incorporated into the World Bank's loan agreements with its borrowers, prescribe the use of 'Standard Bidding Documents', the principal document of which is almost entirely based on the FIDIC-Red Book. This, of course, has given new authority to the influence of FIDIC on the shaping of international construction contract practice and also on the evolution of transnational commercial law in this area.

III. SUMMARY

The restatements of international contract law presented by UNIDROIT and the Lando-Commission pave the way to the codification of transnational commercial law: Informality and pragmatism rather than formalized and overdogmatized instruments. For the first time, a private group of academics and practitioners was able to show that the idea of a transnational commercial law is not an abstract academic subject developed in the ivory tower, but a practical working tool for the international practitioner. Focusing on the question of how to codify the lex mercatoria instead of being trapped in endless doctrinal discussions on the existence of this legal system has led the discussion on transnational law out of the status of stagnation in which it had been trapped in the past. The perspective has changed dramatically and the question is no longer 'lex mercatoria: yes or no?' but 'lex mercatoria: when and how?'

The projects have also done away with the well-known concern raised by international practitioners that the lex mercatoria is too abstract and cannot be used in practice. However, the drafting of the restatements is not the final word in the discussion on possible ways to codify transnational commercial law. In view of its particular legal nature, the lex mercatoria depends upon a new codification technique which provides sufficient openness and flexibility in order to take account of the rapid development of international trade and commerce. In spite of the positive experiences of the American Law Institute, the restatements of UNIDROIT and of the Lando-Commission have nevertheless introduced a dangerous static element into the lex mercatoria-doctrine. At first sight, this consequence seems to be inevitable since every codification necessarily implies the fixing of the law in statutory form. The restatements take account of this problem in so far as they contain provisions which allow the development of new solutions in accordance with their underlying general principles. Yet, these 'opening clauses' are only of limited use. They may help in individual cases but they also reveal the essential weakness of the restatement technique in that they contain an implied acknowledgment of the fact that transnational commercial (contract) law may not be put in statutory form. This need for openness and flexibility in a transnational commercial legal system is of another quality than in domestic legal systems and the idea of a self-contained character of the major codifications this century have long since been abandoned. The lex mercatoria as 'law in the making' requires a degree of codificatory flexibility and subtleness that goes far beyond that which the restatements may provide.

The idea of a 'creeping codification' of transnational law through the drafting of lists of rules and principles avoids this essential weakness of the restatement technique. Contrary to the restatements, the updating and development of the list does not require a formalized procedure. For this reason, the list may be easily adapted to the progressive development of transnational commercial law. As a consequence of this more informal approach to the codification of transnational commercial law, the scope of the list is not limited to international contract law in the proper sense. Rather, the special emphasis on the case law of
international arbitral tribunals allows to focus on those problems which play a dominant and recurring role in contemporary transnational commercial disputes, immaterial of whether they belong to the classical fields of private or public (international) law. The extensive comparative references contained in the list provide additional authority to its contents and avoid a 'battle of lists' from the outset.

CONCLUSION

Unification and creation of the law on the transnational plane are neither fashionable phenomena nor are they mere indications of the 'trends of the time'\(^1\). Instead, they reflect the commercial realities of modern international business practice. Thus, in the international construction industry, a suggestion has been made that a "neutral lex mercatoria" should be applied in public sector procurement in order to create a true "level playing field" for competition for public work and to test the prospects for a general informal harmonization of international construction law\(^2\). Recent arbitral case law also confirms that the transnational spirit of international arbitration provides fertile ground for the application of this concept in international commercial practice and that international arbitrators become increasingly aware of this phenomenon\(^3\). The development of a 'lex petrolia' for the international oil-industry\(^4\), a 'lex numerica' or 'lex informatica' for international data interchange\(^5\), or a 'lex constructionis'\(^6\) for the international construction industry reveals that the transnationalization of commercial law has already transcended the traditional boundaries of general contract law.

