Title:
Berger, Klaus Peter, The Creeping Codification of the New Lex Mercatoriam 2nd. ed. 2010

Table of Contents:
Part I The Theoretical and Methodical Foundations of the New Lex Mercatoria Doctrine
Chapter 2 The Dogmatic Foundations of the New Lex Mercatoria Doctrine
   II. Traditional Objections Against the New Lex Mercatoria Doctrine
      G. The New Lex Mercatoria Does Not Have the Quality of an ‘Autonomous Legal System’
         3. The New Lex Mercatoria as a ‘Transnational’ Legal System
            d. The Contractual Consensus as the Core of Decentralized Law-Making
Part II The New Lex Mercatoria in Practice: New Approaches towards the Codification of Transnational Commercial Law
Chapter 4 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
            b. Constituent Elements of a Legal System: The Interaction Between ‘General Principles’ and ‘Rules’
               aa. The Differentiation Between ‘General Principles’ and ‘Rules’
               bb. Consequences of this Differentiation for the UNIDROIT Principles
      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
            5. Creeping Codification Online: The TransLex Principles
               a. History of the List
               b. History of the Online Codification Platform ‘TransLex’ (www.trans-lex.org)
                  aa. The Predecessor: The Transnational Law Database (Tldb)
                  bb. From the Tldb to the TransLex Principles
               c. Features of the TransLex Principles: The Online Codification Process
                  aa. Content and Structure of the List
                  bb. Formulation and Reformulation of the Principles and Rules Contained in the List
               d. The Meaning of ‘Codification’ in the Context of the New Lex Mercatoria
               e. Updating and Developing the List
   III. SUMMARY

Conclusion

Content:
Part I
The Theoretical and Methodical Foundations of the New Lex Mercatoria Doctrine

[...]

Chapter 2
The Dogmatic Foundations of the New Lex Mercatoria Doctrine

[...]

II. Traditional Objections Against the New Lex Mercatoria Doctrine

[...]

G. The New Lex Mercatoria Does Not Have the Quality of an ‘Autonomous Legal System’
3. The New Lex Mercatoria as a 'Transnational' Legal System

Page: 138

d. The Contractual Consensus as the Core of Decentralized Law-Making

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, e.g. 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 behaviour 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.

Page: 139

This is also true in international trade where the business persons’ 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 to the contract itself. Contractual governance or ‘governance by contract’ occurs 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 humans and the principle of good faith. 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 NLM 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. 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.

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-interests in making a profitable deal. This process of external validation may be effected by the parties’ adhesion to certain general or sectorspecific 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 are operating into ‘binary’ contractual obligations. This ‘objectivation’ of the parties’ subjective contractual consent receives additional force if they base their contract not (only) on terms which they negotiate on an 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’ or the International Federation of Consulting Engineers (FIDIC) Conditions or the model contracts for distributorship, agency and international sales issued by the ICC.
If the confidence of one side in the compliance with the contractual terms by the other is disappointed, the arbitrators,
whose jurisdiction is based on the consensus of the parties, assume the function of a control instance. The parties’
confidence is no longer focused on the counter-party’s will to comply with the contractual terms but on the competence of
the arbitral tribunal as a privately constituted and ‘genuine’ court for international trade. The transfer of the case from
the plane of the individual bargain to the arbitral tribunal also leads to a change of perspective. The neutrality of the
arbitrators requires them to take an objective view of the case, applying objective commercial standards such as ‘fair
dealing’, ‘reasonableness’ and ‘trade usages’, thereby enriching the abstract contractual consensus (‘pacta sunt
servanda’) with commercial life. The private character of the arbitral process may therefore not be used as an
argument to deny the control competence of international arbitrators. Rather, the contractual character of their
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 NLM 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:

‘It belongs to the regrettable weaknesses of public international law that its norms – frequently still in the status
nascendi – are difficult to put in a concrete form. Every arbitral award, every other solution of such a conflict – and
every drafting technique adopted to solve such problems – contribute to the finding 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’.

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 NLM. Transnational law may therefore be traced back to the consensus of the participants of
international trade. 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 4
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\(^1\). 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\(^1\), the contents of contracts, performance and the legal consequences of non-performance. The structure of the Principles follows the American Restatement of the Law of Contracts\(^1\) in that a basic rule or a general legal principle formulated as blackletter law is followed by a short commentary-like explanation and explanatory illustrations. 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\(^1\). 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\(^1\). 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\(^1\). 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\(^1\). 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\(^1\). 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 NLM is discussed\(^1\).

A particular characteristic of many of the provisions contained in the Principles is the attempt to uphold the contract as much as possible\(^1\). 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*’)\(^1\) and also in the area of international commercial arbitration\(^1\). 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 selfsufficient character the contract becomes the ‘substitute law’ for the parties\(^1\). Influenced by Anglo-American drafting techniques, the comprehensive contractual arrangements ‘autonomize’ the parties’ legal relationship from the direct application of substantive law\(^1\). In both long term business relationships and arms’ length bargains, the parties 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\(^1\). 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
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 (Arts 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 généraux’; ‘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 legal norm in the proper sense. Like the American Restatements 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, 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. 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. General principles are therefore always subject to a continual discussion about their effectiveness and scope.

General principles of law 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 from the principles 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’. 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. 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.

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 (Arts 2.1 et seq.), the following articles should be mentioned in this context: Articles relating to the mode of payment (Arts 6.1.7 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 is of utmost economic relevance, given the enormous amounts that are frequently in dispute in international commercial cases. However, the UNIDROIT Principles are not restricted to the reproduction of the technicalities of conclusion of contracts by offer and acceptance 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.

In addition, general principles perform an important gap-filling function. 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. This concept of an autonomous uniform interpretation without reversion 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(2) CISG, both of which were drafted on the basis of corresponding provisions of domestic legal systems. 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’. Through this statement, the Working Group directly recognized the ‘openness’ of the ‘system’ and the important function of the general principles contained therein.

The need to weigh legal principles against legal rules becomes obvious 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 contrary, and the duty to re-negotiate in the event of hardship (Art. 6.2.3).

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 Principles.

The notion of good faith in particular belongs to the common core of the legal systems of the civil law countries and is also acknowledged by the American UCC and the Restatement (2nd) of Contracts and other common law jurisdictions such as Australia. The German Federal Supreme Court has stated ‘that the notion of good faith is a supranational legal principle that is inherent in all legal systems’.

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 1766.
the English courts’ 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 impracticable\textsuperscript{197}. Thus, the English \textit{House of Lords}

Page: 205

has ruled that an express agreement that parties must negotiate in good faith is unenforceable\textsuperscript{198}. From the perspective of a functional comparative analysis\textsuperscript{199}, however, the assumption of a general principle of good faith and its inclusion in the UNIDROIT Principles is justified\textsuperscript{200} and has also found its way into Art. 7 CISG. The reason for this is that English courts have applied the principle of good faith as an ‘implied term of the contract’ in individual cases\textsuperscript{201}, thereby indirectly acknowledging the existence of a principle of ‘good faith in the performance of the contract’\textsuperscript{202}. 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’\textsuperscript{203}. 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 courts\textsuperscript{204}.

