Title:
Berger, Klaus Peter, The Concept of the "Creeping Codification" of Transnational Commercial Law

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Content:
The Concept of the "Creeping Codification" of Transnational Commercial Law

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I. Introduction

Academics and practitioners alike have acknowledged that the idea of the ‘Creeping Codification’ through the drafting of lists of rules and principles of the NLM may provide an escape out of the codification dilemma of transnational commercial law, a dilemma which has trapped the NLM doctrine for decades. It has been argued by renowned international arbitrators that the process of privatized law-making ‘has aptly been described as the “Creeping Codification of the lex mercatoria”‘ and that:

‘[The Creeping Codification of the NLM through a] list … is a tremendous achievement … It perfectly represents the trend associated with the development of what has been identified as the new, new lex mercatoria. For its scholarship, detail and thoroughness, the list puts the lie to the claim that it is not possible to point to, and thus not possible to consider basing commercial relationships on, a discrete body of transnational commercial norms. Berger’s “creepy code” is undeniably a major contribution to the field of transnational law…. the most significant contribution is not the list per se, but the technique that gave rise to it and is meant to ensure its open-endedness and continuing evolution: the technique of Creeping Codification.

... it is evident that the idea of “the list” … is as close as we’ve come, in recent generations, to tackling the lex and wrestling it into usable shape”.
The Creeping Codification has been the subject of comparative academic research. The list reproduces all those rules and principles of the NLM as black letter law which have been accepted in international arbitral and contract practice together with comprehensive comparative references. The list unifies the various sources that have fostered the evolution of a transnational commercial legal system into one single, open-ended set of rules and principles: reception of general principles of law, codification of international trade law by ‘formulating agencies’, case law of international arbitral tribunals, the law-making forces of international model contract forms and general conditions of trade, and the analysis of comparative legal science. Scientific research in this area of highly practical law is of particular relevance because many authors of case notes, articles, and books on transnational commercial law are themselves active in the field of international commercial arbitration. It is, therefore, not necessary to advocate the acceptance and promotion of the NLM, but also to look forward and provide comprehensive case load of international arbitral tribunals which play a pivotal role in the evolution of transnational commercial law. It is this comprehensive coverage of all possible sources of the NLM which provides the necessary legitimacy and authority to the rules and principles contained in the list.

With this approach, the idea of the list stands in the tradition of the Digests of common law published in the first half of the 20th century. What was stated by Edward Jenks in the Preface of his ‘A Digest of English Civil Law’ of 1921 applies with equal justification to the idea of the Creeping Codification through a comprehensive list of principles and rules of the NLM:

‘A Digest differs from a Code, mainly in that it professes merely to state the rules which are covered by existing authority. It claims - at least, when it is the work of purely private authors - no other respect than that which is derived from a belief that it represents an honest, intelligent, and industrious attempt to reduce the chaos of existing materials to simplicity and order.

[...]

The chief intellectual effort demanded of the authors of the work has been to extract, by appropriate treatment, from this formless heap of statutes and judicial decisions, the rules which such authorities enunciate and expound, and to arrange those rules in the most convenient and accessible form.

The emphasis on arbitral case law distinguishes the list from the UNIDROIT Principles. For the work of the UNIDROIT Working Group, awards of international arbitral tribunals played only a subordinate role. Even though they provide a clear, detailed, and analytical picture of the present state of international commercial contract law, the UNIDROIT Principles are characterized by a certain degree of ‘analytical indifferenc’ resulting from the fact that the international business community and its dispute settlement techniques were not a major focus of its research. It has already been emphasized above that international commercial arbitration provides a particularly fertile ground for the development and evolution of principles and rules of transnational commercial law because it is an inherent characteristic of the arbitral process itself that counsel and arbitrators alike present arguments based on comparative research. In this manner, arbitration showcases views, arguments and background information which are necessary for a topical method of the finding of the law. Arbitral procedures therefore perform a dual function in the context of the Creeping Codification of the NLM. First, parties and arbitrators are the primary addressees of the rules and principles contained in the list. Secondly, international arbitral procedures provide the procedural substratum for the ‘discovery’ of new rules and principles of the NLM which will then be included in the list.

This open-end character requires the constant updating and extension of the list and thus meets the needs of the NLM as dynamic ‘law in action’. Conversely, it could also restrict the effectiveness and usefulness of the list. Practical problems will arise in those cases where an arbitrator or international practitioner is faced with a legal problem and finds no relevant rule or principle in the list. Similar to the UNIDROIT Principles, however, the ‘new’ rule or ‘new’ legal principle that is necessary to solve the issue may be derived out of the material that is already contained in the list. The principal purpose of the list is not only to look back and provide a picture of the status quo of the NLM, but also to look forward and provide an incentive for the future evolution of transnational commercial law as an open legal system.

A danger may also arise if parties to an international arbitration base their transnational legal arguments on different lists, thereby initiating a ‘battle of lists’. In view of the special character of the NLM, however, the scenario should rather be considered as a chance for the further evolution and development of transnational commercial law. If the lists do not just reflect rules and principles of the NLM ‘in abstracto’ but contain comprehensive comparative references, arbitrators and counsel are given the opportunity to analyze these references and to come to the conclusion that in spite of textual discrepancies the rules and principles contained in both lists are equal in substance. Admittedly, even the Creeping Codification through a list of principles and rules of the NLM may not remove all the uncertainties connected with the
application of transnational commercial law. These uncertainties are a natural consequence of the openness of the NLM as 'law in action'. The constant evolution and changing picture of international trade and commerce require a corresponding flexibility of the applicable transnational law.

Another basic difference between the UNIDROIT and Lando Principles on the one hand and the Creeping Codification through a list of principles and rules on the other relates to the fact that the list is not limited to the field of international commercial contract law. Rather, the list follows the decision-making practice of international arbitration and therefore contains legal principles that are related to those fields of law which play a predominant role in international arbitral case law, such as international company law, conflict of laws, rules of evidence, the international law of expropriation and general arbitration law. The list thereby provides an additional indication for a wider understanding of the notion of 'international economic law'. At the same time, the idea of an open-ended list shows that the progressive Creeping Codification of the NLM is not adequately reflected in the restatement technique in view of its limited coverage. The Creeping Codification of the NLM through the drafting of lists of rules and principles of transnational commercial law may not be substituted by the publication of restatements of international contract law. Each project has different objectives. The restatements only provide valuable incentives and starting points for the extension and evolution of the list.

1. Previous Efforts to Draft Lists of General Principles and Rules of the New Lex Mercatoria

Even in the ancient law merchant, collections of rules and principles of the lex mercatoria were published for use by the community of merchants. The most famous among them are the fifteenth century Catalanian compilation edited by the Consulate of Barcelona and known as 'The Consulate of the Sea' and the 'Little Red Book of Bristol' published in the thirteenth century and containing the famous text 'Incipit lex mercatoria, que, quando, ubi, inter quos et de quibus sit.' The 'Rôles d’Oléron', a compilation of maritime principles and decisions dating back to the 11th century consolidated principles and rules defining the rights and obligations of the parties to an outward sea voyage carrying a cargo of wine from La Rochelle or Bordeaux to Brittany, Normandy, England, Scotland or Flanders.