Legal theory has to take account of this phenomenon in order to avoid any claims that it is out of touch with reality or antiquated. Therefore, modern conflict of laws-doctrine faces the formidable task of redefining the relationship between autonomous international commercial law on one side and domestic law on the other\(^7\). Formulating this task also reflects the paradox of traditional conflict of laws-doctrine. It was private international law withdrawn from the competence of domestic legislatures by Savigny and handed over to legal science and the courts for further development\(^8\), whose economic efficiency and legal uncertainty triggered the autonomous and decentralized evolution of the law through the international community of merchants\(^9\).

In view of the multifacetedness of the lex mercatoria, private international law alone, however, may not fulfill the enormous task of reconciling domestic conflict of laws rules and transnational legal principles. The hybrid nature of the lex mercatoria, combining elements of commercial law and public international law requires an interdisciplinary approach. This has to include not only conflict of laws but also general private law, contract law and comparative law on one side and public law and public international law on the other\(^10\).

In spite of the comprehensive and all-embracing approach towards the lex mercatoria as an autonomous 'third' legal system between domestic laws and public international law which has been developed in this study, every attempt to deal with transnational commercial law, as the basic and most controversial question of international commercial law, remains no more than an 'approach towards a new understanding'\(^11\) of transnational commercial law. This is not because 'no author can work on all breaks at the same time'\(^12\), an impression which the idea of an autonomous transnational commercial law is said to leave within the traditional doctrine of legal sources. It is true that the discussion on the existence of an autonomous transnational commercial law raises a multitude of methodical, theoretical and practical issues which touch upon basic notions of legal theory and transnational decision-making. This study has shown that the dogmatic arguments against the lex mercatoria "are fading away"\(^13\). The rebirth of the ancient law merchant has led to the development of a coherent system of transnational commercial law that can be reconciled with the traditional and 'positivistic' concepts of the doctrine of legal sources. Based on a dialectical understanding of the relationship between law and commerce, this system constitutes the foundation stone for the evolution of a transnational commercial law as an autonomous legal system. The rules and principles which make up this system have the principal qualities which Benson has defined as the "desirable characteristics" of the law merchant: 1) universal character, 2) flexibility and dynamic ability to grow, 3) informality and speed, 4) reliance on commercial custom and practice\(^14\).
At the same time, the discussion on the viability of a transnational commercial

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legal system needs to be objectified. While any outright rejection of the theory fails to take into account commercial realities, any emphatic acclamation of the concept of commercial transnationalism lacks persuasiveness in that it fails to provide verifiable legal arguments. This resembles the initial scientific treatment of the phenomenon of reception of law in the early ius commune. At that time, there was a similar concern that the new legal situation would attract ‘illusionists and visionaries’ 15. With respect to the lex mercatoria, this danger is increased by a sometimes lax and careless treatment of the concept of an autonomous world trade law. This is especially true with respect to the ‘negative choice of law’ of the parties 16. Without a further inquiry into the motives and the will of the parties, the assumption of a ‘negative choice’ amounts to a fictitious agreement on the applicable law. This idea is often misused, even in international arbitral practice, to indicate the parties’ will to have their contract transnationalized, thereby justifying the application of the lex mercatoria 17. The lex mercatoria-doctrine, whose respect for the autonomy of the parties is one of its most prominent features, would be doomed to fail from the outset if its application would be based on such a violation of the will of the parties.

Legal theory must not only take account of economic realities. After filtering these realities through its methodical processes and concepts, it has to give the results back to legal practice in a workable form. Practitioners of international commerce, whether businessmen, traders or lawyers, always act against the background of an at least tentative understanding of the applicable law. It has been emphasized in the Introduction to this study that they need “definitive” and “provable” legal standards to negotiate their agreements or to resolve disputes, thereby reducing transaction costs 18. Practice and legal science alike, however, are confronted with the codification dilemma in the field of transnational commercial law. The lex mercatoria is ‘law in action’ and depends upon a maximum degree of flexibility and openness. Thus, its rules and principles cannot be fixed in ‘statutory’ form in the proper sense. The UNIDROIT Principles as well as the Principles of European Contract Law drafted by the Lando-Commission reveal this dilemma. They provide a serious new indication for the consolidation of legal convictions pertaining to the existence of an transnational commercial legal system 19. The great importance of these collections is that they exist. They can be taken to the court or the arbitral tribunal, can be referred to by page and article number, and people who are referred to their provisions can locate and review them without difficulty 20. At the same time, however, they do not present the

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flexible codification method that takes account of the peculiar character of the lex mercatoria which, being an open legal system, requires a similar, open codification technique.

