

The Principles of European Contract Law and the concept of the “Creeping Codification” of law

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Abstract: The Principles of European Contract Law, along with other private initiatives such as the UNIDROIT Principles of International Commercial Contracts, pose new problems for legal theory. What is the status of such principles and how can they be used? Berger examines these issues from the perspective of “creeping codification” of transnational law – the idea that slowly and gradually by reference to such principles a uniform private law will emerge. The modern European situation re-enacts the debate between the Thibauts and the Savignys in 19th century Germany: the debate between those who propose early codification and those who seek to develop a political harmony between the law and its subjects. “Creeping codification” reflects the viewpoint of the Savignys. Principles and restatements may be used by national and supranational law makers (legislators and courts), referred to by the parties to an agreement, and built into legal education. This is a process which is already beginning to occur. The existence of specific, written principles rather than open-ended “general principles” of transnational law greatly facilitates the possibility of recognition and use. Because of their private origins, one of the tasks for the promoters of such principles is to ensure that they are well marketed, so that they can obtain maximum use. The “soft law” nature of such rules nevertheless renders them sufficiently flexible that they can easily be modified to suit new conditions and thus better reflect their environment.

Zusammenfassung: Die Grundsätze des Europäischen Vertragsrechts – wie andere private Initiativen wie zum Beispiel die UNIDROIT Prinzipien für internationale Handelsverträge – schaffen neue Problemstellungen für die Rechtstheorie. Welches ist der Status dieser Grundsätze und wie können sie angewendet werden? Berger untersucht diese Fragestellung vom Standpunkt der “schleichenden Kodifizierung” des transnationalen Rechts – der Idee, daß sich langsam und allmählich durch Bezugnahme auf solche Grundsätze ein einheitliches Privatrecht herausbilden wird. Die derzeitige Lage in Europa stellt die Neuauflage des Streits zwischen den Anhängern von Thibaut und Savigny im 19. Jahrhundert in Deutschland dar: Der Streit zwischen denjenigen, die eine frühzeitige Kodifizierung vorschlagen, und denjenigen, die die Entwicklung einer politischen Eintracht zwischen dem Recht

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und seinen Subjekten anstreben. “Schleichende Kodifizierung” spiegelt den Standpunkt der Anhänger von Savigny wieder. Prinzipien und Neuformulierungen mögen von den nationalen und supranationalen Gesetzgebern (Gesetzgebern im engeren Sinne und Gerichten) angewendet, von den Parteien zu einer Vereinbarung herangezogen und in die rechtliche Ausbildung aufgenommen werden. Dies ist ein Prozeß, der bereits begonnen hat. Die Existenz von eher spezifischen, niedergelegten Prinzipien im Gegensatz zu offenen “allgemeinen Grundsätzen” von transnationalem Recht fördert in hohem Maße die Möglichkeit der Anerkennung und der Anwendung. Aufgrund ihres privaten Ursprungs ist eine der Aufgaben für Förderer solcher Grundsätze, sicherzustellen, daß die Grundsätze gut vermarktet werden, um eine größtmögliche Anwendung zu erreichen. Der “soft law” Charakter solcher Regelungen gibt diesen gleichwohl genügend Flexibilität, damit sie zur Anpassung an neue Bedingungen leicht modifiziert werden und sie auf diese Weise ihre Umgebung besser reflektieren können.

Introduction

The publication of Part I and II of the Principles of European Contract Law (PECL) in December 1999 mark the beginning of a new era in the development of a truly transnational contract law. Like their counterpart, the UNIDROIT Principles of International Commercial Contracts (UPICC) published by the International Institute for the Unification of Private Law in Rome in 1994, the PECL stand for an informal development of the law from below. The Restatements of European and International Contract Law reflect a new phenomenon, the “Creeping Codification” of transnational law. It revives the famous dispute between Thibaut and Savigny about the right way to codify the law. At the same time, the PECL as well as the UPICC bring new momentum to legal teaching and legal methodology. The UPICC reflect the creation of a growing body of transnational commercial law, a new law merchant while the PECL may serve as the basis for a methodological *ius commune europaeum*, an indispensable prerequisite for the creation of uniform substantive rules of European contract law. Ultimately, they may pave the way for a European Civil Code.