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 dogmatic\textsuperscript{205}.

Page: 206

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 practice\textsuperscript{206}.

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’\textsuperscript{207}. 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\textsuperscript{208}) contractual relationship, or according to the standards of their respective domestic legal systems, but rather according to a far-reaching, objective standard to be found among businesspersons in international trade, amounting to a ‘fairness in the market place’\textsuperscript{209}. This objective understanding of the notion of good faith in international business is not only in line with the approach taken in § 1-201 (b) (20) UCC and § 2–103 (1) (j) UCC\textsuperscript{210}, 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\textsuperscript{211}. 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\textsuperscript{212}. 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

Page: 207

principle of good faith. Instead, this broad and vague notion always has to be interpreted and applied in a context-oriented manner\textsuperscript{213}.

In spite of its general and vague character, Art. 1.7 of the UNIDROIT Principles may rightly be characterized as the \textit{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\textsuperscript{214}. 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’ behaviour throughout the life of the contract, including the negotiation process, must meet certain requirements which are generally accepted within the international business community\textsuperscript{215}.

The \textit{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\textsuperscript{216} or which are widely known to and regularly observed in international trade by parties and to practices which they have established between themselves (Art.
The Dutch Civil Code also contains specific provisions on the standard thereby performs an important prohibitive function which, under German law, is 'of the standard of reasonableness also reflects its major virtue: It allows arbitrators and

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)), the time of acceptance in case no time has been fixed by the offeror (Art. 2.7), the interpretation of the contract in cases where no common intention of the parties can be determined (Art. 4.1(2)), the determination of the quality of performance which is neither fixed by, nor determinable from, the contract (Art. 5.6), the determination of the time of performance absent an agreement by the parties (Art. 6.1.1(c)). The reasonableness test is also relevant for those articles dealing with 'hardship' (Art. 6.2.2) and 'force majeure' (Art. 7.1.7). In the context of these provisions, the standard of reasonableness frequently takes the place of party agreements, thereby reflecting the drafter's 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 the 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 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 (Arts 4.1 and 4.2). Art. 4.3 of the Principles states that in applying the standard, 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 importantly, ‘the meaning commonly given to terms and expressions in the trade concerned’ shall be considered. With this latter provision the UNIDROIT Principles refer to Art. 9(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 CISG which contains a reasonableness test in Art. 8(2) but has not adopted a provision such as Art. 9(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. 2.19 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 pose 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 (Arts 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\textsuperscript{249}. This objection is unjustified for two reasons. First, the public entity’s conduct in this case would violate the general principle of good faith (\textit{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\textsuperscript{250}. Instead, the provisions always have to be construed in the light of their underlying guiding notions, of which ‘\textit{pacta sunt servanda}’ and ‘reasonableness’ are the most important.

The generality of the principles and rules contained in the UNIDROIT Principles, 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\textsuperscript{251}. It is through their decision-making that the UNIDROIT Principles ‘are filled with life’\textsuperscript{252}. This reflects the general experience that general principles of law and standards of conduct do not have legal effects \textit{in abstrato}, but have to be integrated into a law-finding and norm-creation process\textsuperscript{253}. In the context of transnational commercial law, this is the functional comparative methodology and the institutional creation of the law\textsuperscript{254}.

[...]

II. Escaping the Codification Dilemma: The ‘creeping Codification of the New \textit{Lex Mercatoria}’

[...]

C. The New Concept: The ‘Creeping Codification’ of the New \textit{Lex Mercatoria}

[...]

5. Creeping Codification Online: The TransLex Principles

The TransLex Principles, reprinted in Annex III to this Study and available at www.trans-lex.org, provide a unique online tool for the Creeping Codification of the NLM through the Internet. The TransLex Principles are based on the methodological approach and comparative research described in this Study. The functional comparative methodology\textsuperscript{647} and the case law of international arbitral tribunals\textsuperscript{648} form the two pillars on which the legitimacy of the TransLex Principles is based. They contain legal principles, standards and rules as constitutive elements of a transnational commercial legal system. This online approach to the Creeping Codification of the NLM serves three specific purposes:

- formulating of the rules and principles in black letter text so as to allow the user to apply the NLM in legal practice;
- reproducing the comparative law references for each principle or rule to help to save the time and money that practitioners and academics must invest in comparative research required to determine the contents of transnational law; and
- displaying the relevant materials \textit{in full-text versions} immediately below the black letter text of each principle and rule to enable the user to make his own judgment about the ‘comparative persuasiveness’ of these sources.
a. History of the List

The first version of the lists which form the basis of the TransLex Principles was published in 1992\(^\text{649}\). The list contained thirty-nine principles and rules of the NLM together with numerous comparative law references. The list was unstructured and not organized in any way. Its sole purpose was to prove the contents of the NLM at that specific point in time. The English version of the list, which was published in 1993, contained forty-four principles and rules\(^\text{650}\).

It was Norbert Horn, one of the most important proponents of the NLM doctrine in Germany\(^\text{651}\), who brought up the idea that the list could be more than just an unsystematic compilation of principles and rules of the NLM:

‘One is puzzled by the list . . . because of its form: A concise listing of individual legal notions and legal principles. Almost each of them would deserve a scientific treatment of its own . . . The reader acknowledges with great interest the – according to my knowledge up to now most comprehensive – listing of such basic notions and legal principles. In my opinion, the list, in and of itself, constitutes an advancement of legal knowledge’\(^\text{652}\).

The original German version of the first edition of this book, which was published in 1996, contained the third version of the list, now with sixty-nine principles and rules of the NLM\(^\text{653}\). Again, the list had no structure and was not organized in chapters or subdivisions. It was in that treatise that the idea of the ‘Creeping Codification’ of the NLM was developed and presented\(^\text{654}\). The English version of the German treatise, which was the first edition of this book, was published in 1999. It contained a new version of the list with seventy-eight principles and rules of the NLM.

b. History of the Online Codification Platform ‘TransLex’ (www.trans-lex.org)

There was an intrinsic problem with all lists published between 1992 and 1999. Their growth and character as a mere unorganized compilation of principles and rules reduced their utility. That problem ran counter to the very purpose of the lists, namely the codification of the NLM in a way that makes them easily accessible for practitioners and academics around the globe.

aa. The Predecessor: The Transnational Law Database (Tldb)