The alternative presented in this study is the idea of ‘creeping codification’ of the lex mercatoria through the drafting of lists that contain principles, standards and rules of transnational commercial law. This innovative approach is intended to provide international legal practice with the necessary working tool to ensure the application of the lex mercatoria in everyday arbitration- and drafting-practice without necessarily introducing the static element that is usually connected with any attempt to codify the law. The collection of over sixty legal principles, standards, rules and institutions in a list of transnational commercial law demonstrates the richness and wealth of transnational commercial law. This is important not only for international arbitral tribunals but also for domestic courts. It avoids the danger that is advocated by the prevailing opinion of German legal doctrine 21 that an arbitral award which is based on the lex mercatoria may be set aside by domestic courts because it is a decision in equity without authorization by the parties.

Even after the initial drafting phase, the list of transnational commercial law requires constant attention and updating. This requires a process of continued discussion between those who participate in the creation of transnational law. International arbitrators, international practitioners and international businessmen are reminded of this duty. It resembles the idea of uniting all the participants in international trade in a “law-finding community” 22. It is for this reason that a special research center, the ‘Center for Transnational Law’ (CENTRAL) 23, has been founded at the University of Münster, Germany. Together with its Board of Trustees, composed of renowned experts, both academics and practitioners, in the field of transnational commercial law, CENTRAL provides the institutional framework for the recurring task of updating and developing the list reprinted in the Annex. At the same time, it serves as the focal point for the exchange of ideas, concepts and information on the emerging lex mercatoria. It is only through an organic, comprehensive approach, combining comparative law, conflict of laws, international business law and public international law, that an autonomous world trade law as a third legal system between domestic law and public international law may develop. Even those practitioners who have been skeptical about the transnationalization of commercial law now acknowledge that the publication of the Principles, together with other modern
sources, brings us closer to the point where we can say that the new law merchant is definitive and provable, making it worthwhile to take a second look at the use of the lex mercatoria for a contractual choice of law.\textsuperscript{24}

The lex mercatoria is no longer a myth or legal music of the future. Transnational commercial law, the new law merchant, has become a reality, in legal theory as well as in commercial practice. "The future has already begun".\textsuperscript{25}