On December 16, 1999 the new version of the Principles of European Contract Law (PECL) Part I and II¹ was presented at a conference organised by the Molengraaff Institute for Private Law in Utrecht. Since the drafting of a genuine European Civil Code is still a distant possibility², this presentation represents a milestone in the development of a modern *ius commune europaeum*, a genuine European contract law.

¹ O. Lando & H. Beale (eds), *Principles of European Contract Law*, Parts I and II, Kluwer Law International, Den Haag 1999, p4 et seq.

² In spite of two Resolutions of the European Parliament, see Resolution of 26.5.1989 (Doc A2-157/89, OJ 1989 C 158/89, 400) and Resolution of 6.5.1994 (Doc A3-329/94, OJ 1994 C 205/94, 518).

The idea to draft a Restatement of European contract law dates back to the early sixties³. In spite of this long lasting discussion, the emergence of Restatements of European or international⁴ contract law raises a variety of new legal issues hitherto unknown to traditional legal doctrine outside the USA. The PECL's quality as "soft law", their character as a "Restatement" which is not known in traditional European legal doctrine, provokes the question as to their precise legal effect and their impact on the development of European contract law. This article discusses these issues in the context of what has been termed "the Creeping Codification"⁵ of transnational law.

A. The concept of the "Creeping Codification" of Transnational Law

I. The meaning of the concept

The Oxford Dictionary explains that one possible meaning of "to creep" is "to develop slowly and steadily...in the hope of advancement".⁶ This linguistic approach reveals two important qualities of the concept of the Creeping Codification of the law.

I.1. Towards a revised understanding of the codification process: the informal creation of law

First, we are dealing with an informal codification process that develops outside the EU institutions and the domestic legislatures of the Member Countries. Creeping Codification stands for a reversal of the traditional legal process, i.e. for the advancement of the law from below, not through the formal means of the traditional codification process but through the "private" endeavours of academics and legal practice, sometimes under the umbrella of an international institution such as UNIDROIT. Restatements of contract law as well as other projects for the informal

³ See VAN HECKE, *De Conflictu Legum*, Sijthoff, Leyden 1962, p198 et seq.

⁴ See for the UNIDROIT Principles of International Commercial Contracts, M.J. BONELL, *An International Restatement of Contract Law*, Transnational Juris Publications, Inc., Irvington, NY, 2nd ed 1997, p105 et seq.

⁵ Cf. K.P. BERGER, *Internationale Wirtschaftsschiedsgerichtsbarkeit*, de Gruyter, Berlin 1992, p374, n. 196; K.P. BERGER, *International Economic Arbitration*, Kluwer, Deventer 1993, p543; K.P. BERGER, *Formalisierte oder "Schleichende" Kodifizierung des Transnationalen Wirtschaftsrechts*, de Gruyter, Berlin, 1996, p191 et seq; K.P. BERGER, *JZ* 1998, 369, 374; K.P. BERGER, *The Creeping Codification of the Lex Mercatoria*, Kluwer Law International, Den Haag, 1999, p210 et seq; K.P. BERGER, in CENTRAL (ed), *Transnational Law in Commercial Legal Practice*, Quadis Publ., Münster, 1999, pp121, 124 et seq; O. LANDO, in Centre for the Advanced Study of European and Comparative Law (ed), *The Harmonization of European Contract Law through a Restatement of Principles*, 1997, 1, 20.

⁶ Illustrated Oxford Dictionary, Olms Zürich, Hombrechtikon, 1998, p195.

codification of European and international contract and business law⁷ play a prominent role in this context. At the same time, the determination of their legal quality requires a rethinking of the traditional theory of legal sources. What is the legal relevance and quality of a set of legal rules and principles which are less than a code of domestic law or a convention of public international law but more than just a collection of certain legal rules contained in a law review article? Is the answer to this question depending upon the acceptance and use of the PECL over a certain period of time, similar to the *opinio iuris*-requirement of customary law? We will come back to these questions below.