In 1999, CENTRAL began to consider the use of modern communication technology for the implementation of the concept of the ‘Creeping Codification’ of the NLM. The idea of publishing a CD-ROM with the text of the list and the numerous full-text materials supporting each principle\(^\text{655}\) was quickly abandoned. It was obvious that this technology would not be able to keep pace with the dynamic development of the NLM. Instead, the idea was born to set up a ‘codification platform’ on the Internet. To prepare for this project, a list was published by the Research Team in a CENTRAL publication on transnational law in late 1999 which was, for the first time, subdivided into fifteen chapters and which contained – also for the first time – the black letter text of each principle and rule contained in the list\(^\text{656}\). In May 2000, the CENTRAL Team, having conducted a global survey on the use of transnational commercial law in international practice, announced that it would ‘publish a comprehensive Online Database on Transnational Commercial Law in early 2001’\(^\text{657}\). While the Internet has been regarded as a typical area of business life for which transnational legal structures have developed into a kind of ‘lex informatica’ or ‘lex electronica’\(^\text{658}\), the CENTRAL Research Team regarded the Web as the only technical environment through which the Creeping Codification of the NLM could be implemented. The CENTRAL Research Team quickly realized that the unique character of the World Wide Web avoids the defects inherent in traditional means of codification. The absence of a territorial localization of the Web conforms with the transnational character of the NLM, whose primary goal is to detach commercial law from the territorial constraints of domestic legal systems. The ‘Open-Access’ environment and global scope of the Web complies with the nature of the NLM as a ‘public domain law’. Also, the Web permits easy and free access to the NLM on a global scale. Unlike printed texts, the technical options available on the Web, coupled with modern IT- and database technology, allow for easy everyday access, use, as well as the quick and continuous updating and dynamic evolution of the TransLex Principles. Through the Internet, CENTRAL can take account of the special character of the Creeping Codification concept.
which is as flexible, spontaneous, and highly volatile as the NLM itself\textsuperscript{659}. The use of the highly flexible technical environment of the Web assuages concerns that any attempt to ‘catch’ the NLM, which is floating in the transnational sphere, and to force it back into the straightjacket of a code-like list might ultimately result in compromising not only the autonomy, but also the inherent flexibility and highly dynamic character of the NLM\textsuperscript{660}.

A senior member of the CENTRAL Research Team, Holger Dubberstein, a lawyer and expert in IT and database programming, programmed the database as an Internet-based codification platform. The result of his excellent work, the ‘Transnational Law Database’ (Tldb, \texttt{www.tldb.de})\textsuperscript{661} was launched at an international conference on ‘Transnational Law in the Age of Globalization’ held at Münster University on October 26, 2001. At the conference, one of the speakers, Gralf-Peter Calliess, stated:

‘. . . in terms of providing free and easy access to systematic knowledge of Lex Mercatoria and thereby enabling self-reference, the CENTRAL Transnational Law Database launched today could be a milestone on the road to the New Law Merchant’\textsuperscript{662}.

After CENTRAL moved from Münster University to the University of Cologne in April 2002, the Tldb was renamed into ‘Transnational Law Digest & Bibliography’ in order to emphasize the ‘Digest-like’\textsuperscript{663} quality of the platform, while maintaining the acronym ‘Tldb’. The platform was also transferred from a ‘.de’– to a ‘.net’-domain (\texttt{www.tldb.net}) to underline the transnational character of the codification platform.

bb. From the Tldb to the TransLex Principles

Over the next seven years, various problems in the handling of the Tldb manifested. The front-end of the Tldb became too complex, sacrificing the user-friendliness of the platform. At the same time, the back-end program which the members of the CENTRAL Team used to prepare and upload new documents became outdated and its use proved to be very time consuming. Also, the feedback from the users indicated that the message behind the acronym ‘Tldb’ was not readily understood by those academics and practitioners who were not familiar with CENTRAL and its research activities.

For all of these reasons, the decision was made at CENTRAL in early 2008 to set up a completely new online codification platform – TransLex – to which the list and the materials contained in the Tldb would then be transferred. The programming of TransLex was done by two members of the team with considerable experience in database programming, Ulf Krause and Oliver Froitzheim. The new TransLex-logo has four colours. These four colours represent the four areas of the TransLex platform at \texttt{www.trans-lex.org}:

- \textit{TransLex Principles}: a list of almost 130 principles of transnational law, the ‘New Lex Mercatoria’.
- \textit{TransLex Bibliography}: a comprehensive bibliography on transnational law.
- \textit{TransLex Materials}: a collection of texts of international conventions, model laws, restatements, domestic statutes, soft law instruments and many other materials.
- \textit{TransLex Links}: a collection of selected links which are relevant for research in transnational law and international business law.

TransLex was launched at the final rounds of the \textit{Willem C. Vis} Arbitration Moot Competition in Vienna in early April 2009. In fact, many student teams who have participated in that competition in the past have made extensive use of the Tldb, and the teams who participated in the final rounds of 2009 showed great interest in the new TransLex platform.

Like the UNIDROIT and \textit{Lando} Principles\textsuperscript{664}, the TransLex Principles are of a multi-functional nature. They may be used:

(1) to determine the applicable rules in a dispute if the parties have chosen ‘transnational commercial law’, ‘general principles of law’, ‘the \textit{lex mercatoria} or the like;
(2) to determine the applicable law, if, absent a choice of law by the parties, the arbitrators decide to apply this concept to the dispute before them;
to allow for an autonomous interpretation of and for the filling of internal gaps in international conventions and other uniform law instruments;

(4) to allow for the ‘internationally useful’ construction of domestic law in international disputes;

(5) to ascertain the disputed meaning of legal terms of transnational commerce, e.g. ‘force majeure’, ‘hardship’, ‘best efforts’, ‘time of the essence’, ‘FOB’ etc.;

(6) to supplement or correct a future European Civil Code in international commercial disputes;

Page: 275

(7) to provide legal know-how about modern commercial law to developing and transition countries; and

(8) to provide information about transnational law to other sciences (politics, economics, sociology) which are exploring the clash between the territorial limitations of the law and the transnationalization of international commerce and trade in an era of globalization.

As Features of the TransLex Principles: The Online Codification Process made do not reflect a change in the substantive meaning of the force majeure principle. Rather, the CENTRAL Research Team recognized that the text of the Apact Incoterms principle and the IT WIPO and DMCADrafts from the US enacted the text of the force majeure principle in different subsections. The practical examples of force majeure events were likewise moved to a separate subsection and grouped into different subcategories of events. That is why the central structure of the changes that go beyond mere textual or structural improvements. Many of the examples contained in the current version of that subsection have been added as a consequence of the creeping codification of force majeure. The force majeure event was added very early on after the Act of October 2001. The TransLex Incoterms contains the following principle:

Principles from the UNIDROIT and the List of Incoterms shall be applied to international contracts, at the option of the parties.