\begin{itemize}
  \item Wieacker, Festschrift Zweigert, at 575, 592; cf. also Molineaux, J.Int'l.Arb., No. 1 1997, at 55, 58.
  \item Molineaux, id.
  \item Stammler, Wirtschaft und Recht, at 529.
  \item Meyer-Coding, Die Rechtsnormen, at 6 et seq.; cf. also Mertens, RabelsZ 56 (1992), at 219, 231; cf. generally for an agent-based computer model for the study of social patterns of norms Picker, U.Chi.L.Rev. 1997, at 1225, 1234 et seq.
  \item Wieacker, Festschrift Zweigert, at 575, 592.
  \item Rühl, Rechtsschöpfung durch die Wirtschaft, at 9.
  \item Stammler, Wirtschaft und Recht, at 532.
  \item Rühl, Rechtsschöpfung durch die Wirtschaft, at 16.
  \item Wieacker, Festschrift Zweigert, at 575, 592.
  \item See Kahn, in: Bonell/Bonelli (eds.), Contratti Commerciali Internazionali E Principi UNIDROIT, at 41, 42.
  \item Hyland, supra note 498, at 425 et seq. citing from Pufendorf, De jure naturae et gentium libri octo and Grotius, De jure belli ac pacis libri tres.
  \item See Atyiah, An Introduction to the Law of Contract, at 7 et seq.
  \item Zimmermann, ZEuP 1993, at 4, 30; cf. also for the principle "ex pacto nudo datur actio" Hyland, supra note at, 417.
  \item Coquillette, in: Petit (ed.), Del lus Mercatorum Al Derecho Mercantil, at 143, 168 (citing from the Little Red Book of Bristol).
  \item See Kötz, Europäisches Vertragsrecht, Vol. I, at 11.
  \item Braeckmans, TvPr. 1986, at 1, 16; Storme, in: Hartkamp/Hesselink/Hondius/dv Perron/Vranken (eds.), Towards a European Civil Code, at 159, 184.
  \item Hyland, Am.J.Comp.L. 1992, at 541, 545.
  \item Hyland, id., at 427 et seq. (citing Flour and Aubert).
  \item See Atyiah, supra note 520, at 14; cf. for the classical "trust theory" ("Vertrauenstheorie") as the means to bind a party to its promise Schermaier, ZEuP 1998, at 60, 73 et seq. (with reference to Grotius and Domingo de Soto).
  \item See the principle included in the list that is reprinted infra, in the Annex to this study.
  \item See generally Bernstein, J.Legal Stud. 1992, at 115 et seq.
  \item Galgano, Ann.Surv.Int'l.&Comp.L. 1995, at 99, 102 et seq.; see also Gandolfi, Rev. trimestrielle de droit civil 1992, at 707, 710 stating that this lawmaking through contract practice is tending towards an "éloignement progressif d'une vision étatiste du droit".
  \item Cf. for the genuine adjudicatory function of arbitral tribunals supra D.2.a.
  \item Cf. Bonell, ICLQ 1978, at 413, 428: '...in interpreting commercial transactions, particularly when concluded at an international level, it is not sufficient to base oneself on the confidence which the parties might have established between themselves; due consideration must also be given to the expectation which the generality of the operators has of fair dealing in the respective trade sector'; cf. also infra chapter 4 I.A.7.b.b.; Kahn, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration, at 237, 242: 'On constatera que l'introduction de la notion de professionalisme donne une coloration spécifique à la règle générale que le contract tienne lieu de loi aux parties'; cf. also David, Le Droit Du Commerce International, at 127 et seq.
  \item But see Kassis, Théorie Générale des Usages du Commerce, at 406.
  \item Cf. infra chapter 4 I.A.7.a.
  \item Goldstain, Festschrift Schmitthoff, at 171, 179: '...it is a fact that Standard Contracts and the General Conditions have often been corrected through competition and therefore constitute rational solutions'.
  \item The term was coined by Schanzle, Investitionsverträge im Internationalen Wirtschaftsrecht, at 151.
  \item Sandrock, ZHR 152 (1988), at 66, 86 (translation by the author); cf. also Gramlich, Rechtsgestalt, Regelungstypen und
Rechtsschutz bei grenzüberschreitenden Investitionen, at 527: ‘Without a minimum degree of convergence with respect to the systematic categorization of the multitude of cross-border transactions and operations, which have their common denominator in the typical activities of international investment... the criteria of which have to be deduced not only from domestic law but also from rules developed on the international plane, and not necessarily only those derived from public international law - the law, especially in the sphere of transnational economy, runs the risk of not being able to follow the realities of meta-legal facts, of being reduced to a mere mechanical image of these facts without being able to assume the function of reflecting these facts, let alone to serve as a device to influence and structure transnational economy’ (translation by the author).