Drafting lists of general principles and rules of transnational law also has a certain tradition in the context of the NLM. However, the far-reaching consequences of this procedure for the 'Creeping Codification' of transnational law have never been realized. In almost all of these cases, the lists merely served as a means to prove that the NLM is not devoid of contents. In many cases these lists were not included in a special annex, but rather formed part of the text of the study. Consequently, a codifying effect of these lists was never discussed and no attempts were ever made to develop these list procedures into an independent and autonomous codifying technique for transnational commercial law. In fact, international legal practice has criticized the fact that the existing lists were not found in the normal places to which judges, arbitrators and lawyers could turn: '[t]he occasional law review article is no substitute for a code or, in common law jurisdictions, line of judicial opinions.'

Lists of this kind were drafted both in the field of public international law (on the basis of Art. 38 (1) (c) of the ICJ Statute) and in the area of transnational commercial law. The first substantial effort in this direction was made by Georges Ripert. In 1933 he presented a comprehensive collection of general principles of private law which, in his view, could also be utilized in the field of public international law. He referred to ‘modern trends towards the unification of domestic private laws’ and referred in this context to the work of the newly founded UNIDROIT and the drafting of the Franco-Italian Obligation Law. Ripert regarded these developments as a strong indication for the existence of common principles and rules ('fonds commun') in the legal systems of the world.

In 1956, Josef Esser, who was strongly influenced by the works of Ripert, was amazed to see 'what a long list of such universal institutions could be found in the field of private law alone' and used this research for his own collection of general principles of private law. In 1953 Bin Cheng devoted a maus opus to the collection of general principles of public international law. This collection included principles that were derived not only from private law but also from general procedural law and genuine public international law. All of these studies were limited to the collection of general principles of law which are mentioned in Art. 38(1)(c) of the ICJ Statute. They do not take account of the economic aspects of transnational law such as customs, usages and the case law of international arbitral tribunals which play such a pivotal role in the evolution and development of the NLM. These lists therefore only reflect one aspect of the NLM doctrine: the reception of general principles of law. Nevertheless, for this limited purpose, these studies present valuable guidelines for the development of a modern theory of 'Creeping Codification' of transnational commercial law.

In the field of international commercial arbitration, various attempts have been made in the past to draft lists of general principles and rules of an autonomous world trade law. In 1993, the ‘Institute of International Business Law and Practice’ of the ICC and the Committee for International Commercial Arbitration of the International Law Association presented a study on ‘transnational rules in international commercial arbitration’ which contained a detailed analysis of various
principles of the NLM. The fathers of the NLM doctrine, Goldman, Fouchard, and Schmitthoff, always included in their theoretical considerations a list of rules and principles of transnational commercial law. These lists have been completed and refined through the studies of Mustill, Paulsson, Blessing and other authors from the field of international commercial arbitration. Molinaux has presented a list of principles that is said to be part of a 'lex constructionis' as a distinct legal area from or within the NLM. Magnus and Ferrari and others have derived general principles from the CISG. Academics from the Garrigues Chair of Global Law at the University of Navarra in Spain have published a voluminous list of 1,000 principles, rules and aphorisms of 'Global Law'. It is this process of refinement and consolidation which makes the idea of an open-ended list of the NLM so valuable for international legal practice.

In its January 1997 Newsletter, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) presented a list of 26 legal principles that were up to then adopted by the arbitral tribunals in cases arbitrated under the auspices of the Centre. Interestingly enough, the structure of CRCICA's list is very similar to the TransLex Principles reprinted in Annex III of this Study. Starting with such basic notions as 'pacta sunt servanda' and 'good faith', the list also comprises more concrete rules relating to such basic and fundamental issues as 'penal clauses', 'force majeure', 'navigation agents of shipping lines', 'interest for delay', 'the causality relation', 'responsibility of the consulting engineer' and 'contractual liability'. It is important to note that this is the first time that a renowned international arbitral institution has made use of the list-idea to publish a compilation of principles without recourse to any domestic legal system. A more recent list has not been published by the Centre. However, since 1985, the awards rendered under the auspices of the CRCICA have been published in two collections, thereby creating more transparency with respect to the way in which the arbitral tribunals acting under the rules of the Centre have reached their conclusions.

Finally, in an ICC Award rendered in 1996, the arbitral tribunal applied the NLM and listed 8 principles and rules which, in its view, form part of the NLM. This is the first international arbitral award, in which the arbitral tribunal did not content itself with a mere definition of the NLM and the restatement of one single rule which it needed for the resolution of the particular legal issue before it. Instead, it listed a whole number of these principles and rules in order to make its award more palatable and persuasive for the parties and the courts which will be called upon to enforce the award.

The inherent potential of this codification technique is not only reflected by its adoption by international arbitral institutions but also in the substantial growth which these lists have witnessed in the past years. While the initial lists contained only five, seven or nine principles, Mustill was able to present a list in 1987 that included twenty principles and rules of transnational commercial law. Goldman’s view that the principles and rules contained in these lists would provide sufficient material to solve the overwhelming majority of legal issues that occur in international commercial disputes appears overly optimistic. Mustill himself acknowledges that his list merely reflects the contents of the NLM as it is alleged by the proponents of transnational commercial law. Mustill himself had considerable reservations about some of the principles.

2. Contribution of the Lists to the Discussion of the New Lex Mercatoria Doctrine

The lists do not only perform an important function as a bridge over the 'abyss between doctrinal formula and practical thinking'. They also have an independent scientific value for the further evolution of transnational commercial law. Through abstraction from the various sources of transnational commercial law, they provide a realistic picture of the contents of the NLM, thereby filling the theoretical discussion with practical life and verifying the thesis of the existence of an autonomous transnational commercial legal system. This theoretical aspect has important repercussions on transnational legal practice. The list provides a clearly defined, flexible legal framework for the controlled application of the NLM. It has been characterized as the 'coup de grâce' for the NLM doctrine that the tremendous amount of academic attention devoted to it has only given rise to a very limited number of principles. The consolidation and automization of transnational commercial law that goes along with the drafting of these lists can therefore be viewed as a basic prerequisite in regarding the parties’ reference to the NLM as a genuine choice of law. The resulting inclusion of the NLM doctrine in traditional conflicts of law concepts ensures that arbitral awards based on autonomous world trade law will not be set aside by domestic courts. The same applies to a refusal of recognition and enforcement of international arbitral awards abroad unless the award suffers from a general grave mistake in the application of the law that has been described above. This is in line with the ‘Resolution on Transnational Legal Principles’, adopted by the International Law Association on its 65th conference on April 26, 1992, in Cairo. This Resolution established a direct link between the validity of international arbitral awards based on the NLM and the consolidation and stabilization of transnational commercial law.

Finally and most importantly, the idea of drafting an open-ended list of principles and rules of the NLM does away with one of the major objections raised against the NLM doctrine: the criticism that this allegedly unstructured and heterogeneous legal mass poses considerable problems for everyday legal practice because its contents is so difficult to
determine. These lists therefore prove that the NLM doctrine is still alive and in a process of constant evolution.