The recent developments in the EU which have lead to the creation of the DCFR reveal the tremendous significance which these references have. It was for this reason that the TransLex Principles do not follow the example of the UNIDROIT Working Group to allow for an autonomous interpretation of and for the filling of internal gaps in international conventions and other texts) in its Principles of European Contract Law and not to follow the example of the UNIDROIT Working Group to allow for the ‘internationally useful’ construction of domestic law in international disputes;

The Meaning of ‘Codification’ in the Context of the New Lex Mercatoria

By clicking on a principle of his choice, the user of the TransLex principles gets instant access not only to its black letter text but also to a short summary of the principle and to a list of the sources on which that principle is based. The search bar allows the user to search for a principle by name, by number or by keyword. The user can also select a language and a jurisdiction from a drop-down menu. This is an example of the increasing systematization of the NLM described above. Such systematization is by no means a new phenomenon. Even the ancient predecessors of the list, like the Institutes of Gaius, contained a coherent set of rules corresponding in broad terms to the chronology of a sea voyage.

It becomes obvious from this description of the technical features of the Creeping Codification process why the term ‘codification’ in the context of the TransLex Principles must not be confused with the traditional notion of codification by domestic legislatures. The Creeping Codification process has a number of features that distinguish it from the traditional notion of codification. For example, ‘force majeure’ was added very early after the launch of the Tldb to take account of the fact that this was the first major feature of the new lex mercatoria.

However, codification is no principle of this type. The TransLex Principles are not to be confused with a collection of rules and principles. Rather, they contain a coherent set of rules corresponding in broad terms to the chronology of a sea voyage.

That view must be rejected for three reasons. First, traditional codification techniques are being increasingly criticized today. They have been useful for legal textbooks of the CENTRAL Research Institute, but the rise of electronic publishing and the internet has made them obsolete. The traditional notion of codification is a process of selecting, organizing, and arranging the law in a way that is comprehensible and usable by the public. It is a way of making the law more accessible and understandable. However, codification is no more an efficient way of organizing society than the pre-existing concept of the law. The law of the TransLex Principles is not based on the idea of a single, comprehensive code. Rather, it is a system of rules that can be applied in a variety of different situations. The use of a code-like technology:

TransLex Principles by the CENTRAL technicians and equipped with a large variety of search filters allows the user to be downloaded as formatted and unlocked pdf-files. A sophisticated search engine developed specifically for the TransLex Principles makes it possible to search for a principle by name, by number or by keyword. The user can also select a language and a jurisdiction from a drop-down menu. This is an example of the increasing systematization of the NLM described above. Such systematization is by no means a new phenomenon. Even the ancient predecessors of the list, like the Institutes of Gaius, contained a coherent set of rules corresponding in broad terms to the chronology of a sea voyage.

The documents which constitute the comparative law references are reproduced on the platform in PDF format but can be downloaded as formatted and unlocked PDF files. A sophisticated search engine developed specifically for the TransLex Principles makes it possible to search for a principle by name, by number or by keyword. The user can also select a language and a jurisdiction from a drop-down menu. This is an example of the increasing systematization of the NLM described above. Such systematization is by no means a new phenomenon. Even the ancient predecessors of the list, like the Institutes of Gaius, contained a coherent set of rules corresponding in broad terms to the chronology of a sea voyage.

The recent developments in the EU which have lead to the creation of the DCFR reveal the tremendous significance which these references have. It was for this reason that the TransLex Principles do not follow the example of the UNIDROIT Working Group to allow for an autonomous interpretation of and for the filling of internal gaps in international conventions and other texts) in its Principles of European Contract Law and not to follow the example of the UNIDROIT Working Group to allow for the ‘internationally useful’ construction of domestic law in international disputes;
The purpose of producing TransLex Principles is to establish a basis for the comparative persuasiveness of the principles and rules contained therein. They also serve as a comparative substratum for the further evolution of the list. In general, development of specific rules from mere ‘candidates’ to genuine components of the NLM. It lies in the very nature of the Creeping Codification process that the list is constantly updated and developed in order to provide an accurate ‘snapshot’ of the NLM. This specific character of the Creeping Codification is central to the idea of a worldwide data communication network that was suggested in the first edition of this book. This approach was also changed significantly in the online-lists. The central purpose of the Creeping Codification is to create transparency of the codification process by explaining the history of a given principle or rule through the codification process within TransLex. Embedded in the programming of the platform.

That task that has been aptly described by an international arbitral tribunal as follows:

Contrary to the international restatements, however, the text of the TransLex Principles is not carved in stone but has been suggested that the name of the NLM should rather be 'principia mercatoria' or 'general principles', or forming part of the lex mercatoria (thus being carried by an individual principle or rule). In fact, it is not the list itself that deserves to be called 'general principles', or forming part of the lex mercatoria (thus being carried by an international 'communis opinio vel necessitas'), but it has a much more difficult and responsible task to document written law in a restatement-like fashion.

The parties must act in accordance with the standard of good faith and fair dealing in international trade.

e. Updating and Developing the List

The list contains a number of principles that have been developed in a systematic way through computer programs. The list is constantly updated and developed to provide an accurate 'snapshot' of the NLM. This specific character of the Creeping Codification is central to the idea of a worldwide data communication network. The list contains a number of principles that have been developed in a systematic way through computer programs. The list is constantly updated and developed to provide an accurate 'snapshot' of the NLM. This specific character of the Creeping Codification is central to the idea of a worldwide data communication network.
The textual and structural changes reflected in the two versions are not due to a change in the substantive meaning of the developed principles, rather they are intended to improve the legibility of the principles for the application and are justified by the need for a more systematic presentation. These changes are not due to a change in the substantive meaning of the principles but are rather for the purpose of improving the legibility of the principles for the application. In this regard, the TransLex Principles, which has always been a key principle in the lists, was formulated in the original contracts, the principle of good faith will almost always impose on the work or the conduct of a party on an ad hoc basis, taking into account all circumstances of the concrete case. This analysis must include the aspects of the potential policies, duties and legalities as well as the possible breach of the ICJ's General Principles of Law. The principle of good faith is a key principle in the lists, the principle of good faith will almost always impose on the work or the conduct of a party on an ad hoc basis, taking into account all circumstances of the concrete case. This analysis must include the aspects of the potential policies, duties and legalities as well as the possible breach of the ICJ's General Principles of Law. The principle of good faith is a key principle in the lists, the principle of good faith will almost always impose on the work or the conduct of a party on an ad hoc basis, taking into account all circumstances of the concrete case. This analysis must include the aspects of the potential policies, duties and legalities as well as the possible breach of the ICJ's General Principles of Law.
The idea of the ‘Creeping Codification’ of transnational law through an online codification platform avoids this essential weakness of the restatement technique. Contrary to the restatements, the updating and development of the TransLex Principles is an ongoing process. The highly flexible, open-access environment of the World Wide Web, combined with the innovative technological advances in modern database and information technology, allows for the quick and continuous updating and evolution of the list. Any adaptation of the list to the progressive development of transnational commercial law is instantly visible and accessible for the users around the globe. Due to the highly flexible and volatile character of the NLM, any attempt to codify this legal system can only produce a ‘snapshot’ of the reality of transnational commercial law at a given moment in time. Since the TransLex Principles constitute an Internet-based codification platform, they can cope with that intrinsic problem of the NLM much better than any other, more traditional codification technique which must necessarily remain static and inflexible.