Cf. generally Stammler, Wirtschaft und Recht, at 508.
Cf. supra chapter 3 I.B.1.
Bonell, An International Restatement of Contract Law, at 48.
Cf. supra chapter 3 I.B.1.
Cf. for details infra B.2.b.
Cf. generally Stammler, Wirtschaft und Recht, at 508.
Cf. supra chapter 3 I.B.1.
Bonell, An International Restatement of Contract Law, at 117 et seq.
Bonell, An International Restatement of Contract Law, at 117 et seq.
Cf. supra chapter 3 I.B.1.
See Huet, in: Institute for International Business Law and Practice (ed.), UNIDROIT-Principles of International Commercial Contracts: A New Lex Mercatoria?, at 275, 280: ‘...the danger is that by avoiding any national references, the Principles, which seek to satisfy everyone, may actually end up being chosen by no one at all’.
Cf. infra II.C.4.
Cf. Bianca/Bonell-Bonell, Commentary on the International Sales Law, Art. 7, note 2.3.2.2.
Cf. Berger, Internationale Wirtschaftsschiedsgerichtsbarkeit, at 115 (in the context of the applicable law) and at 502 (in the context of the continuing validity of the arbitration agreement after the setting aside of the arbitral award); cf. also Bühler/Waiz v. Eschen, IPRax 1990, at 62, 64.
Cf. for details supra chapter 2 II.G.3.c.
Cf. supra chapter 2 II.G.3.c.
Cf. for the evolution of a general principle of law in this area Lorenz, JZ 1962, at 269, 274.
Cf. for the 'force-majeure'-principle as part of transnational law the list of principles and rules of the lex mercatoria reprinted in the Annex of this study.
Cf. for the general approach of the Principles as set out in the introduction supra chapter 2 II.G.3.c.
Cf. generally Bonell, An International Restatement of Contract Law, at 129 et seq.
Cf. generally for the interaction of the principle of ‘pacta sunt servanda’ with other rules of general contract law Lando, in: Essays in Honor of Roy Goode, at 103, 106 et seq.
Schneider, Gesetzgebungsehe, § 2, No. 16; Atienza/Manero, in: Festschrift Valdés, at 109, 114
Cf. supra chapter 3 I.B.
Atienza/Manero, in: Festschrift Valdés, at 109, 112; cf. also Rheinstein, U.Chicago.L.Rev. 1957, at 597, 600: ‘1. Rules. They are precepts attaching a definite, detailed legal consequence to a definite, detailed state of facts...2. Principles. These are authoritative starting points for legal reasoning, employed continually and legitimately where cases are not covered or are not fully or obviously covered by rules in the narrower sense...’
Alexy, Theorie der Grundrechte, at 116; Atienza/Manero, id., at 116; Dillard, Rec.Cours 1957, at 449, 479.
Dworkin, Law's Empire, at 210 et seq.
Atienza/Manero, in: Festschrift Valdés, at 109, 121; Esser, Grundsatz und Norm, at 7; Watt, Clunet 1997, at 403, 408.
Watt, id., at 403, No. 3, for French private international law.

Cf. Berger, RabelsZ 61 (1997), at 313 et seq.; see also for interest as an item of damages list of principles and rules of the lex mercatoria reprinted in the Annex of this study.

Cf. the project of Cornell Law School, which excluded any teleological valuation processes supra chapter 3 II.A.2.


Cf. already supra chapter 2 II.A.2.c. and chapter 3 II.A.2.c.

Bonell, An International Restatement of Contract Law, at 57 et seq.

Cf. Dölle-Wahl, EKG, Art. 17, No. 13 et seq. (with reference to the 'ius gentium' of classical Roman law); Bianca/Bonell-Bonell, Commentary, Art. 7, No. 2.3 et seq.

Cf. already supra chapter 2 II.A.2.c. and chapter 3 II.A.2.c.

Bianca/Bonell-Bonell, Commentary, Art. 7, No. 2.3.2.


Cf. for the importance of such provisions which ensure the 'openness' of domestic codifications supra chapter 2 II.G.2.c.


Sec. 242 of the German Civil Code (German BGB) ('The debtor is bound to perform according to the requirements of good faith, ordinary usage being taken into consideration'), see Ebke/Steinhauer, in: Beatson/Friedmann (eds.), Good Faith and Fault in Contract Law, at 171 et seq.; see also Art. 1366 of the Italian Codice Civile; Art. 1134 Sec. 3 of the French Code Civil.

Cf. Sec. 1-201 (19) UCC; 'Good faith means honesty in fact in the conduct or transaction concerned'; Sec. 1-203: 'Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement'; see also Sec. 205 of the Restatement (2nd of Contacts; cf. also Diamond v. Oreamuno, 287 NYS 2nd. 300, affd. 24 NY 2nd. 494; Anderson, UCC, Vol. 1, Sec. 1-201: 82 et seq.; cf. also Farnsworth, Contracts, at 187 et seq. ('duty to bargain in good faith'); the notion of good faith was introduced into the UCC by Professor Karl Llewellyn, Chief Reporter for the UCC, who was inspired by the good faith- ('Treu und Glauben') provision of Sec. 242 of the German Civil Code, see Farnsworth, in: Beatson/Friedmann (eds.), Good Faith and Fault in Contract Law, at 153, 155.