I.2. The “Law in Action”-approach to the codification process

Secondly, the notion of the Creeping Codification of the law implies a gradual development over time rather than a “big bang” of a new Code. The Creeping Codification is not only informal, it is also a slow and steady process. It is never finished and always in the process of advancement towards more workable and practical rules.⁸ This particular quality of the Creeping Codification results from the special character of this area of law. Much more than any other area of law, contract law is living law, developing at an enormous pace and requiring a flexible and readily adaptable regulatory framework. This particular quality of modern civil law resembles the “ongoingness” and “vitality” of the former *ius commune*.⁹ It would be a mistake to capture this law in the tight meshes of a traditional codification. A European Civil Code, just as any other formal codification, would necessarily introduce a static element into this process. Legal certainty would be achieved at the price of inflexibility. Restatements and other forms of informal codification of contract law leave enough room for the adaptation of the law to new developments and for the creation of new transnational concepts and methods while maintaining an acceptable level of legal uncertainty. Also, these informal instruments could be adapted to the ever changing conditions of real life in a much faster and much more efficient way than any formal codification. The current preparation of a second edition of the UNIDROIT Principles¹⁰ as well as the relatively quick development from the first to the present version of the Lando Principles provide impressive proof of this proposition.

⁷ Cf. eg the *List of Principles, Rules and Standards of the Lex Mercatoria* developed by the Center for Transnational Law (CENTRAL) at Münster-University; K.P. BERGER, in CENTRAL (ed), *Transnational Law in Commercial Legal Practice*, *supra* n. 5, p146 et seq.

⁸ K.P. BERGER, *The Creeping Codification*, *supra* n. 5, p218 et seq.

⁹ See R. ZIMMERMANN, *Col.J.Europ.L. (Columbia Journal of European Law)* 1994/95, 63, 84 et seq.

¹⁰ See M.J. BONELL, in CENTRAL (ed), *Transnational Law in Commercial Legal Practice*, pp7, 41 et seq.

II. The “Thibauts” versus the “Savignys”

The contrast between traditional positivistic ideas of codification and progressive approaches to the development of the law as reflected in the recent emergence of Restatements of contract law reminds us of the famous dispute between Savigny and Thibaut about the codification of German private law in the 19th century. In fact, Ole Lando and Reinhard Zimmermann have repeatedly turned back the clock of legal history and have compared the current discussion about the codification of European private law with the dispute between Thibaut and Savigny.¹¹ In their view, those who advocate the drafting of a European Civil Code belong to the “Thibauts”, while those who favour the informal, Creeping Codification of private law may be called the “Savignys”.

Thibaut advocated the drafting of a German Civil Code. He was, however, far from favouring the impossible venture of a “complete” code covering every conceivable fact pattern. Instead, he combined a sound drafting approach with comparative legal thinking, thus revealing himself as a true comparatist. Thibaut emphasised this important comparative dimension of his quest for the codification of German private law in one of his several “Additions” to his famous pamphlet of 1814¹² published in the same year. In the seventh Addition we find the statement that:

“Our [German] understanding of legal history should comprise the laws of all ancient and modern people in order to be truly pragmatic. Ten learned lectures on the laws of the Persians and the Chinese would instil more legal understanding in our law students than one hundred on the terrible mistakes of the law of succession from Augustus to Justinian....one should give us a simple code drafted in clear language and in conformity with the spirit of our people. In this case our governments could demand without any injustice that every young law student who takes his law exam must study carefully the Greek speakers and his Cicero. Our law faculties will then have the pleasure that their law candidates, just as their counterparts in Oxford, will greet their leaders with odes in Latin and Greek”.¹³

Thibaut’s positivistic approach to the unification of German private law and, most important, to the codification of law in general, was strongly opposed by Savigny, a proponent of the “historical school of jurisprudence”.¹⁴ For him, law was necessarily “natural” in character. In his view, the core of every legal system is customary law (in a non-technical sense) developing through “the inherent and silent powers of

¹¹ See O. LANDO, *ERPL* 1997, 525; R. ZIMMERMANN, *Col.J.Europ.L.* 1994/95, 81: “In a way, ..., it is Savigny versus Thibaut all over again.”

¹² A. THIBAUT, *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland*, Mohr und Zimmer, Heidelberg 1814.

¹³ A. THIBAUT, in J. Stern (ed), *Thibaut und Savigny*, Wissenschaftliche Buchgesellschaft, Darmstadt 1959, p170 (emphasis added).