The TransLex Principles portray with a very high degree of precision the status of the NLM at any given point in time. At the same time, the highly dynamic character of the NLM is reflected in the technique of the Creeping Codification of transnational law which avoids the ‘petrification’ of the law which necessarily goes along with any traditional codification process.
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’. Instead, they reflect the commercial realities of modern international business practice. The increasing number of Codes of Conduct and other instruments of private governance show that the privatization of rule- and law-making has become a reality in international business. The Academic DCFR and the Resolution of the EU Parliament of December 12, 2007, which puts particular emphasis on the non-binding, soft law character of the DCFR, prove that even within the work towards a European Civil Code, the persuasive force of a compilation of non-statutory legal principles has been accepted as an efficient means to achieve the ambitious goal of the unification of European private law.

International business has always shown a tendency to favour practice-made rules of a transnational character. 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. 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. The development of a

‘lex petrolia’ for the international oil industry, a ‘lex numerica’ or ‘lex informatica’ for international data interchange, ‘lex sportiva’ for international sports law or a ‘lex constructionis’ 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. 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. Their economic inefficiency and the resulting legal uncertainty triggered the autonomous and decentralized evolution of the law through the international community of merchants.

In spite of the comprehensive and all-embracing approach towards the NLM as an autonomous ‘third’ legal system between domestic laws and public international law, 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’ of transnational commercial law. 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 NLM ‘are fading away’.

At the same time, the discussion on the viability of a transnational commercial 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’. With respect to the NLM, 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. 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 NLM\textsuperscript{19}. The NLM doctrine, the respect of which 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.

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\textsuperscript{20}. Legal theory and legal practice alike, however, are confronted with the codification dilemma in the field of transnational commercial law. The NLM is a ‘law in action’ and depends upon a maximum degree of flexibility and openness. 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 a transnational commercial legal system\textsuperscript{21}. 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\textsuperscript{22}. At the same time, however, they do not present the flexible codification method that takes account of the peculiar character of the NLM which, being an open legal system, requires a codification technique that corresponds to the highly dynamic nature of the NLM.

The alternative presented in this Study is the idea of ‘Creeping Codification’ of the NLM through the TransLex Principles. This innovative approach is intended to provide international legal practice with an easily, freely and globally accessible Web-based platform to allow for the application of the NLM in everyday arbitration and drafting practice. If the ‘...the Internet is becoming the town square for the global village of tomorrow’ (Bill Gates 2003\textsuperscript{23}) then the World Wide Web must be regarded as the ideal forum for the codification of the NLM. It is the online character of the TransLex Principles which avoids the ‘petrification’ of the law that necessarily goes along with any traditional codification process. Unlike domestic law-making procedures, the Creeping Codification of the NLM is an ongoing, spontaneous and dynamic process which is never completed. This process requires a codification technique with a corresponding openness and dynamism. This dynamism can be guaranteed only through the use of the Internet. The open-access public domain created by the Internet, combined with modern database technology, provides the ideal substratum for the constant development and enrichment of the NLM through the process of Creeping Codification.

That process must not be confused with the traditional notion of codification by domestic legislatures. There is not and cannot be a single ‘legislator’ of the NLM which is created ‘bottom up’ by the community of merchants. Rather, by putting the principles and rules of the NLM in the form of black-letter rules with a synopsis of the relevant comparative law references, the TransLex Principles establish a presumption, \textit{i.e.} prima facie evidence, that the principles and rules reproduced in the list do in fact form part of the NLM. With this approach, the TransLex Principles aim at alleviating the burden of arbitrators and contract lawyers who need to be concerned, in their daily work and in every single case, with the ‘validity’ and ‘application-worthiness’ of a particular principle or rule of the NLM.

Today, in an age of self-regulation and private governance, ‘Cartesian pragmatism’\textsuperscript{24} prevails over theoretic trench fighting about the nature and doctrinal underpinnings of the NLM doctrine. In economics, the ‘Economics of Governance’ theory concludes that private ordering is central to the performance of any economy, regardless of the particular conditions of lawfulness because in many instances, business actors can devise more satisfactory solutions to their problems and disputes than can professionals (lawmakers, courts) who are constrained to apply general rules on the basis of limited knowledge of the problem or the dispute\textsuperscript{25}. A consequence of these new legal and economic developments, the traditional theory of legal sources which is centred around the notion of sovereignty of the state\textsuperscript{26} is being replaced by a legal pluralism which accepts that society’s ability for self-organization and self-coordination is more than a mere factual pattern without independent legal significance.

As a consequence of these new legal and economic developments, the traditional theory of legal sources which is centred around the notion of sovereignty of the state\textsuperscript{26} is being replaced by a legal pluralism which accepts that society’s ability for self-organization and self-coordination is more than a mere factual pattern without independent legal significance.

In this age of private governance and legal pluralism, the NLM is not a myth or dream of the future. Today, transnational commercial law, the New \textit{Lex Mercatoria}, is a fact of life\textsuperscript{27}. The NLM doctrine, the respect of which 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.

Molineaux, id.

Stammler, Wirtschaft und Recht, at 529.


Wieacker, Festschrift Zweigert, at 575, 592.

Rühl, Rechtsschöpfung durch die Wirtschaft, at 9.

Stammler, Wirtschaft und Recht, at 532.

Rühl, Rechtsschöpfung durch die Wirtschaft, at 16.


See Kahn, in: Bonell/Bonelli (eds.), Contratti Commerciali Internazionali E Principi UNIDROIT, at 41, 42.

See supra Chapter 1 III.

Zumbansen, Ind.J.Gl.Legal Studies 2007, at 191, 211.

See Loquin, in: Souveraineté etatique et marchés internationaux à la fin du 20ème siècle, at 23, 31; see also Berger, in: Berger (ed.), The Practice of Transnational Law, at 1, 14 et seq.

Hyland, supra note 538, at 425 et seq. citing from Pufendorf, De jure naturae et gentium libri octo and Grotius. De jure belli ac pacis libri tres.

See Atiyah's Introduction to the Law of Contract, at 9 et seq.

Zimmermann, ZEuP 1993, at 4, 30; cf. also for the principle 'ex pacto nudo datur actio' Hyland, supra note 538, at 417.