3. The Role of General Principles of Law

Transnational commercial law which is focused solely on general principles of law or on technically detailed legal rules is not viable. This is reflected in the experience with the project of the American Cornell Law School, which focused solely on the technical issue of the formation of international contracts\textsuperscript{60} and the judgment of the Vienna Supreme Court, which set aside an arbitral award that was based solely on the principle of good faith\textsuperscript{61}. General principles such as ‘good faith’ and ‘\textit{pacta sunt servanda},’ although prominent in every list, do not constitute vague \textit{formulae} that are intended to invite decisions in equity that are totally detached from any legal considerations\textsuperscript{62}. While vagueness and flexibility do not necessarily constitute attractive elements of transnational commercial law\textsuperscript{63}, it is impossible to regard transnational commercial law as a set of clearly defined, detailed legal rules. Rather, every attempt to codify the NLM involves a sound mixture of detailed legal rules and general principles as well as standards of conduct (‘\textit{obligations de comportement}’)\textsuperscript{64}. In spite of their necessary vagueness and generality these general principles provide a vital function within the system of transnational commercial law:

‘\textit{Le droit international économique connaîtra rarement la précision méticuleuse du droit des traités. Il est « impressionniste » et non « pointilliste ». Cette malléabilité n’empêche pas les normes du droit international économique d’exister, d’être strictement appliquées, de faire preuve d’effectivité et enfin d’être sanctionnées – sans doute grâce à des techniques inusitées et inconnues du droit international classique}’\textsuperscript{65}.

These general principles of law play an important, dual role in the drafting of lists of the NLM.

a. Genetic Function of General Principles of Law

The origin of many of the rules and principles contained in the various lists may be traced back to the basic notion of good faith. For example, the right to set-off mutual claims is based on the idea that it would be against good faith if a creditor require performance of an obligation from his debtor if the creditor would have to return immediately what he has received from the debtor (‘\textit{dolo agit, qui petit, quod statim redditurus est}’)\textsuperscript{66}. A particularly important aspect of good faith is the prohibition of contradictory conduct (‘\textit{venire contra factum proprium nemini licet}’). Even though the latter principle is ‘still far away from a sufficient normative solidification’\textsuperscript{67}, it lies at the roots of many of the more detailed rules and principles contained in the list. The principle thereby serves as a perfect example for the inductive development of special rules within the system of transnational commercial law. Thus, the principles of ‘\textit{volenti non fit iniuria}’ as well as the general prohibition of a state or state-controlled entity to deny its contractual obligations with the reference to its internal law, is based on the idea of ‘\textit{venire contra factum proprium}’. That principle forms part of public international law and is reflected in Art. 46 of the Vienna Convention on the Law of Treaties. As one of the first principles of the NLM, it has been codified in domestic law in Art. 177 (2) of the Swiss Statute on Private International Law\textsuperscript{68}. The idea of liability for breaking off negotiations in bad faith can be traced back to the prohibition of ‘\textit{venire contra factum proprium}’ and its Anglo-American counterpart, the idea of ‘\textit{promissory estoppel}’\textsuperscript{69}. The general principle, as well as the detailed rules derived from it, all hint at a subordinate idea pertaining to the codification of transnational law. They provide strong indications for the development of a general principle of transnational liability for disappointing the confidence of the other party in the performance of one’s own obligations\textsuperscript{70}. From the perspective of German law, this development finds further support in the strong interaction between the idea of confidence and faith of one party in the performance of the other party’s obligation and the general prohibition of ‘\textit{venire contra factum proprium}’\textsuperscript{71}. The development towards a transnational principle of liability related to this aspect of confidence is reinforced by the special role which confidence and faith play in the doctrine of international contract law\textsuperscript{72}.

b. General Principles of Law as Reference Points for Valuation Processes Within the System of the New Lex Mercatoria

Within the complex process of developing an autonomous system of transnational commercial law, general principles of law such as ‘good faith’ and ‘\textit{pacta sunt servanda}’\textsuperscript{73} perform an important ‘classification and evaluation function’\textsuperscript{74} with respect to the legal character and application of rules and standards contained in that system. This phenomenon is exemplified by the duty to renegotiate. The origin, contents and character of this duty are influenced by the principle of good faith and are also linked to other general principles such as ‘\textit{clausula rebus}’. A new rule that is being discovered as an element of the NLM always has to be harmonized with the general principles that form the basic pillars of transnational commercial law\textsuperscript{75}. Indeed, the constant interplay between legal rules and principles described above in the context of the UNIDROIT Principles\textsuperscript{76} is also decisive for the evolution of the NLM in general\textsuperscript{77} and for the structure of the lists in particular. As has been stated by an international arbitral tribunal:
‘The application of international principles of law offers many advantages. They apply in a unique manner and they are independent of the particularities of any domestic legal system. They take into account the particular needs of international relations and allow a fruitful exchange between the systems which are often linked to conceptual distinctions in an exaggerated manner on the one hand and those who seek just and pragmatic solutions of individual cases on the other. It is thus an ideal opportunity to apply [in this arbitration] what is more and more called lex mercatoria'.

In the context of the NLM, general principles of law perform a function that is similar to that of domestic legal systems in that they provide the substratum for the development of new legal rules. Because of their genetic function as the drivers of the NLM, the argument that general principles of law should not be included as sources of the NLM because general principles of commercial law do not exist must be rejected. Every legal system, whether commercial or not, requires some basic standards and principles out of which new rules can be developed. It is their fundamental legal character and not their commercial nature which qualifies general principles of law as constituent elements of the NLM.

Frequently, the lists reproduce legal principles in their original Latin terminology. This ‘Latin approach’ is evidence that the dogmatic basis of these principles can be traced back to classical Roman law. The reference to the Roman origins of many of the rules and principles contained in the list provides another important aspect of the research on which the list is based. It is interesting to note in this context that the voluminous list of 1000 principles, rules and aphorisms of ‘Global Law’ published by the Garrigues Chair of Global Law at the University of Navarra in Spain contains only Latin principles and rules which are reprinted therein together with reference to international legal materials and the reprint of the original Latin text of the Roman Digest in which some of these principles and rules have their roots. This historic approach reflected in the Latin maxims finds support in the drafting process of the Dutch Civil Code. Even though this code is based on substantial comparative research, the drafters have emphasized the Roman origins of many of the rules and principles contained therein. Also, reference to the Roman origins of the rules and principles that are part of the NLM provide an important complement to the various sources of contemporary law such as the case law of international arbitral tribunals, international contract forms, general conditions of trade and the scientific discussion of the NLM doctrine. The historic references thereby add to the legitimacy of the NLM as an autonomous transnational legal system.

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

4. The Open-ended Character of the List

Even though the list performs an important function as a ‘focal point’ for the Creeping Codification of the NLM, this should not be confused with a definite manifestation and petrifaction of transnational commercial law.