¹⁴ F. VON SAVIGNY, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, Mohr, Heidelberg 1814.

the people and not by the arbitrariness of a lawmaker".¹⁵ According to Savigny, "law grows with the people, is shaped by the people and disappears and dies away just as the people lose their identity".¹⁶ For Savigny this inherent relationship between the people and the law is the "political element", its academic treatment and development the "technical element" of law.¹⁷ In his eyes, "this living customary law is the true source of progress of society".¹⁸

These quotations reveal that there is a natural link between Thibaut's and Savigny's dispute over the organic or positivistic nature and development of domestic German law in the 19th century and the current discussion on the "right" way to codify European and international contract law.

III. The goals of the creeping codification of the law

The ultimate aim of the Creeping Codification of the law is the advancement of the creation of uniform private law through new and progressive means of "codification". These new forms have developed out of practical necessity. Some form of black letter law is needed for every type of law to make it workable in legal practice.¹⁹ The ultimate goal of this technique is therefore similar to that of the formal ways of creating uniform law. It is intended to reduce transaction costs, to create a level playing field for parties to cross-boarder contractual transactions, to overcome the uncertainties of the "jump in the dark"²⁰ of private international law and to serve as an important integrative force for the creation of a Single European Market.

There is, however, an important genetic difference between the traditional means of unification and the concept of the Creeping Codification of contract law. While the former has to fight with the sovereign prerogatives and traditional disinterest of domestic lawmakers for international matters,²¹ the latter is intended to overcome the severe disadvantages of the formalised unification process:²² the reluctance of domestic legislature to foster the unification of private law and to give up traditional legal concepts, the dependence of the success of such projects on the current political attitudes in the jurisdictions concerned, the risk that the time factor may cause such projects to be overtaken by the developments of reality and the NIMBY("not in my backyard")-argument²³ which very often stands in the way towards a widespread creation of uniform law.

¹⁵ F. VON SAVIGNY, id, p15.

¹⁶ F. VON SAVIGNY, id, p11.

¹⁷ F. VON SAVIGNY, id, p12.

¹⁸ F. VON SAVIGNY, id, p132.

¹⁹ See for arguments against the workability of the *lex mercatoria* concept in legal practice O. SANDROCK, *American Review of International Arbitration* 1992, 30, 50 et seq; M.J. MUSTILL, *Arbitration International* 1988, 86, 114 et seq.

²⁰ L. RAAPE, *Internationales Privatrecht*, Vahlen, Berlin, 5th ed 1961, p90.

²¹ Especially in the field of contract law which is not politically attractive to say the least.

²² See P. STEPHAN, *VJIL (Virginia Journal of International Law)* 1999, 743, 752 et seq.

²³ See R.M. GOODE, *ULR (Uniform Law Review)* 1991, 54, 60 et seq.

IV. Unity through Multiplicity?

Doing away with traditional “positivistic” approaches towards the creation of uniform law and favouring the concept of informal “creeping” codification, of the “soft-law” character of uniform European contract law, however, involves a new problem, the one of “unity through multiplicity”.²⁴ The notion of “private lawmaking” opens the door for as many projects as there are persons or academic institutions interested in the codification of European and transnational private law. The Restatement projects of UNIDROIT and the Lando-Commission as well as the CENTRAL List of Principles, Rules and Standards of the Lex Mercatoria²⁵ present excellent examples of this problem.²⁶ In the modern world of privately-made uniform law “a market for the product” UNIDROIT or Lando-Principles is said to exist, the development of a “widely diversified marketing strategy” is required for the success of the PECL²⁷ and the private or semi-private nature of these and other initiatives provokes the interesting issue of a “claim for copyright of the law”.²⁸

Behind these phenomena we find vital questions: How do the various projects fit together?²⁹ How do we deal with the problem of the battle of projects? To which set of rules should the arbitrator or judge refer in a concrete case? If one takes the concept of Creeping Codification seriously, these are in deed tough questions. On the other hand, the problems in this area should not be overestimated. What we are facing today with the multiplicity of projects is the emergence of a European and truly global legal culture which is developing outside the constraints of the domestic or EU-lawmaking process.³⁰ This informal process is shaped by the emergence of the Single European Market and the Global Market Place. Thus, the results which these projects achieve for the resolution of the manifold problems of contract law are not so different. In fact, these different vehicles are more often than not mutually supportive and supplementary of each other.³¹ The problem is rather one of determining the authoritative value of each of these projects and their relationship vis a vis each other in case of conflict. In fact, it is at this juncture that final word has not yet been said. We are faced with the question as to the dogmatic and methodological basis of the emerging doctrine of transnational law.³²

²⁴ A. ROSETT, *Am.J.Comp.L. (American Journal of Comparative Law)* 1998, 347, 348.