Hyland, id., at 427 et seq. (citing Flour and Aubert).

See Atiyah, supra note 602, at 9 et seq.; 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).


See generally Bernstein, J.Legal Stud. 1992, at 115 et seq.

Galgano, Ann.Surv.Int'l & Comp.L. 1995, at 99, 102 et seq.; see also Gandolfi, RTD civ. 1992, at 707, 710 stating that this law-making through contract practice is tending towards an éloignement progressif d'une vision étatiste du droit.

Loquin, in: Souveraineté étatique et marchés internationaux à la fin du 20ème siècle, at 23, 33 et seq.; see also for the view that a contract which is considered as a source of transnational law 'must be open to challenge as not inherently rational and, indeed, as oppressive or injurious to the wider public interest' Goode/Kronke/McKendrick, Transnational Commercial Law, No. 1.43.

See supra Chapter I III.B.

Loquin, supra note 613, 34; Mustill, Arb.Int'l 1988, at 86. 89; Goode/Kronke/McKendrick, id., No. 1.50: '... standard-term contracts drawn up by trade or professional bodies which are designed to balance the competing interests may give a guide to the legitimate expectations of the market and can form the basis of a legal norm.'

Cf. for the genuine adjudicatory function of arbitral tribunals supra D.2.a.

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 I.1.A.7.b.bb.; 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.


Cf. infra Chapter I.1.A.7.a.
Goldstajn, 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’.

The term was coined by Schanze, Investitionsverträge im Internationalen Wirtschaftsrecht, at 151.

Schanze, 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 Stammel, Wirtschaft und Recht, at 508.

See infra 11.

These provisions are of extreme relevance for international arbitration where the issue of contract interpretation plays a role far more important than that of determining the applicable law, see Lalive, in: Bonell/Bonelli (eds.), Contratti Commerciali Internazionali E Principi Unidroit, at 73, 81.

Cf. supra Chapter 3 I.B.1.

Bonell, An International Restatement of Contract Law, at 68.


Cf. supra Chapter 3 I.B.1.

Cf. for details supra B.2.b.

See Huet, in: Institute of 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.5.c.

Bonell, RabelsZ 56 (1992), at 274, 281 et seq.; Bonell, An International Restatement of Contract Law, at 102 et seq.

Cf. Bianca/Bonell-Bonell, Commentary on the International Sales Law, Art. 7, No. 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 von Eschen, IPRax 1990, at 62, 64.

Cf. for details supra Chapter 2 II.G.3.d.

Schanze, Investitionsverträge im internationalen Wirtschaftsrecht, at 135 (‘consensual regulation of commerce’).

Cf. supra 6.b.

Cf. for details supra Chapter 2 II.G.3.d.

Cf. for the evolution of a general principle of law in this area Lorenz, JZ 1962, at 269, 274.


Cf. generally Bonell, An International Restatement of Contract Law, at 117 et seq.


Schneider, Gesetzgebung, § 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.Chi. 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 409.

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 TransLex Principle No. VII.6.

181 Cf. the project of Cornell Law School, which excluded any teleological valuation processes supra Chapter 3 II.A.2.
183 Cf. already supra Chapter 2 II.A.2.c. and Chapter 3 II.A.2.c.
184 Bonell, An International Restatement of Contract Law, at 83 et seq.
185 Cf. Dölle-Wahl, EKG, Art. 17, Nos. 13 et seq. (with reference to the ‘ius gentium’ of classical Roman law);
186 Bianca/Bonell-Bonell, Commentary on the International Sales Law, Art. 7, Nos. 2.3 et seq.
187 Bianca/Bonell-Bonell, Commentary on the International Sales Law, Art. 7, No. 2.3.2.
189 Cf. for the importance of such provisions which ensure the ‘openness’ of domestic codifications supra Chapter 2 II.G.2.c.
191 Cf. for the application of the principle of good faith on re-negotiation UNIDROIT (ed.), Principles of International Commercial Contracts, at 153; generally Horn, AcP 1981, at 255 et seq.
193 Cf. 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: Beaton/Friedmann (eds.). Good Faith and Fault in Contract Law, at 171 et seq.; see also Art. 1366 of the Italian Codice Civile and Art. 1134(3) of the French Code Civil.
194 Farnsworth, id., at 156 et seq.
195 BGH, NJW 1993, at 259, 263.
200 Cf. Art. 5.2 UNIDROIT Principles; see Lalive, in: Bonell/Bonelli (eds.), Contratti Commerciali Internazionali E Principi Unidroit, at 73, 81.
201 Chitty on Contracts, Vol. 1, No. 1-032.
202 O’Connor, Good Faith in English Law, at 15 et seq.; Scally v. Southern Health and Social Services Board, 1 A.C. [1992] 294; Algussein Establishment v. Eton College, 1 W.L.R. [1988] 587; Intertoto Library Ltd. v. Stiletto Ltd. 1 Q.B. [1989] 433, 439; ‘English law has, characteristically, committed itself to no such overriding principle [as good faith] but has developed piecemeal solutions in response to demonstrated problems of unfairness’; but cf. Judge Steyn: ‘In my 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: Cranston (ed.), Essays in Honor of Roy Goode, at 103, 124.
203 Chitty on Contracts, Vol. 1, No. 1-034.
204 See Steyn, L.Q.Rev. 1997, at 433, 440: ‘Given the needs of the international market place, and the primacy of European Union law, English lawyers cannot avoid grappling with the concept of good faith . . . where in specific contexts duties of good faith are imposed on parties our legal system can readily accommodate such a well tried notion. After all, there is not a world of difference between the objective requirement of good faith and the reasonable expectations of parties’; cf. also Goode, supra note 197, at 240: ‘The fact that two separate groups of scholars working largely independently of each other, and including lawyers from the United Kingdom, the United States and Ireland, produced restatements embodying in almost identical terms a general requirement of good faith should give powerful spur to reconsideration of the traditional perspective of English law, at least in international transactions’; Beaton/Friedmann, in: Beaton/Friedmann (eds.), Good Faith and Fault in Contract Law, at 3, 15.
Both provisions define good faith as ‘honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade’.


Art. 1.8 UNIDROIT Principles refrains from adhering to the ‘subjective’ theory of Anglo-American law employed in Art. 9(2) CISG (‘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, No. 2.2.1; cf. also Bonell, An International Restatement of Contract Law, at 142 et seq.; Bonell, ICLQ 1978, at 413, 432.

Cf. supra Chapter 2 II.G.1.; see also Kramer, in: Bonell/Bonelli (eds.), Contratti Commerciali Internazionali E Principi Unidroit, at 163, 164 et seq.


Article 1.8 UNIDROIT Principles refrains from adhering to the ‘subjective’ theory of Anglo-American law employed in Art. 9(2) CISG (‘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, No. 2.2.1; cf. also Bonell, An International Restatement of Contract Law, at 142 et seq.; Bonell, ICLQ 1978, at 413, 432.