Farnsworth, id., at 156 et seq.

German Federal Supreme Court, NJW 1993, at 259, 263.


Sec. 1-201 (19) UCC; 'Good faith means honesty in fact in the conduct or transaction concerned'; Sec. 1-203: 'Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement'; see also Sec. 205 of the Restatement (2nd of Contacts; cf. also Diamond v. Oreamuno, 287 NYS 2nd. 300, affd. 24 NY 2nd. 494; Anderson, UCC, Vol. 1, Sec. 1-201: 82 et seq.; cf. also Farnsworth, Contracts, at 187 et seq. ('duty to bargain in good faith'); the notion of good faith was introduced into the UCC by Professor Karl Llewellyn, Chief Reporter for the UCC, who was inspired by the good faith- ('Treu und Glauben') provision of Sec. 242 of the German Civil Code, see Farnsworth, in: Beatson/Friedmann (eds.), Good Faith and Fault in Contract Law, at 153, 155.


Walford v. Miles, [1992] 2 A.C. 128 (per Lord Ackner)

Cf. for the 'functional comparative method' supra chapter 2 II.A.1.

Cf. Art. 5.2 UNIDROIT-Principles; see Lalive, in: Bonell/Bonelli (eds), Contratti Commerciali Internazionali E Principi UNIDROIT, at 73, 81.


respectful view the body of rules, which are described as the uberrima fides principle, are rules of law developed by the judges... In my judgment it is incorrect to categorize them as implied terms...; see also Lando, in: Essays in Honor of Roy Goode, at 103, 124.


Cf. supra chapter 2 II.G.3.d.


Sec. 2-103 (1) (b) UCC: 'Good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade'; cf. Anderson, UCC, Vol.1, Sec. 2.193:23 et seq.

Cf. for the definition of 'good faith' O'Connor, Good Faith in English Law, at 120: 'The principle of good faith in English law is a fundamental principle derived from the rule pacta sunt servanda, and other legal rules, distinctively and directly related to honesty, fairness and reasonableness, the application of which is determined in a particular time by the standards of honesty, fairness and reasonableness prevailing in the community which are considered appropriate for formulation in new or revised legal rules'; cf. also Chitty on Contracts, Vol. 2, No. 36-181; Steyn, supra note 200, at 438: '...good faith additionally sets an objective standard, viz., the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned'.


Schlechtriem, Good Faith in German Law and in International Uniform Law, at 6 et seq.

Cf. infra II.C.4; see also Kramer, in: Bonell/Bonelli (eds.), Contratti Commerciali Internazionali E Principi UNIDROIT, at 163, 164 et seq.


Art. 1.8 UNIDROIT-Principles refrains from adhering to the 'subjective' theory of Anglo-American law employed in Art. 9 Sec. 2 of the Vienna Sales Convention ('The parties are considered to have impliedly made applicable to their contract a usage...'); if, however, trade usages are applicable if both parties or one of them 'ought to have known them', there is no room left for subjective criteria and the trade usages apply ipso iure, thereby rendering the 'implied' agreement'-requirement into a mere fiction, cf. Bianca/Bonell-Bonell, Commentary on the International Sales Law, Art. 9, note 2.2.1; cf. also Bonell, An International Restatement of Contract Law, at 144 et seq.; Bonell, ICLQ 1978, at 413, 432.


Cf. Bianca/Bonell-Bonell, supra note 212, Art. 9, note 1.3 et seq.

Uniform Law on the International Sale of Goods of July 17, 1973 (BGBl. I at 856); see generally Dölle, Kommentar zum Einheitlichen Kaufrecht, Art. 9, No. 2 et seq.

Cf. Bianca/Bonell-Bonell, supra note 212, note 1.4.1.