²⁵ See *supra* n. 5.

²⁶ See F. BLASE, *Vindabona Journal* 1999, 3, 6 et seq.

²⁷ F. BLASE, *id.*, 8, 13.

²⁸ See A. ROSETT, *Am.J.Comp.L.* pp18, 358.

²⁹ See O. SANDROCK, *JZ* 1996, 1, 8.

³⁰ A. ROSETT, *Am.J.Comp.L.* pp18, 349.

³¹ F. BLASE, *supra* n. 26, 6; A. ROSETT, *Am.J.Comp.L.* pp18, 353.

³² See *infra* B.II.2.

V. Creeping codification and consumer protection

When discussing the phenomenon of the Creeping Codification of law at the occasion of the presentation of the Lando-Principles, an important caveat must be made. The concept of the Creeping Codification was initially developed in the context of the transnationalisation of international business law, the creation of a new *lex mercatoria*.³³ This new *lex mercatoria* is based not only on the principles of the free will of the parties but also on the self-responsibility of international businessmen. In the absence of any need to ensure consumer protection, international trade and commerce constitutes an ideal climate for the free development of contractual structures.³⁴ The presumption of the professional competence of international businessmen resulting from this special scenario has developed into a rule of transnational law and is used constantly by international arbitral tribunals to justify the distribution of risks within international commercial contracts.³⁵

The PECL have a wider ambit. They intend to cover the whole field of contract law, business as well as consumer contracts. Within the EU, however, this problem is alleviated by the many initiatives of the EU Commission with respect to consumer protection. They have created an amalgam of mandatory law which ensures distributive justice in contractual relationships and takes precedence over the PECL according to their Art. 1:103 (2).

B. The principles of contract law and the phenomenon of the creeping codification of law

The relationship between the Creeping Codification of law and the Restatements of contract law can be seen on at least three different levels of the legal process.

I. The 'Promotional Task' principles

First, these projects make transnational contract law easily accessible, thereby curing one of the major defects of the current doctrine of transnational law.³⁶ At the

³³ See K.P. BERGER, *The Creeping Codification of the Lex Mercatoria*, p216 et seq.

³⁴ See F. KAHN, in BONELLI & BONELLI (eds), *Contratti Commerciali Internazionali E Principi UNIDROIT*, Giuffrè, Milano 1997, 41, 42.

³⁵ See, eg *ICC Award* No. 1990, *Clunet* 1974, 897; No. 1512, *Clunet* 1974, 905; No. 2291, *Clunet* 1976, 989; No. 2438, *Clunet* 1976, 969 with note Y. DERAIS, id, 971; No. 3130, *Clunet* 1981, 932; No. 3380, *Clunet* 1981, 927; No. 5364, *Clunet* 1991, 1059; cf. generally K.P. BERGER, *The Creeping Codification of the Lex Mercatoria*, p236.

³⁶ See B. SELDEN, *Ann.Surv.Int'l.&Comp.L. (Annual Survey of International and Comparative Law)* 1995, 111, 119: "...those partial listings [of principles and rules of the *lex mercatoria*] were not found in the normal places to which judges and arbitrators (and lawyers) turn. The occasional law review article is no substitute for a code or, in common law jurisdictions, line of judicial opinions."

same time, they perform a promotional task that cannot be overestimated. A major deficit of the informal codification of the law is the lack of easily accessible information about these projects through official gazettes or a collection of statutes. Recent studies show that knowledge of these projects among state court judges is almost non-existent.³⁷ The widespread discussion about their viability, their legal nature and the options for their practical application create a certain degree of consciousness and awareness in domestic courts and lawmakers that common principles and rules of European contract law do exist.³⁸ The discussion is no longer centred around an invisible, and for this reason sometimes heavily criticised abstract notion of transnationalism. For the first time, the transnationalisation of law can be linked to a tangible set of black letter law. This new “visibility” of transnational law, in turn, creates an increasing degree of “transnational mindset” in practitioners and lawmakers. Savigny has alluded to the necessity of this development in that he urged that the common knowledge of the law “should not be stored in some dusty tomes or left to be shaped by individual academics. Rather, it should become the common knowledge of all lawyers who want to work with sincerity and an open mind for their profession”.³⁹

II. New directions for legal teaching and legal methodology

Based on this new awareness of legal practice and the academia, the informal codification of European law will have a considerable influence on the new shape and direction of domestic law and domestic legal theory. This applies both to legal teaching and legal methodology.