Gaillard maintains that the idea of drafting lists of principles and rules of the NLM is based on a misconception of the true nature of transnational commercial law. In his opinion, the contents of the NLM cannot be derived from a simple list, but instead result from the application of a certain comparative methodology. The legal rules and principles that constitute the contents of the NLM may not be determined in advance, but only on an ad hoc basis, i.e. once a dispute has risen on the basis of the directives given by the parties or, in the absence of such agreement, by applying the functional comparative method. Gaillard maintains that this approach does not require any further efforts by international arbitrators and counsel than the classical doctrines of private international law. Likewise, Goode argues that the ex ante determination of the contents of the NLM is not in the interest of parties to international transactions and that this determination should be left to the arbitrator who has to decide a concrete case:

‘No doubt it is possible after the event for an arbitrator, armed with all the relevant facts, to identify a rule of the lex mercatoria applicable to the case in hand. It is quite another to extrapolate from this ex post identifiability the ex ante ability to determine that the lex mercatoria would be suitable as a governing law for a dispute that has not yet arisen and the nature of which may be difficult, if not impossible, to foresee'.

This view must be rejected for two reasons. First, it underestimates the considerable problems that are related to the determination of the contents of the NLM. These problems were exemplified in the Eurotunnel arbitration. Gaillard maintains that it was the methodical task of the arbitrators in this case to ascertain the relevant jurisdictions from which
the general principles, referred to in the complex choice of law clause of the construction contract, should be derived. In actual practice, however, the arbitrators decided to have recourse to the UNIDROIT Principles as a pre-fabricated set of rules of authoritative persuasiveness. Thus, the pragmatism of international arbitral practice lends itself much more to a decision-making method with sufficient room for the further development of the NLM. This leads to a constant process of cross-fertilization between the decision-making of international arbitral tribunals and the list. The list derives substantial input from the case load of international arbitration, while international arbitrators may use the list and the comparative references contained therein to develop or ‘discover’ new rules or principles of this transnational commercial legal system. This means that the lists are never ‘completed’ or ‘closed’. Although in its initial form a list may not contain the solution to a certain legal issue of transnational law, a later version may include a principle or rule that has been acknowledged in international arbitral or contract drafting practice. Here lies the decisive advantage of this non-formalized codification procedure as compared to the formalized approaches taken by the UNIDROIT Working Group and the Lando Commission. The work of these groups had to be ‘finished’ at some point in time. Even though the 2004 version of the Principles show that there is a possibility for both the amendment and the updating of the UNIDROIT Principles, such process always require the initiation of a new formalized procedure within the Working Group and within UNIDROIT. Updating the list through Creeping Codification, however, does not require a formalized procedure of that kind and can therefore be effected through a constant dialogue between arbitral practice, legal science and the academic institution that is responsible for the list. It is for this reason that the list contains a ‘more or less complete collection of principles’ which reflect the lex mercatoria in its present form. The progressing quality of comparative science necessarily leads to an increase in the sophistication of existing lists. As a consequence of this dialectical process between comparative science and (arbitral) practice, new principles will be added to the list and existing ones will be refined or even substituted by others. In spite of the uncertainty that is necessarily connected with the drafting of the list as a process of the constant evolution and change, the list still provides the necessary prerequisite for the practical acceptance of the NLM: the list creates ‘a certain degree of predictability’ for the resolution of legal conflicts, thereby guaranteeing more legal certainty in transnational dispute resolution. This provides parties to international contracts with a certain basis for ‘conflict avoidance’ through planning and drafting techniques thereby depriving the NLM of the aura of a ‘laissez faire-doctrine’.

At the same time, the goal of achieving legal certainty is not seen as an end on its own. Rather, the list technique leaves enough room for a teleological evolution of the NLM. The application of the NLM in practice therefore always oscillates between two extreme positions without ever reaching either: a decision in equity or a decision according to codified written law. Both aspects influence the doctrine of a transnational autonomous law, but taken alone they would mean the failure of the NLM doctrine.

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 and the case law of international arbitral tribunals 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 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. The list contained 39 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 44 principles and rules.

It was Norbert Horn, one of the most important proponents of the NLM doctrine in Germany, 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.

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 69 principles and rules of the NLM. 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. 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 78 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 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. 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’.

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’, 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. 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.

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, www.tldb.de) 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'.

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’ quality of the platform, while maintaining the acronym ‘Tldb’. The platform was also transferred from a ‘.de’- to a ‘.net’-domain (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 www.trans-lex.org:

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

TransLex was launched at the final rounds of the *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 **Lando Principles**, 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 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;
3. 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 key legal terms of transnational commerce, e.g. ‘force majeure’, ‘hardship’, ‘best efforts’, ‘time is of the essence’, ‘FOB’, ‘CIF’ etc.;
6. to supplement or correct a future European Civil Code in international commercial disputes;
7. to provide legal know how about modern commercial law to developing and transition countries;
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.

c. Features of the TransLex Principles: The Online Codification Process

Apart from its online character, the list contained in the TransLex Principles differs from the lists published in the four books mentioned above in various respects.

aa. Content and Structure of the List

A first major difference relates to the content and structure of the list. As of October 2009, the TransLex Principles contained 128 principles and rules of the NLM. The list begins with very general principles of good faith and the standard of reasonableness. It also contains very detailed and specific rules on such issues as agency, contract interpretation, the consequences of non-performance, force majeure and hardship, interest claims, unjust enrichment, expropriation, international commercial arbitration, and conflict of laws. The scope of the list thus goes far beyond international contract law. The principles and rules contained in the list, either on their own or in their combination, allow for the resolution of the vast majority of international business disputes. TransLex therefore does away with the longstanding criticism that the tremendous amount of academic attention devoted to it has only given rise to a very limited number of workable principles.

Unlike their predecessors which were published between 1992 and 1999, the TransLex Principles are not an unorganized compilation of principles and rules of the NLM. Instead, they are structured in 14 Chapters which are accessible through 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 ‘Rôles d’Oléron’ , were not an unsystematic compilation of rules and principles. Rather, they contained a coherent set of rules corresponding in broad terms to the chronology of a sea voyage.

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 hundreds of comparative law references (doctrine, arbitral awards, court decisions, national legislation, international restatements, model laws, model terms), most of them in full-text versions. It is one of the main tasks for the members of the CENTRAL Research Team to collect on a continuous basis new materials and upload them onto the platform. Reproduction of these sources has always been a key feature of the four lists published before the Tldb was launched and is also a key feature of TransLex. Apart from its online character and scope, which is not limited to contract law, it is that feature which distinguishes the TransLex Principles from the UNIDROIT and Lando Principles . The experience with the American Restatement of the Law of Contracts reveals the tremendous significance which these references have. It was for this reason that the Lando Commission decided to include notes with comparative law references (without, however, reproducing their full texts) in its Principles of European Contract Law and not to follow the example of the UNIDROIT Working Group . The references guarantee the transparency which is necessary for a worldwide acceptance of the TransLex Principles and the rules and principles contained therein.