Cf. infra B.2.b.

Cf. Dölle-Wahl, EKG, Art. 17, No. 59 et seq.

Bianca/Bonell-Bonell, supra note 212, Art. 7, No. 2.3.2.2; Ferrari, Rev.int.dr.comp. 1996, at 813, 849.


Joachim, Comp.L.Yb.Int'l.Bus. 1992, at 341, 353: 'The notion of reasonableness implies a reasonable use of rights. The reasonable man would not carry a legal interest to an extreme. The reasonable man test is, therefore, employed by
judges as a means against abuse of rights. This thought relates to the ‘doctrine of reasonable use’ in the United States."


225 Nassar, see supra note 221, id.


227 Cf. supra chapter 2 II.G.2.


229 Cf. supra chapter 2 II.G.3.c.

230 Cf. supra chapter 2 II.G.2.

231 Cf. supra chapter 2 II.G.3.c.

232 Cf. infra chapter II.C.4.

233 Cf. supra chapter 2 II.G.3.c.

234 Cf. supra chapter 2 II.G.3.c.

235 Cf. supra chapter 2 II.G.3.c.

236 Cf. supra chapter 2 II.G.3.c.

237 Cf. supra chapter 2 II.G.3.c.

238 Cf. supra chapter 2 II.G.3.c.

239 Cf. supra chapter 2 II.G.3.c.

240 Cf. supra chapter 2 II.G.3.c.

241 Cf. supra chapter 2 II.G.3.c.

242 Cf. supra chapter 2 II.G.3.c.

243 Cf. infra chapter II.C.4.

244 Cf. infra chapter II.C.4.

245 Cf. infra chapter II.C.4.

246 Cf. infra chapter II.C.4.

247 Cf. infra chapter II.C.4.

248 Cf. infra chapter II.C.4.

249 Cf. infra chapter II.C.4.

250 Cf. infra chapter II.C.4.

251 Cf. infra chapter II.C.4.

252 Cf. supra chapter 2 II.G.3.c.

Cf. Dasser, Lex Mercatoria, at 116; cf. also Osman, Lex Mercatoria, at 322 et seq.


See supra I.A.7.b.

Cf. Mayer, Festschrift P. Lalive, at 543, 550 et seq.

Cf. for the principle of good faith as a source of the ‘estoppel-doctrine’ in common law supra I.A.7.b.


Cf. supra chapter 2 II.A.1.

Cf. the survey on the Latin origins in Ars Aequi Libri, Burgerlijk Wetboek, Boeken 1 t/m 8, at 606.

Cf. for the ‘Latin solution’ of the Chamber for Complaints of the European Patent Office Knütel, ZEuP 1994, at 244, 245 et seq., see for the Roman legal tradition of many rules and principles of the lex mercatoria Knütel, id., at 274; cf. for the legitimacy of rules and principles of Roman law Liebs, Lateinische Rechtsregeln und Rechtssprichwörter, at 10 ; cf. also Fouchard, L’Arbitrage Commercial International, at 441 et seq.

Cf. supra chapter 3 I.B.

Cf. supra I.B.2.b.

Cf. Langen, Transnationales Recht, part I, No. 30 : ‘The judge may not be allowed to assume, without any further considerations, the equality of principles of different legal systems. This is indeed no longer reconcilable with legal certainty’; cf. also Zimmermann JZ 1995, at 478, 480 , who rightly characterizes the omission of any comparative references through the UNIDROIT Working Group as ‘not very convincing’

Ströhmholz, Festschrift Zweigert, at 909, 910

Cf. supra 2.

Cf. supra chapter 2 II.A.1.c.

Cf. supra chapter I.A.3.b.

Cf. supra I.A.3.b.a.

See generally Solotych, Das Zivilgesetzbuch der Russischen Föderation, at 3 et seq.


Glöckner, id.; Waehler, id.

Glöckner, supra note 237, id.

Waehler, see supra note 237, at 29.