II.1. Teaching

Legal teaching plays an important role in creating a spirit of comparative and international legal thinking among young lawyers as a basic prerequisite for the unification of law.⁴⁰ Roscoe Pound has emphasised this significance of comparative law in connection with the formative era of a “world law”.⁴¹ The PECL as well as other instruments resulting from the informal codification process are an important comparative teaching tool in that they provide a standard point of reference to make stu-

³⁷ See for a disappointing inquiry among American judges in Florida concerning their knowledge of the UNIDROIT Principles, A.I. ROSETT, *Am.J.Comp.L.* 1998, 361; CENTRAL at Münster-University, Germany has conducted a worldwide survey on the knowledge and use of the *lex mercatoria* in 1999 which has generated more positive data, see K.P. Berger, H. Dubberstein, S.M. Lehmann & V. Petzold (eds), *The Practice of Transnational Law*, 2000.

³⁸ See R. ZIMMERMANN, *JZ* 1995, 477, 491.

³⁹ F. VON SAVIGNY, *supra* n. 13, 125.

⁴⁰ See J. GORDLEY, *Am.J.Comp.L.* 1995, 555 et seq; A. FLESSNER, 56 *RabelsZ* 1992, 243, 250 et seq; H. KÖTZ, (*Revue de droit internationale et de droit comparé*) 1999, 753, 766 et seq.

⁴¹ R. POUND, *Am.J.Comp.L.* 1952, 1, 8 et seq.

dents aware of the European and transnational dimension of their profession. The substantial comparative efforts of the drafters enable students to see the whole kaleidoscope “of useful ideas and experiences of other legal systems”⁴² in a single instrument of uniform law. The PECL may thus serve as the focal point for the teaching of civil law at a “European Law School”. In fact, various German textbooks already refer to the UNIDROIT and Lando Principles.⁴³ The PECL should also provide an ideal background for a European Moot Court Competition in the area of private and commercial law.⁴⁴

II.2. The development of a methodological *Ius Commune Europaeum*

a. *The gradual convergence of civil and common law methodology*

As to the application of the law in legal practice, Basil Markesinis, Ernst A. Kramer and others have hinted at the beginning development of a genuine comparative methodology in Europe, a methodological “*ius commune europaeum*”.⁴⁵ The significance of an internationalisation of legal methodology has long since been underestimated. However, there is no viable and workable uniform private law without a sufficient methodological basis. This development has to start within the respective domestic jurisdictions instead of on some vague and distant transnational plane detached from the solid foundations of domestic law. Again, we are facing a slow and invisible “creeping” process, this time, however, not on the plane of substantive law but on the plane of legal theory. This process of methodological convergence shows effects in the area of statutory interpretation, where English courts tend to adopt the “purposive” Continental approach of interpretation and of the changed understanding of civil lawyers of the phenomenon of “judge made law”, i.e., the growing amount of genuine case law.⁴⁶

⁴² See for this goal of the use of comparative law in legal teaching M. RHEINSTEIN, *Einführung in die Rechtsvergleichung*, Beck, München, 2nd ed, p191.

⁴³ See eg I. SCHWENZER & M. MÜLLER-CHEN, *Rechtsvergleichung*, Mohr, Tübingen, p29; H. KÖTZ, *Europäisches Vertragsrecht*, Vol. I, Mohr, Tübingen 1998, p35.

⁴⁴ See the proposal of F. BLASE, *supra* n. 26, p14; see also K.P. BERGER, in K.H. BÖCKSTIEGEL (ed), *New Perspectives of Air Law, Space Law, and International Business Law for the Next Century*, Heymann, Köln 1996, pp309, 319; F. BLASE, in K.P. BERGER (ed), *Understanding Transnational Commercial Arbitration*, 2001 (forthcoming).