The documents which constitute the comparative law references are reproduced on the platform in PHP-format but can be downloaded as formatted and unlocked pdf-files. A sophisticated search engine developed specifically for the TransLex Principles by the CENTRAL technicians and equipped with a large variety of search-filters allows the user to search for specific principles, rules or documents. When searching for a principle or rule, the search engine always produces the black letter text of the relevant principle as the first search result. While working with TransLex, users can suggest further references through the ‘suggest a reference’-feature that was programmed into the platform for every principle or rule. This feature, together with the idea of a blog-like discussion forum on transnational law which will be implemented in the future, realizes the idea of a ‘worldwide data-communication network’ that was suggested in the German version of the first edition of this book. TransLex also contains a ‘genesis’ function which is intended to create transparency of the ‘codification’ process by explaining the history of a given principle or rule throughout the codification process within TransLex. Embedded in the programming of the platform but not yet activated is an ‘annotation’ feature which allows the CENTRAL Team to issue annotations and comments for individual principles or rules contained in the list.

bb. Formulation and Reformulation of the Principles and Rules contained in the List

A second major difference relates to the way in which the principles and rules are formulated in the lists. This difference is due to the different purposes of the book- and the online-lists. The purpose of the book-lists was limited to furnishing
proof of the existence of the ‘constituent elements’ of the NLM. Therefore, those lists simply reflected the technical term of the relevant principle (e.g. ‘bona fides’, ‘pacta sunt servanda’, ‘hardship’, ‘force majeure’) and provided comprehensive comparative references for each principle and rule contained in the lists. The book-lists did not contain the black letter text of the principles and rules contained therein. That approach was changed in the online-lists. The change was prompted by the UNIDROIT and Lando Principles which attempted for the first time to formulate the black letter text of the rules and principles of international contract law in a restatement-like fashion.

Contrary to the international restatements, however, the text of the TransLex Principles is not carved in stone but has always been, still is, and will always be subject to constant review, textual refinement and adaptation to new developments in international business practice by the CENTRAL Research Team. This is another indication of the special character of the Creeping Codification which relates not only to the continuous expansion of the lists, but also to the constant improvement of principles and rules already included in the lists. The changes are also reflective of the different underlying purpose of the online-lists. Rather than being mere archives of the nomenclature and abstract contents of the NLM, the online lists are also intended to provide the international practitioner with a workable tool to apply the NLM in practice.

Three examples reflect the textual changes which many of the principles and rules contained in the online-lists have undergone over the past years. In the first version of the Tldb, the ‘good faith principle’ was formulated in the following words:

‘No. I.1 – Good faith and fair dealing in international trade

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

In the current version of the TransLex Principles, the same principle is formulated in a broader fashion:

‘No. I.1.1 – Good faith and fair dealing in international trade

(a) Parties to international business transactions must act in accordance with good faith and fair dealing in international trade. This standard applies to the negotiation, formation, performance, and interpretation of international contracts.

(b) The standards and requirements imposed on the parties by this Principle vary depending on the individual circumstances involved, such as the trade sector in which the parties are operating, their size and degree of professional sophistication, and the nature and duration of the contract.’

The textual and structural changes reflected in the two versions are not due to a change in the substantive meaning of the principle. Rather, they are intended to provide more guidance to international legal practice for the application of this very general and basic legal principle. At the same time, the new subsection (b) makes it clear that the application of the good faith principle is never a purely mechanical process, but always requires a determination of what is deemed to be a proper conduct of a party on an ad hoc basis, taking into account all circumstances of the concrete case. This analysis must include the nature of the contract itself. Thus, the reference to the ‘duration of the contract’ in subsection (b) is meant to indicate that the time factor may play an important role as an ‘amplifier’ for the parties’ duties imposed on them by the good faith principle. Thus, in long-term, ‘relational’ contracts, the principle of good faith will almost always impose increased duties of good faith on both parties as compared to ‘one off’ exchange contracts.

A second example relates to the principle of nominalism. In the Tldb, that principle was phrased in the following words:

‘No. IX.3 – Nominal-Value Principle

Unless otherwise agreed by the parties, each party bears the risk of currency depreciation (nominal-value principle).’

In the TransLex Principles, the same principle is formulated as follows:

‘No. V.2.3 – Nominalistic Principle

Unless otherwise agreed by the parties (e.g. in “value-stabilization clauses” or “index-linking clauses”), a claim for payment in a certain currency entitles the creditor only to the contractually specified amount of that currency (nominal value), irrespective of any fluctuations of the currency in which the debt is expressed between the date of concluding the
contract out of which the claim arises and the date of payment.’

Again, the textual changes do not reflect a change in the substantive meaning of the principle. Rather, they were influenced by a recent study on force majeure and hardship in international contract law.\textsuperscript{138}

Finally, the ‘force majeure’ principle, which has always been a key principle in the lists, was formulated in the original version of the Tldb in the following words\textsuperscript{139}:

‘No. 3 – Force majeure

If non-performance of a party is due to an impediment which is beyond the reasonable control of that party and could not have reasonably been foreseen by that party at the time of conclusion of the contract, such as war, civil war, strike, acts of governments, accidents, fire, explosions, natural disasters etc., and neither the impediment nor its consequences could have been avoided or overcome by the non-performing party (“acts of God”, “force majeure”, “höhere Gewalt”), that party’s non-performance is excused. If non-performance is temporary, performance of the contract is suspended during that time and that party is not liable for damages to the other party. If the period of non-performance becomes unreasonable and amounts to a fundamental non-performance, the other party may claim damages and terminate the contract.’

In the TransLex Principles, the same principle has undergone substantial textual and structural changes:

‘No. VI.3 – Force majeure

(a) If non-performance of a party is

i) due to an impediment which is beyond the reasonable control of that party and

ii) could not have reasonably been foreseen by that party at the time of conclusion of the contract, and

iii) neither the impediment nor its consequences could have been avoided or overcome by the non-performing party (“Acts of God”, “Force Majeure”, “höhere Gewalt”), and

iv) the non-performing party did not assume, explicitly or implicitly, the risk of the occurrence of the impediment

that party’s non-performance is excused.

(b) If non-performance is temporary, performance of the contract is suspended during that time and that party is not liable for damages to the other party. If the period of non-performance becomes unreasonable and amounts to a fundamental non-performance, the other party may claim damages and terminate the contract.

(c) Unless otherwise agreed by the parties expressly or implicitly, Force Majeure events under subsection (a) above are impediments such as

i) war, whether declared or not, civil war or any other armed conflict, military or non-military interference by any third party state or states, acts of terrorism or serious threats of terrorist attacks, sabotage or piracy, strike or boycott, acts of governments or any other acts of authority whether lawful or unlawful, blockade, siege or sanctions, or

ii) accidents, fires, explosions, plagues, or

iii) natural disasters such as but not limited to storm, cyclone, hurricane, earthquake, landslide, flood, drought etc., or

iv) any event of a similar nature.

(d) Where the obligee has been prevented by a Force Majeure event as defined in (a) above from causing a limitation period to cease to run, the limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.’

As in the case of the good faith and nominalistic principle, most of the changes 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
force majeure principle in the Tldb was not very user-friendly. To address that concern, the prerequisites and legal consequences of the force majeure principle were expressed 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 subsection provides an example of 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 process. For example, ‘piracy’ was added very early after the launch of the Tldb to take account of the increasing use of piracy, e.g. in the Gulf of Aden, offshore Lagos in Nigeria and in other places of the world. The events ‘acts of terrorism or serious threats of terrorist attacks’ contained in subsection (c) I were added to the list as a reaction to a change in the force majeure drafting practice of many companies after 9/11. However, the wording of the introductory phrase of that subsection (‘such as’) and of subsection (iv) (‘any event of a similar nature’) make it clear that the list of force majeure events contained therein is non-exhaustive. Therefore, the changes made did not cause a change in the substantive content of the force majeure principles. Rather, they served to clarify its extended scope in international contract practice as a reaction to the changed realities of the global economic environment.