Cf. for the function of the UN Sales Convention as promoter of legal unification Magnus, ZEuP 1993, at 79, 80 et seq.; see for the work on the UNIDROIT-Principles Hartkamp, in: Boele-Woelki et al. (eds.), Comparability and Evaluation, at 85 et seq.


Cf. supra chapter 2 II.G.3.b.

Cf. supra chapter 2 II.G.3.b.


UNCITRAL Model Law on Electronic Commerce, UN Doc. a/51/17, Suppl. No. 17; see also UN Doc. A/CN.9/WG.IV/WP 64 of January 31, 1995 ('Draft Guide to enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and related Means of Communication'); cf. Berger; International Economic Arbitration, at 138 et seq.; cf. also the UNCID Rules, ICC Publ. No. 452; the rules developed by international institutions on EDI are regarded as part of a 'lex mercatoria numerica', see Caprioli/Sorieul, Clunet 1997, at 323, 330 (at 367 et seq. for the UNCITRAL Model Law).

But see Lybian Arab Foreign Bank v. Bankers Trust Co, [1989] Q.B. 728 stating (per Staughton J.) that wire transfer through CHIPS or Fedwire is not a trade usage or custom; see Goode, ICLQ 1997, at 1, 8 et seq.

General Conditions For the Supply of Plant and Machinery For Export, prepared under the auspices of the United Nations Economic Commission for Europe, Geneva, March 1953, UN Publication Ref.: ME/188 bis/53.

ORGALIME General Conditions for the Supply of Mechanical, Electrical and Related Electronic Products, of October 1992; Orgalime is located in Brussels, Belgium and groups the central trade federations of the mechanical, electrical, electronic and metalworking industries in sixteen European countries and provides liaison between these organisations in the legal, technical and economic fields.


Molineaux, id.

Bonell, ZRVgl. 1996, at 152.

Cf. supra chapter 2 G.2.

1 See Kötz, RabelsZ 56 (1992), at 215 et seq.


3 Cf. the statement of the sole arbitrator in ICC Award no. 8385, Clunet 1997, at 1061, 1066: "L'application de principes internationaux offre beaucoup d'avantages. Ils s'appliquent uniformément et sont indépendants des particularités de chaque droit national. Ils prennent en compte les besoins des relations internationales et permettent un échange fructueux entre les systèmes parfois exagérément liés à des distinctions conceptuelles et ceux qui cherchent une solution juste et pragmatique de cas particuliers. C'est donc une opportunité idéale pour appliquer [in this arbitration] ce qui est de plus en plus nommé lex mercatoria"; cf. also ICC Award No. 8385, Clunet 1997, at 1078, where the tribunal developed eight principles which, in its view, form part of the lex mercatoria.


6 Molineaux, J.Int'l Arbit. No. 1 1997, at 55, 64 et seq.

7 Firsching/von Hoffmann, IPR, § 2, No. 56 in fine.


9 Cf. supra chapter 1 I A.

10 Cf. U. Hübner, Die methodische Entwicklung des internationalen Wirtschaftsrechts, at 34.

11 Bärnamp, Festschrift Mann, at 547, 571.

12 See Joerges, RabelsZ 43 (1979), t 6, 40.


16 See supra chapter 2 II.F.2.a.

17 Cf. supra chapter 2 II.F.2.a.

18 See Borchers, in: Raisch/Shaffer (eds.), Introduction to Transnational Legal Transactions, at 139, 156 et seq.


23 See “Transnational Law Center Opens at Münster University”, Int’l.Arb.Rep, May 1998, at 19; the research tasks of the Center are reproduced on the CENTRAL internet homepage at http://www.transnational-law.de; the address is: Center for Transnational Law (CENTRAL), Universität Münster, Universitätstraße 14-16, 48143 Münster, Germany, Tel: (0)251-8322781; Fax: (0)251-8323558; email: central@uni-muenster.de.


Referring Principles:

- I.1.1 - Good faith and fair dealing in international trade
- I.2.1 - Standard of reasonableness
- II.4 - Agency by estoppel / apparent authority
- III.1 - Set-off
- IV.5.3 - Interpretation in favor of effectiveness of contract
- IV.6.9 - Duty to notify / to cooperate