⁴⁵ See generally E.A. KRAMER, in W.R. Schlupe et al (eds), *Recht, Staat und Politik am Ende des zweiten Jahrtausends*, Haupt, Bern 1993, pp729, 736; E.A. KRAMER, in C.J. Meier-Schatz (ed), *Die Zukunft des Rechts*, Helbing & Lichtenhahn, Basel und Frankfurt am Main 1999, pp71, 74 et seq; B. MARKESINIS, *The Gradual Convergence. Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century*, Clarendon Press, Oxford 1994; cf. also K.P. BERGER, *Auf dem Weg zu einem europäischen Gemeinrecht der Methode*, ZEuP (*Zeitschrift für Europäisches Privatrecht*) 2001 p4.

⁴⁶ E.A. KRAMER, *id.*, p75 et seq; see also LORD GOFF OF CHIEVELEY, *The Wilberforce Lecture 1997, International and Comparative Law Quarterly* 1997, 745, 747 et seq; B. MARKESINIS, Cambridge L.J. 2000, 294 et seq; K.P. BERGER, ZEuP 2001, 4ff.

b. Towards an “Internationally Useful” construction of domestic law

In this context, the PECL perform a very important task for the further internationalisation and Europeanisation of legal methodology. They open the door for a new era of dynamic statutory interpretation, i.e. an interpretation of domestic law in the light of the Lando Principles. This “internationally useful construction” of domestic law⁴⁷ emphasises the increased significance of comparative law in legal practice.⁴⁸

It has been used in a recent ICC arbitral award. The sole arbitrator construed the provisions on force majeure of the applicable sixth book of the Dutch Civil Code in the light of the UNIDROIT Principles.⁴⁹ He was entitled to take this comparative approach to statutory interpretation because he found support for his view in Dutch legal literature.⁵⁰ Since the UNIDROIT Principles have been considered by the Dutch lawmaker in the preparation of the new Civil Code, the judge or arbitrator shall be 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. The rule or principle of Dutch law is applied to the individual case only if it is in conformity with the UNIDROIT Principles. The comparative efforts employed by the Dutch lawmakers in the drafting process⁵¹ justify 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.⁵²

It is not by coincidence that this approach was first developed in the context of Dutch private law. The new Dutch Civil Code is certainly the most “cosmopolitan”⁵³ enactment in Western Europe. Also, the concept is by no means new. It is known from choice of law clauses in large infrastructure projects or contracts for the exploitation of natural resources. In these contracts, the parties sometimes provide that the law of country X may be applied to the contract if this law is in conformity with general principles of law or with the *lex mercatoria*.⁵⁴

⁴⁷ See for this concept K.P. BERGER, *The Creeping Codification*, *supra* n. 5, p183 et seq; K.P. BERGER, *Festschrift Sandroock*, Verlag Recht und Wirtschaft, Heidelberg 2000, p49 et seq; E.A. KRAMER, in C.J. Meier-Schatz (ed), *supra* n. 45, p82, n. 52.

⁴⁸ See LORD GOFF OF CHIEVELEY, *supra* n. 46, 748: “Comparative law may have been the hobby of yesterday, but it is destined to become the science of tomorrow.”

⁴⁹ *ICC Award* No. 8486, *Chunet* 1998, 1047 with note Y. DERAIS, *id.*, 1050 et seq.

⁵⁰ G. KUIJER, *Ars Aequi*, *Ars Aequi Libri*, Nijmegen 1996, pp16, 19.

⁵¹ 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*”, K. ZWIEGERT & H. KÖTZ, *Einführung in die Rechtsvergleichung*, Mohr, Tübingen, 3rd ed 1996, p101.

⁵² See A. ROSETT, *supra* n. 24, 354: “[The Principles]...supply common-sensical approaches to problems that have long eluded common sense.”

⁵³ U. MATTEI, “A Transaction costs approach to the European Code,” *ERPL* 1997, 537, 539.

⁵⁴ See, eg *SSP (Middle East) Ltd., et al v. Arab Republic of Egypt et al*, ILM 1983, 752, 771; *Letco Award*, ILM 1987, 658.

The arbitrator's reference in the ICC award to domestic Dutch doctrine also reveals the major problem of this approach. The theories on statutory construction are always domestic doctrines. Traditionally, these doctrines have developed out of a framework of dogmatic and constitutional ramifications. Very often, they are linked to the question of what a domestic judge may do or may not do from a constitutional point of view. The mere existence of a Restatement of European contract law does not per se justify a fundamental change in these theories on statutory construction. This is the price for the "soft law" character of the PECL. The viability of the "internationally useful" construction of domestic law therefore always requires a solid dogmatic groundwork in the respective European jurisdictions.