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

It becomes obvious from this description of the technical features of the Creeping Codification process why the term ‘codification’ used in the context of the TransLex Principles must not be confused with the traditional notion of codification by domestic legislatures. There is a natural temptation to fall into this trap because the code, once thought quintessential to private law in the state, is translated into realms outside the state. Some even argue that the use of traditional ‘codification’ techniques might serve to alleviate concerns raised by the proponents of the positivist, monistic and state-centred theory of legal sources against the NLM doctrine.

That view must be rejected for three reasons. First, traditional codification techniques are being increasingly criticized today. They are useful as technical tools to ensure legal certainty and uniformity of legal rules within a given jurisdiction. However, codification is not considered as an efficient means of reshaping society or improving the law. Reshaping and improving the law, however, are essential objectives for any codification of the NLM as law in action. It must also be noted that in today’s multi-faceted society, which is developing at high speed, the idea of the ‘code’ has been disenchanted. The recent developments in the EU which have lead to the creation of the DCFR, a code-like compilation of principles and rules of European private law, reveal that, in view of these intrinsic limits of traditional codification techniques, the term ‘codification’ may assume a new meaning in the near future. Such a development can be observed in the area of public international law where the notions of ‘codification’ and ‘progressive development of the law’ tend to merge, thereby giving a new and progressive meaning to the traditional notion of ‘codification’ known from domestic law-making. It is argued that even at the state level, such redefinition and modernization of the notion of ‘codification’ may involve the use of modern IT-technology:

‘Codification – perhaps it comes back in a completely new way, detached from the traditional literary understanding of lawmakers and statutory texts; perhaps as a database which is systematized and can be used in a systematic way through computer programs.’

Secondly, the idea of traditional codes and codification techniques is closely linked to the nation state, while transnational law is intended to de-nationalize international business law. Thirdly, while codification is not per se inconsistent with the NLM, the traditional notions of ‘legislature’ and ‘codification’ have no place in the context of the NLM doctrine. The NLM is created ‘bottom up’ by the international business community. It is not imposed on the parties to international business transactions ‘top down’ by a formal law-making process. Therefore, neither CENTRAL, UNIDROIT, nor any other academic or non-academic institution or organization can claim to be the ‘legislator’ of the NLM.

In fact, there is no single institution or formulating agency which possesses a ‘law-making monopoly’ for the NLM similar to that which state legislatures possess for domestic law and the reception of international law instruments. Rather, CENTRAL, through its TransLex Principles, acts as the ‘formulator’ or ‘chronicler’ of modern transnational commercial law. By formulating the principles and rules contained in the list and linking them to the comparative law materials, including arbitral case law and international Restatements such as the UNIDROIT and Lando Principles, in which they are reflected and which are reproduced on the platform, the TransLex Principles establish a presumption, i.e. prima facie evidence that the principles and rules reproduced in the list do in fact form part of the NLM. It is for this reason that it has been suggested that the name of the NLM should rather be principia mercatoria. It is precisely through this presumptive effect of the list that the Creeping Codification aims at making the application of transnational commercial law by international arbitrators easier. That task that has been aptly described by an international arbitral tribunal as follows:
'It is always a more difficult and more demanding task for a tribunal to decide a case by the only reference to, and guidance by, general principles of law, lex mercatoria etc., instead of simply having regard and applying the solution as provided for in a particular national law, its case law and doctrine; this is so because an arbitrator, who can simply apply a national law, may not have to scrutinize and to be concerned about the “validity” and “application-worthiness” of a particular provision; he may and will simply apply the law (sometimes adding his own regrets: dura lex sed lex). However, an arbitrator who has to reflect on those rules and principles which truly deserve to be called “general principles”, or forming part of the lex mercatoria (thus being carried by an international “communis opinio vel necessitas”), will have a much more difficult and responsible task to accomplish156 .

e. Updating and Developing the List

The purpose of reproducing the comparative references in the TransLex Principles is not limited to providing the 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 and for the development of specific rules from mere ‘candidates’157 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 was the major reason why the Web was chosen as a technical basis to implement this concept.

The process of adding a principle or rule158 starts with a concrete legal problem that appears in an international business transaction which became public through a dispute before an international arbitration (with a resulting award that was published) or a domestic court decision. The corresponding legal principle or rule is then developed on the basis of the functional comparative methodology, i.e. using a topical, problem-oriented comparative approach159 . This process accounts for the dual nature of the list, embracing both general principles of law as an abstract set of principles and the legal and/or commercial convictions of the international community of merchants. The process also considers the plurality of legal sources which account for the development of the NLM and which include public international law, uniform laws, the general principles of law, the rules developed by international ‘formulating agencies’, un-codified customs and usages, standard-form contracts, and published arbitral awards160 . These sources constitute the ‘raw material which has to be distilled into formally enacted or declared rules in order to become binding161 , in order to become part of the NLM as an autonomous legal system.

As far as the discovery of general principles of law and legal rules is concerned, the UNIDROIT Principles and the Lando Principles of European Contract Law may serve as a starting point for the comparative analysis. The restatements are not a source of the NLM in the proper sense162 , but they provide an initial indication for the existence of certain legal principles and rules on the transnational plane163 . Other lists of principles164 may also be included in the research but must be meticulously verified, as some do not contain any comparative references165 , while others merely repeat the contents of other lists without verifying the comparative legitimacy of the individual rule, principle or standard. An example is the list set up by Mustill, himself an opponent of the NLM doctrine.

In order to ensure this legitimacy, the research must include classical legal systems from civil and common law countries and ‘hybrid’ legal systems such as the civil code of the Canadian province of Quebec, the laws of Scotland, South Africa or of the US state of Louisiana and the special laws of foreign trade contracts of the countries of the former Eastern Bloc and of the People’s Republic of China166 . Also, the comparative analysis includes Part I of the Civil Code of the Russian Federation promulgated on January 1, 1995167 . The value of this law for comparative research is based on the fact that it is drafted upon the major codifications of civil law of continental Europe168 . The drafting process of the new Russian law was dominated not so much by Anglo-American legal notions and ideas but by the legal systems of Germany, the Netherlands and Italy. As a consequence of this comparative drafting approach, the new Russian law takes account of recent developments and statutes in the field of private law in Europe169 . Apart from its contents, the new Russian law is of particular significance for comparative research because it performs an important integrative function in the former Soviet Union. The law constitutes the beginning of a far-reaching and unified codification movement in the field of private law. Uzbekistan and Kazakhstan have adopted the Russian draft170 , and the Republic of Kirgizstan has promulgated a new civil code that is based on a previous draft of the Russian law171 .

