A practical example for the application of the concept of transnational law in a domestic law context is the notion of the "internationally useful construction" of domestic law. The concept opens the door for a new era of dynamic statutory interpretation, i.e. an interpretation of domestic law in the light of transnational commercial law.

I. The Basic Approach

There is a basic methodical substratum for the development of an international methodology of interpretation based on transnational commercial law and on the Restatements of international contract law such as the UNIDROIT Principles of International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL). This view finds support in the general experience that the choice of the 'correct' method of interpretation in an individual case is always based on a teleological evaluation of the possible results with a view to ensuring the acceptability of the solution within a given social order. This method of construction, within the context of the individual legal problem and the socio-economic context of the case, plays an important role in any methodical question that is related to the issue of statutory interpretation.

The domestic judge or international arbitrator who applies a certain domestic law may therefore use this discretion to strive towards an internationally useful interpretation of that law. In transborder trade and commerce this will be a solution which is sensible under the economic circumstances of the case. If the parties have included a choice of law clause in their contract it can be assumed that they will accept a certain margin of possible decisions based on this law:

"In choosing a certain domestic legal system a party does not mean certain foreseeable solutions for legal problems that may arise out of the contract; rather, he accepts the characteristic margin of possible and correct decisions which is typical for the solution of these legal problems under that particular legal system."

Within this natural 'margin' the judge or arbitrator may decide to apply an internationally useful method of construction which finds a solution that takes into account the particularities of international trade and the economic interests of the parties.

II. An Example from Arbitral Practice

The concept of the internationally useful construction of domestic law has been applied in an ICC arbitral award from
1996. In that case the seller refused to pay the sales price. He based this refusal on a dramatic drop in the price of the product and currency depreciations in his country which made it impossible for him to receive adequate financing from his bank. In his view, the circumstances justified the hardship defence under Art. 6:258 of the Sixth Book of the Dutch Civil Code (Burgerlijk Wetboek, BW), the law applicable to the contract. The sole arbitrator rejected this argument. He hinted at Dutch legal doctrine which maintains that Art. 6:258 BW must be construed in a restrictive manner. To support this view in an international context, he interpreted Art. 6:258 BW in light of the UPICC. The arbitrator emphasized that Art. 6:258 BW is lex specialis to the general rule expressed in Art. 6:248 (2) and Art. 3 (12) BW, allowing the judge to consider certain contractual provisions inapplicable on grounds of reasonableness and fairness ("redelijkheid en billijkheid"). According to Art. 3:12 BW, "Dutch common opinion of law" is the determining factor to interpret the requirements of reasonableness and fairness in the Dutch Civil Code. In international cases, the arbitrator reasoned, this domestic common opinion is replaced "by the common opinion in international contract law". In his view, this international opinion is influenced in a decisive manner by the principle of the sanctity of contracts (pacta sunt servanda) as expressed in the UPICC, arbitral case law and international doctrine.

III. The Limits

The arbitrator's reference to domestic Dutch doctrine in the ICC Award reveals the limits of this approach. The theories on statutory construction are always domestic doctrines. Thus, this method of construction always remains subject to the constraints of the relevant domestic law. In accordance with this view, the arbitrator in the ICC Award reported above felt entitled to interpret the Dutch Civil Code in the light of the UPICC because he found support for his view in Dutch legal literature. Since the UPICC were considered by Dutch lawmakers in the preparation of the new Civil Code, the judge or arbitrator is entitled to use them as a sort of filter in international cases. The domestic law is viewed and analysed against the background of the Principles. A rule or principle of Dutch law is applied to the individual case only if it is in conformity with the UPICC. The comparative efforts employed by the Dutch lawmakers in the drafting process justifiably compare the comparative approach in the practical application of the law in legal practice. This ensures that Dutch contract law is applied in a sensible and interest-oriented manner in international transactions.

It follows from the above that the mere existence of a Restatement of European contract law does not per se justify a fundamental change in these domestic theories on statutory construction. This is the price for their "soft law" character. Therefore, the viability of the "internationally useful" construction of domestic law always requires a solid dogmatic groundwork in the respective European jurisdictions whose law is applied.

In Germany, scholars maintain that in international contexts, the German Law on Standard Contract Conditions (AGB-Gesetz), as well as the general contract law of the German Civil Code and the German Commercial Code should be construed in the light of the PECL. The concept shall be applicable in all those cases where the law leaves room for flexibility, especially through blanket clauses, such as good faith, or the reference to trade practices and usages. Even in purely domestic cases, German doctrine looks at the approach of "modern lawmakers" such as the Lando Commission and the UNIDROIT Working Group. It is an open question in German legal doctrine whether the pre-contractual liability ("culpa in contrahendo") in case of breach of a duty of confidentiality involves a duty to pay compensation based on the benefit received by the party in breach. Canaris has argued that, in order to resolve this issue de lege lata, German doctrine should look at Art. 2.16 of the UPICC for guidance:

"The step [to accept a duty to pay compensation based on the benefit received] would find strong support in Art. 2.16 (2) UPICC. This would increase substantially the weight of this argument and would tip the balance in favour of such an approach, given that German legal doctrine is undecided and open on this issue. This would apply in particular if Art. 2.16 (2) UPICC is grounded on a broad comparative basis and does not result from a more or less isolated idea of its drafters."