Cf. supra Chapter 2 II.G.1.; 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(2) CISG (‘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, No. 2.2.1; cf. also Bonell, An International Restatement of Contract Law, at 142 et seq.; Bonell, ICLQ 1978, at 413, 432.

Cf. supra Chapter 2 II.G.1.; 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(2) CISG (‘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, No. 2.2.1; cf. also Bonell, An International Restatement of Contract Law, at 142 et seq.; Bonell, ICLQ 1978, at 413, 432.

Cf. supra Chapter 2 II.G.1.; 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(2) CISG (‘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, No. 2.2.1; cf. also Bonell, An International Restatement of Contract Law, at 142 et seq.; Bonell, ICLQ 1978, at 413, 432.

Cf. supra Chapter 2 II.G.1.; 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(2) CISG (‘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, No. 2.2.1; cf. also Bonell, An International Restatement of Contract Law, at 142 et seq.; Bonell, ICLQ 1978, at 413, 432.

Cf. supra Chapter 2 II.G.1.; see also Kramer, in: Bonell/Bonelli (eds.), Contratti Commerciali Internazionali E Principi Unidroit, at 163, 164 et seq.

seq.

239 Art. 9(3): ‘Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned’; cf. Dölle, EKG, Anhang, No. 18.

238 Cf. Dölle id., No. 18.

237 Cf. for a criticism of this omission Bianca/Bonell-Bonell, Commentary on the International Sales Law Art. 9, No. 3.5.

236 Schlechtriem, Good Faith in German Law and in International Uniform Laws, at 12.


234 Hill, id., at 166.

233 See UNIDROIT (ed.), Principles, at 78 (Commentary).

232 Id.

231 Hill, supra note 240, at 167.

230 UNIDROIT (ed.), Principles, at 145 (Commentary).

229 See e.g. ICC Award No. 5485, YCA 1989, at 156, 168; ICC Award No. 5953, Clunet 1990, at 1056; Fouchard, L’Arbitrage Commercial International, at 442; Paulsson, Rev.d’Arb. 1990, at 55, 82 et seq.

228 ICC Publication No. 421, at 22.

227 See Ad Hoc Award of September 10, 1975, YCA 1977, at 156, 158; ICC Award No. 8486 (unpublished); Nassar, Sanctity of Contracts Revisited, at 205.


224 Cf. supra Chapter 2 II.C.2 and D.2.

223 Cf. van Houtte, supra note 217, id.

222 Esser, Grundsatz und Norm, at 69 et seq.

221 Cf. for details supra Chapter 2 II.A. and G.

220 Cf. for details supra Chapter 2 II.A.1.

219 Cf. supra Chapter 2 II.D.2.

218 Berger, Internationale Wirtschaftsschiedsgerichtsbarkeit, at 374 et seq.


216 See De Ly, International Business Law and Lex Mercatoria, at 234; Marrella, La Nuova Lex Mercatoria, at 690; see also supra Introduction, I.A.1, footnote 31.

215 Translation by the author of this book, the German original is published in Berger, in: CENTRAL (ed.), Jahresbericht 2007/2008, at 38. See also Winiger, ASA Bull. 1992, at 565: ‘The compilation of substantive legal principles which are being used increasingly by international arbitrators in lieu of domestic laws, coupled with comprehensive references, is of particular value especially for the legal practitioner’ (translation from the German original by the author).

214 Berger, Formalisierte oder ’schleichende’ Kodifizierung des transnationalen Wirtschaftsrechts, at 217 et seq.

213 See Berger, id.

212 See Berger, CENTRAL-Datenbank zum transnationalen Wirtschaftsrecht, in: CENTRAL (ed.), Center for Transnational Law, 1997, at 18 et seq.


208 See Frischkorn, Eur.J.L. Reform 2005, at 331, 343: ‘By the time the list is prepared, the Lex Mercatoria may have changed.’

207 See e.g. Fortier, Arb.Int’l 2001, at 121, 126: ‘I cannot help but wonder whether Berger’s proposal does not end up impaled on the horns of the very “codification dilemma” that he himself invokes. One may legitimately ask whether any institutional framework is able to maintain the degree of openness and flexibility required to keep pace with the world of international commerce – particularly the world of e-commerce’ (emphasis in the original); Wasserstein Fassberg, Chi.J.Int’l L. 2004, at 67, 82: ‘This push towards formalised codification . . . requires lex mercatoria theorists to relax the qualifications for membership and compromise its autonomy in a way which ultimately belies the standard justification offered for its existence – the more formal and explicit the rules, the less organic, the less spontaneous, the less authentic they are’.


See supra note 551.

See supra I.A.10 and I.B.2.c.

Purpose and Concept at www.Trans-Lex.org/000010.

See supra Chapter 2 II.G.1.b.

See supra C.1.

Sheppard, supra note 560, at 217.

But see Brunner, Force Majeure and Hardship under General Contract Principles, at 20 who argues that the drawback of the UNIDROIT Principles – the absence of comparative law materials – is considerably mitigated by the fact that the UNIDROIT Principles correspond to a large degree with the Lando Principles which contain such comparative law references. That, however, would require the burdensome process of constant comparisons between UNIDROIT and Lando Principles. The TransLex Principles combine the black letter text and comparative law references at a glance, i.e. within a single instrument.

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’ (translation by the author); 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’.

Berger, Formalisierte oder ‘schleichende’ Kodifizierung des transnationalen Wirtschaftsrechts, at 213 note 11.


See Nassar, Sanctity of Contracts Revisited, at 161.

See e.g. Macneil/Gudel, Contracts: exchange transactions and relations, at 11 et seq., 177 et seq.

See Central List of Principles, Rules and Standards of the Lex Mercatoria, supra note 656, at 159.

The ‘See principle history’ section for this TransLex Principle indicates that ‘the wording of the Principle was revised according to Brunner, Force Majeure and Hardship under General Contract Principles, Exemption for Non-Performance in International Arbitration 2009, at 451 et seq.’

See Central List of Principles, Rules and Standards of the Lex Mercatoria, supra note 656, at 156.

See for piracy activities the website of the Piracy Reporting Centre established in Kuala Lumpur, Malaysia, by the International Maritime Bureau (IMB), a specialized division of the International Chamber of Commerce (ICC), www.icc-ccs.org/index.php?option=com_content&view=article&id=30&Itemid=12.

But see Herber, IHR 2003, at 1 et seq. who seems to misunderstand that fundamental difference between the traditional notion of ‘codification’ and its meaning as ‘privatized law-making’ in the context of the NLM.


See supra Chapter 2.