The results derived from this comparative research may then be verified on the basis of international conventions such as the CISG172 and its predecessors, The Hague Sales Laws, and with reference to conventions of public international law, such as the Vienna Convention on the Law of Treaties of 1969. The CISG plays a pivotal role in this verification process for two reasons. First, the Convention is itself a first step towards the codification of the NLM in the field of international sales contracts173 . Secondly, many of the principles and rules contained therein have been derived from the practice of international arbitral tribunals which in turn are a driving force behind the development of an autonomous and transnational commercial legal system174 .
The second aspect in the development of the list relates to the question of whether general principles or rules are in fact supported by the conviction of the general community of merchants. Here, the verification process has to include the case law of international arbitral tribunals and those legal instruments which have been drafted by reputable international institutions, such as the ICC, and which constitute an amalgamation of commercial competence and experience. These ‘code-like’ instruments include the ‘Uniform Customs and Practices for Documentary Credits’ issued by the ICC and in effect in a revised version since July 1, 2007 (UCP 600), ‘Uniform Rules for Demand Guarantees’, and the INCOTERMS. Reference can also be made to the various projects of UNCITRAL, such as the Convention on Independent Guarantees or the work on a Standard Communication Agreement Pertaining to Electronic Date Interchange (EDI and EDI-Lite) as reflected in the UNCITRAL Model Law on Electronic Commerce. The various cross border payment-schemes such as SWIFT, CHIPS or CHAPS may provide important indications as to the existence of a commercial usage in the field of interbank payment. Standard Contract Conditions such as the ‘General Conditions For The Supply of Plant and Machinery For Export’, drafted by the United Nations Economic Commission for Europe in March 1953, and the ‘ORGALIME General Conditions for the Supply of Mechanical, Electrical and Related Electronic Products’ must also be included in the comparative research. Finally, the verification process has to focus on international standard form contracts and general conditions of trade such as the FIDIC-Conditions. The FIDIC-Red Book has greatly influenced the shaping of international construction law, as the new World Bank guidelines for procurement, which are incorporated into the World Bank’s loan agreements with its borrowers, prescribe the use of ‘Standard Bidding Documents’, the principal document of which is almost entirely based on the FIDIC-Red Book. This, of course, has given new authority to the influence of FIDIC on the shaping of international construction contract practice and also on the evolution of transnational commercial law in this area.

II. Summary

The restatements of international contract law presented by UNIDROIT and the Lando Commission have paved the way for the codification of transnational commercial law. Today, informal and pragmatic rulemaking prevails over formalized and overdogmatized doctrinal discussions. For the first time, a private group of academics and practitioners was able to show that the idea of a transnational commercial law is not an abstract subject developed in the academic ivory tower, but a practical working tool for the international practitioner. These projects have transformed the until now amorphous concepts of transnational commercial law into concrete and workable principles and rules for use by contracting parties, arbitral tribunals, and even national courts and legislatures. Focusing on the question of how to codify the NLM instead of being trapped in endless doctrinal discussions on the existence of this legal system has led the NLM doctrine out of the status of stagnation in which it had been trapped in the past. The perspective has changed dramatically. The question is no longer ‘lex mercatoria: yes or no?’ but rather ‘lex mercatoria: when and how?’.

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

The idea of 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 does not require a formalized procedure but is an ongoing process. The highly flexible, open access environment of the World Wide Web, combined with the innovative technical features of modern database 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, i.e. a reflection of the content of the NLM 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.

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2. See e.g. Ipsen, Private Normenordnungen als Transnationales Recht?, at 45 et seq., at 86 (‘There seems to be agreement that these lists portray the core of the lex mercatoria’) and 96 et seq.; Lando, Am.J.Comp.L. 2005, at 379, 384: [The] list is well documented and a remarkable achievement; its usefulness cannot be underestimated; Frischkorn, Eur. J. L. Reform 2005, at 331, 338 et seq.; Lando, Europ.Rev.Priv.L. 1997, at 525: ‘The Savignys want a creeping harmonization of [European] private law, to use an expression borrowed from the German writer Klaus Peter Berger’; Molinex, J. Int’l Arb. 2000, issue 1, at 147, 150: ‘... the list looks forward and provides an incentive for the future evolution of transnational commercial law as an open legal system ... There can be no doubt that this is a list which will become a sine qua non reference and ... a launch point for research for international arbitration practitioners and arbitrators’; Pryles, Mealey’s Int’l Arb. Rep., February 2003, at 1, 21, 25 et seq.; Blase, Die Grundregeln des Europäischen Vertragsrechts als Recht grenzüberschreitender Verträge, at 275, fn. 307: Brunner, Force Majeure and Hardship under General Contract Principles, at 12; see from the perspective of the Iran-US Claims Tribunal Brunetti, Arb. Int’l 2002, at 355 et seq. surveying the Tribunal’s jurisprudence relating to selected rules of the author’s list; see also Gopalan, J.L.&Com. 2004, at 117, 145; Metzger, Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, at 530, 543; Winiger, ASA Bull. 1992, at 565; Addor, AJP 1993, at 357, 358; Burgert, VersR 1993, at 36, 37; Hausmann, in: Reithmann/Martiny (eds.), Internationales Vertragsrecht, No. 3522; see generally for the drafting of ‘systematic surveys on the autonomous law practiced by arbitrators’ Stein, Lex mercatoria, at 167.


7. Thus, Paulsson and Mustill, who have both drafted lists of general principles and rules of transnational commercial law, are both active in the practice of international commercial arbitration.

8. Cf. Langen, Studien zum Internationalen Wirtschaftsrecht, No. 11.

9. Cf. also from the perspective of public international law Baade, in: Horn (ed.), Legal Problems of Codes of Conduct for MNEs, at 407, 413: ‘... whenever the volume of learned comment outstrips the supply of “hard” decisional law, and especially wherever scholarly discussion starts to feed on itself, it loses touch with reality’; cf. also supra Chapter 2 II.D.1.

10. Jenks (ed.), A Digest of English Civil Law (1921), at iii et seq.; see also Broom, A Selection of Legal Maxims (1939), at v: ‘If, then, it be true that a knowledge of first principles is at least as essential in Law as in other sciences, certainly in none is a knowledge of those principles, unaccompanied by a sufficient investigation of their bearing and practical application, more likely to lead into grievous error.’


12. For ‘per omnes locos tractare’ cf. Zippelius, Juristische Methodenlehre, at 81; cf. also Stein, Lex mercatoria, at 168.


23 Ripert, id., at 585; as to UNIDROIT see supra i.A.; see for the draft of a Franco-Italian Law of Obligations supra Chapter 3 I.A.

24 Ripert, supra note 168, at 586.


26 Esser, id., at 37.

27 Esser, supra note 171, at 346 et seq.


29 Cf. Esser, supra note 171, at 342: ‘The evolution of principles that are freed from the constraints of domestic legal history and law, is directly connected with international arbitral practice’; cf. also Stein, Lex mercatoria, at 169 et seq.

30 Cf. supra Chapter 2 II.A.2.c.

31 Cf. the contributions of van Houtte (changed circumstances and pacta sunt servanda), Bowden (L’interdiction de se contredire au détriment d’autrui), Bernardini (Duty to cooperate), O’Neill/Salam (Exceptio non adimpleti contractus), Rivkin (Force majeure), Hanotiau (Principles on calculation of damages) and Karrer (Interest) in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration, at 105 et seq.


33 Fouchard, L’Arbitrage Commercial International, at 423 et seq.

34 Schmitt Hoff, International Trade Usages, at 47.


37 Paulisson, Rev d’Arb. 1990, at 82 et seq. (limited to the case law of ICC arbitral tribunals).

38 Blessing, in: Böckstiegel (ed.), Die internationale Schiedsgerichtsbarkeit in der Schweiz (II), at 13, 68 et seq.


40 Molineaux, J.Int'l Arb. 1997, issue 1, at 55, 64 et seq.; see also for the application of ‘international rules of construction contracts’ in arbitral practice ICC Award No. 4650, YCA 1987, at 113.