IV. The Comparative Persuasiveness of the Restatements

The last sentence of Canaris' argument reveals the major problem with using the UPICC and PECL as ready-made comparative reference points for an internationally useful construction of domestic law. The Restatements are "comparative snapshots" without binding effect. Their usefulness results to a large extent from the mere fact that they exist and that they are formulated like black letter law without being "law" in the proper sense. Their use as a standard reference point, their time-saving effect as a means to substitute profound comparative analysis, depends on the comparative persuasiveness of every single rule or principle contained in the Restatement. This aspect is particularly relevant in those areas where the drafters of the Restatements have not merely selected the best solution from the legal
system compared but have "invented" new rules. There may be a presumption that these black letter rules reflect the comparative ratio scripta of international contract law. The user, however, must be able to convince himself of the depth and scope of the comparative research that underlies every single rule. This requires that the comparative research on which these principles and rules are based is disclosed to the user.

There is, however, a significant difference between the UPICC and the PECL with respect to the transparency of the comparative work on which they are based. In the UPICC, there are no 'notes' specifying the comparative references (statutory provisions of domestic laws, court judgements, arbitral awards, conventions, doctrinal writings etc.) on which the wording of the principle is based. The drafters intentionally left out references to national legal systems for two reasons. First, they wanted to emphasize the international, or rather transnational character of the UPICC, which are detached from any domestic legal system. Secondly, the omission of comparative references was intended to avoid highlighting the fact that in the preparation of the Principles, some legal systems played a more significant role than others. Thus, the comparative persuasiveness of the UPICC rests exclusively on the composition, authority and reputation of the UNIDROIT Working Group.

The PECL are different. Here, one finds a comprehensive list of comparative references at the end of each principle or rule. The list at the end of Art. 2:302 reveals that under Italian, Portuguese, Dutch, English and Scottish law, damages for misuse of information include the defendant's profits, while under Austrian, Belgian, Danish, French and Luxembourg law, only the aggrieved party's loss is compensated. Thus, the drafters of the PECL have made it clear that Art 2:302 (2) does not constitute the common core of the legal systems compared, but rather what the Working Group considered the "best" solution from an interest-oriented perspective. This approach cannot be criticised since the codification of the "best" or "most suitable" solution is a legitimate purpose of the functional comparative analysis. Art. 2:302 (2) may therefore be used as a means for the internationally useful construction of German contract law as suggested by Canaris. The difference is that the PECL allow the user to make his own judgement as to the comparative persuasiveness of the rule, while the UPICC do not reveal the comparative depth and basis of this rule to its user.

**Conclusion**

The concept of the internationally useful construction of domestic law may serve to overcome the deficiencies of domestic laws in international commercial disputes. However, it must be handled and applied with care in practice. It may not serve as a means to change or distort the law through the backdoor of interpretation. While international arbitrators must be regarded as authorized to develop and shape the laws which they are called upon to apply in a given dispute, an arbitrator may use the concept only if and insofar the applicable law leaves room to differentiate between purely domestic and international commercial cases.

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4 See Wichard, *op. cit. supra* n.2, at p. 300 suggesting that under German law, the Principles might influence the 'internationally useful interpretation' of Sec. 254 (duty to mitigate damages) and 275 (impossibility) of the Civil Code.
10 Schödermeier, *Sonderprivatrecht für internationale Wirtschaftsverträge*, p. 198: "All in all, the statutory construction according to the functional considerations of international practice is embedded in the values of the respective domestic legal system - there is trust in international practice, but it is controlled and verified according to the own fundamental legal values. Domestic laws can hardly be denied this influence." (translation by the author).
12 It is argued that due to this thorough comparative preparation of the Dutch Civil Code, the Dutch lawmaker "may have found its own style, based on continental-european ius commune", Zweigert/Kötz, *Einführung in die Rechtsvergleichung* (3rd ed. 1996), p. 101.
have long eluded common sense”.

14 Berger, op. cit. supra n. 1, at p. 190; Wichard, op. cit. supra n. 2, at pp. 300 et seq.


18 See for this dual purpose of the functional comparative analysis Berger, supra n. 1, at 147.


22 See supra n. 16.