Coing, ZvglRwiss 81 (1982), 1, 15; van den Berg, De politiek van codificatie in Europa, at 8 (available at www.recht.nl/doc/codificatie_in_europa.pdf); K. Schmidt, Die Zukunft der Kodifikationsidee, at 64 et seq. (for a critical view on the German Commercial Code); see for an early critical view on codification techniques Clarke, The Science of Law and Lawmaking, at 41: ‘... neither for the layman nor for the lawyer, can it be said that the law can be successfully limited to one book of a few hundred pages [i.e. a Code]. The history of every Code that has ever been in operation – with its numerous volumes of commentaries, decisions of Courts as to its meaning, and revisions, repeals, and reenactments, gives the lie to the contention.’

Caroni, Gesetz und Gesetzbuch, at 125 et seq.

See supra Chapter 3 I.E. and Chapter 4 I.B.3.

Ferrante, in: Piergionvanni (ed.), From Lex Mercatoria to Commercial Law, at 121, 123. The DCFR has been characterized as a ‘non-legislative codification of European private law’ and as a ‘codification-like system of legal norms with immediate application’, Jansen/Zimmermann, NJW 2009, at 3401, 3406 (emphasis added).

See supra B.1.

Lachs, IJIL 1974, 1; Singh, IJIL 1978, 2; Jain, Codification and Progressive Development of International Law, at 4.

Zeh, in: Merten/Schreckenberger (eds.), Kodifikation gestern und heute, at 135, 144 (translation by the author, emphasis added).


See supra Chapter 2 II.G.3.c.

See Brunner, Force Majeure and Hardship under General Contract Principles, at 20 et seq.

See Hight, 63 Tul. L. Rev. 1989, at 613, 616; Marrella, La Nuova Lex Mercatoria, at 636; see also Lowenfeld, in Lowenfeld, Collected Essays Over Three Decades, 2005, at 173, footnote 71, stating that ‘[t]here is some appeal to this point, though, . . . it is clearly too late to change the name of a concept so widely described if not always understood’.

417, footnote 53 (emphasis added).

698 Strömholm, Festschrift Zweigert, at 909, 910.

699 The flexibility of the ‘creeping codification’ may also lead to the striking of a principle or rule from the list. So far, this has happened very rarely.

700 Cf. supra Chapter 2 II.A.1.c.

701 See Lando, ICLQ 1985, at 747, 748 et seq.


703 But see Larroumet, La Semaine Juridique 1997, at 147, 148 stating that the UNIDROIT Principles could be regarded as a potential source of the lex mercatoria; however, see id., at 149 stating that the Principles may not contravene the law applicable to the contract which may be a domestic law, public international law or the lex mercatoria.


705 See supra 1.

706 See for the significance of comparative references for the legitimacy of any attempt to ‘codify’ transnational commercial law supra Chapter 2 II.A.1.

707 Cf. for details supra I.A.3.b.aa.

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


710 Glöckner, id.; Waehler, id.

711 Glöckner, supra note 709, id.

712 Waehler, see supra note 709, at 29.

713 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.


716 Cf. supra Chapter 2 II.G.3.c.


718 ICC Publ. No. 600; cf. also ICC (ed.), Commentary on UCP 600, ICC Publ. No. 680; see for the significance of the UCP as an element of the NLM Kahn, Annex 1 infra.

719 ICC Publ. No. 458, cf. Berger, DZWr 1993, at 1 et seq.; the rules are considered part of the lex mercatoria in the ICC Award No. 8365, Clunet 1997, at 1078, 1080.

720 ICC Publ. No. 560; the materials mentioned are partly reprinted at von Cammerer/Schlechtriem, CISG, Annexes V–VII.


723 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.

724 Cf. Braeckmans, TviPr. 1986, at 1, 10 et seq.

725 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.

726 ORGALIME General Conditions for the Supply of Mechanical, Electrical and Electronic Products, of August 2000, available at www.orgalime.org/publications/conditions.htm; ORGALIME is located in Brussels, Belgium, and groups the central trade federations of the mechanical, electrical, electronic and metalworking industries in twenty-two European countries and provides liaison between these organizations in the legal, technical and economic fields.

727 Fédération Internationale Des Ingénieurs-Conseils, Conditions of Contract for Works of Civil Engineering Construction,
Part I: General Conditions with Forms of Tender and Agreement, Part II: Conditions of Particular Application with Guidelines for Preparation of Part II Clauses, 4th ed. 1987; see for the influence of FIDIC on the evolution of a genuine ‘lex constructionis’ Molineaux, J.Int’l Arb. 1997, issue 1, at 59 et seq.

728 Molineaux, id.
729 Cf. supra Chapter 2.
731 Bonell, ZfRV 1996, at 152.
732 Cf. supra Chapter 2 II.G.2.
1 See Kötz, RabelsZ 56 (1992), at 215 et seq.
2 See supra Chapter I III.B.
3 See supra Chapter 4 I.B.3.
6 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. 8365, Clunet 1997, at 1078, where the tribunal developed eight principles which, in its view, form part of the lex mercatoria; Paris Chamber of Arbitration Award No. 9246, YCA 1997, at 28, 31: ‘… the tribunal deems it … proper to refer to the body of rules of international commerce which have been developed by practice and affirmed by the national courts (lex mercatoria)’.
10 Molineaux, J.Int’l Arb. No. 1 1997, at 55, 64 et seq.
11 See Ipsen, Private Normenordnungen als Transnationales Recht?, at 65 et seq.
12 von Hoffmann/Thorn, IPR, § 2, No. 56 in fine.
14 Cf. supra Chapter 1 I.A
15 Bármann, Festschrift Mann, at 547, 571.
16 Lando, in: Festschrift till Stig Strömholm, at 567, 578.
18 See supra Chapter 2 II.F.2.a.
19 Cf. supra Chapter 2 II.F.2.a.
20 See Borchers, in: Raisch/Shaffer (eds.), Introduction to Transnational Legal Transactions, at 139, 156 et seq.
24 See supra Chapter 2 I.B, note 40.
25 See Williamson, The Economics of Governance, www.aeaweb.org/annual mtg_papers/2005/0107_1645_0101.pdf, at 2 et seq; see for the conflict of the lack of democratic legitimacy and political accountability of decision-making and the increased effectiveness of rule-making within international institutions such as ISO and ICANN Fukuyama, America at the Crossroads, at 163 et seq.
26 von Jhering, Der Zweck im Recht, Vol. 1, at 249: ‘Only those rules imposed by society deserve the name of law which have behind them the force of the law or … the force of the sovereign state, meaning that only those rules adopt the quality of legal norms that have been vested with this effect by the sovereign state or that the state is the only source of the law’ (translation by the author).
27 De Ly, Diritto del Commercio Internazionale 2000, at 555, 570.

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
IV.5.3 - Interpretation in favor of effectiveness of contract
IV.6.9 - Duty to notify / to cooperate