42 Domingo/Ortega/Rodriguez-Antolin/Zambrana, Principios de Derecho Global, 1000 reglas, principios y aforismos jurídicos comentados, at 31 et seq.


44 Alam-Eldin, Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration, 2 Volumes.

45 ICC Award No. 8365, Clunet 1997, at 1078, 1079 et seq.; the principles listed in the award are: 1. pacta sunt servanda; 2. good faith; 3. duty to negotiate in good faith; 4. resolution of contract in case of substantial breach by one of the parties; 5. prohibition to prevent the performance of one’s own obligation through a wilful act; 6. venire contra factum proprium; 7. interpretation of contracts according to the principle of ‘ut res magis valeat quam pereat’ and 8. principle of implied consent by conduct.

46 See Arnaldez, Comment to ICC Award No. 8365, Clunet 1997, at 1080, 1081.

47 Cf. Schmitt Hoff, International Trade Usages, at 47 (five); Note, Harv. L. Rev. 1988, at 1816, 1826 et seq. (seven); Molineaux, supra note 186, id. (nine).


49 Goldman, Festschrift Lalive, at 241, 243.

50 Mustill, Arb.Int'l 1988, at 86, 110, fn. 82; cf. also Weise, Lex mercatoria, at 124.

51 Esser, Grundsatzz und Norm, at 335.


53 See Schwab, ZP 107 (1994), at 118; cf. for a more careful view Magnus, RabelsZ 59 (1995), at 469, 491: ‘… they seem to reflect generalized notions of the basic structure of mutual contractual relationships as a whole’ (translation by the author).


Gaillard, supra note 235, at 583.

See supra I.A.10.b.

Gaillard, supra note 235, at 585.

Cf. supra Chapter 2 II.A.1.a.

Cf. Goldman, Festschrift Lalive, at 241, 249 for the principles of defective contract formation, representation and form, which he initially did not consider to form part of the lex mercatoria.

Bonell, An International Restatement of Contract Law, at 24, 361 et seq.


Cf. for domestic law K. Schmidt, Die Zukunft der Codifikationsidee, at 75 et seq.; classical dialectic methods can therefore be used in the context of topical legal processes; in this context, they serve to apply legal principles, on which a general agreement has been reached, in order to use the combination of these principles and the weighing of interests as a means to arrive at a resolution of legal problems. see Horn, NJW 1967, at 601, 607.

Cf. for this ‘norm-creation-potential’ as ‘the real focal point of the discussion on the lex mercatoria’, Mertens, Festschrift Odersky, at 857 et seq.

Langen, Transnationales Recht, part I, Nos. 11 et seq.; Samuel, Jurisdictional Problems, at 248 mentions as one of the basic arguments against the lex mercatoria doctrine the lack of predictability of decision-making.

Cf. Esser, Grundsatz und Norm, at 343: ‘Instead of the primitive “either-or” of domestic law and equity, a universal practice of general principles of law in the sense of Art. 38 No. 3 of the ICJ-Statute is required more and more’ (translation by the author).

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

Cf. supra Chapter 2 II.D.2.

Berger, Internationale Wirtschaftsschiedsgerichtsbarkeit, at 374 et seq.

Berger, International Economic Arbitration, at 544 et seq.

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

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).

Berger, Formalisierte oder „schleichende“ Kodifizierung des transnationalen Wirtschaftsrechts, at 217 et seq.

See Berger, id.


Ipsen, Private Normenordnungen als Transnationales Recht?, at 104 et seq.; Kahn, in: Fouchard/Vogel (eds.), L’actualité de la pensée de Berthold Goldman, at 25, 26 et seq.

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

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 155.

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 165, 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.

129 Cf. supra Chapter 3 I.B.
130 Cf. supra I.B.2.b.
131 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’.
132 Berger, Formalisierte oder “schleichende” Kodifizierung des transnationalen Wirtschaftsrechts, at 213 note 11.
135 See Nassar, Sanctity of Contracts Revisited, at 161.
136 See e.g. Macneil/Gudel, Contracts: exchange transactions and relations, at 11 et seq., 177 et seq.
137 See Central List of Principles, Rules and Standards of the Lex Mercatoria, supra note 261, at 159.
138 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.’
139 See Central List of Principles, Rules and Standards of the Lex Mercatoria, supra note 261, at 156.
140 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.
141 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.
143 See supra Chapter 2.
145 Coing, ZVglRWiss 81 81982)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.’
146 Caroni, Gesetz und Gesetzbuch, at 125 et seq.
147 See supra Chapter 3 I.E. and Chapter 4 I.B.3.
148 Ferrante, in: Piergionvanni (ed.), From lex mercatoria to commercial law, at 121, 123.
149 See supra B.1.
150 Lachs, IJIL 1974, 1; Singh, IJIL 1978, 2; Jain, Codification and Progressive Development of International Law, at 4.
151 Zeh, in: Merten/Schreckenberger (eds..) Kodifikation gestern und heute, at 135, 144 (translation by the author, emphasis added).
153 See supra Chapter 2 II.G.3.c.
154 See Brunner, Force Majeure and Hardship under General Contract Principles, at 20 et seq.
155 See Highet, 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, fn. 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’.
157 Strömholt, Festschrift Zweigert, at 909, 910.
158 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.
159 Cf. supra Chapter 2 II.A.1.c.
160 See Lando, ICLQ 1985, at 747, 748 et seq.
162 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.

163 See Goode, ICLQ 1997, at 1, 26: ‘More significant is their availability as a tool for courts and arbitrators seeking to identify current norms of contract established by mercantile usage or general principles of law, to ascertain what in modern legal thinking are conceived as best solutions to typical contract problems …’; van Houtte, Arb.Int’l 1995, at 382, note 4: ‘The Principles will only be part of the lex mercatoria if they are recognized as such by the business community and by arbitrators’; cf. also Perales Viscasillas, Ariz.J.Int’l &Comp.L. 1996, at 383, 399; Raesche-Kessler, in: Institute of International Business Law and Practice (ed.), UNIDROIT Principles of International Commercial Contracts: A New Lex Mercatoria?, at 167, 174 et seq.

164 See supra 1.

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

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

167 See generally Solotych, Das Zivilgesetzbu.ch der Russischen Föderation, at 3 et seq.


169 Glöckner, id.; Waehler, id.

170 Glöckner, supra note 322, id.

171 Waehler, see supra note 322, at 29.

172 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.


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


177 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.

178 ICC Publ. No. 458, cf. Berger, DZWir 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 .

179 ICC Publ. No. 560; the materials mentioned are partly reprinted at v. Caemmerer/Schlechtriem, CISG, Annex V to VII.


182 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.


184 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.

185 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 22 European countries and provides liaison between these organisations in the legal, technical and economic fields.


187 Molineaux, id.

188 Cf. supra Chapter 2.


190 Bonell, ZIRV 1996, at 152.

191 Cf. supra Chapter 2 II.G.2.