The prospects of the development of such groundwork depend on the penetration of knowledge about the Restatements among scholars and practitioners. On the international plane, there seems to be a growing awareness of the purpose and benefits of the Principles.⁵⁵ In Germany, the first steps have been made. German 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.⁵⁶ The concept shall be applicable in all those cases where the law leaves room for flexibility, especially through the blanket clauses such as good faith or the reference to trade practices and usages.⁵⁷ Some even maintain that the UNIDROIT Principles constitute a "binding codification" of the *lex mercatoria*.⁵⁸ For Swiss law, Ernst A. Kramer has provided another interesting dogmatic justification of this approach. In his view, the reference in the last sentence of the Preamble of the UNIDROIT Principles to "national and international legislators" should be construed in a functional manner so as to encompass domestic judges who develop the law "like legislators" under the famous Art. 1 Sec. 2 of the Swiss Civil Code (ZGB).⁵⁹ Finally, even in purely domestic German cases reference has been made for the construction of German Civil law to the approaches of "modern lawmakers" such as the Lando and UNIDROIT Principles. They were invoked to support a quest for maintaining the flexibility and adaptability of the "culpa in contrahendo" – doctrine⁶⁰ as one of the dogmatic corner stones of German contract law. Thus, these soft law instruments pave the ground for opening traditional German doctrine to the

⁵⁵ See on the results of the CENTRAL Enquiry on the Use of Transnational Law in Legal Practice among more than 2.700 practitioners worldwide, K.P. Berger, H. Dubberstein, S.M. Lehmann & V. Petzold, *The Practice of Transnational Law* (forthcoming).

⁵⁶ K.P. BERGER, *The Creeping Codification*, *supra* n. 5, p190; K.P. BERGER, *Festschrift Sandrock*, *supra* n. 47; J.C. WICHARD, 60 *RabelsZ* 1996, 269, 300 et seq.

⁵⁷ See A.S. HARTKAMP, in ICC (ed), *UNIDROIT Principles of International Commercial Contracts: A New Lex Mercatoria?*, UNIDROIT, Rome 1995, pp254, 259: "Whenever a rule [of domestic law] leaves room for interpretation, profit may be made from the [UNIDROIT] Principles."

⁵⁸ R. HAUSMANN, in C. Reithmann & C. Dageförde (eds), *Internationales Vertragsrecht*, Schmidt, Köln, 5th ed 1996, No. 2435.

⁵⁹ E.A. KRAMER, *supra* n. 47, p82.

⁶⁰ H. WIEDEMANN, *JZ* 1998, 1176 et seq.

influence of international soft law instruments. It is only a matter of time that references to the PECL will be found in the standard German commentaries on the German Civil Code.

3. *The principles as a codification of the Lex Mercatoria or of general principles of law?*

The third aspect of the legal process where the impact of the PECL can be felt relates to the crucial question of whether the PECL constitute more than just soft law instruments, whether they can be regarded as a true codification of general principles of contract law or, in the global context, as a codification of the new *lex mercatoria*.

As far as the latter one is concerned, one has to emphasise that the analytical vacuum of the functional comparative analysis alone does not provide enough breeding ground for the “political element” of transnational law as understood by Savigny.⁶¹ While it is true that the Preambles of both the Lando and UNIDROIT Principles provide for their application in cases where the parties have referred to “general principles, the *lex mercatoria* or the like”, this reference alone cannot mean that all rules and principles contained therein are *per se* part of transnational commercial law. The Principles as a private form of transnational lawmaking cannot themselves decide about their legal quality. Rather, qualifying certain rules or principles as part of transnational commercial law requires acceptance by the international community of traders (“*societas mercatorum*”) and by international arbitral tribunals as the natural judges of international trade and the social engineers of transnational commercial law. Thus, as long as the viability of a principle or rule has not been tested in commercial practice, both the UNIDROIT and Lando- Principles are “Pre”-Statements⁶² rather than “Re” Statements of transnational commercial law. There is a presumption that the Principles contain provisions which reflect the *lex mercatoria*, but this presumption may be rebutted if the respective rule or principle is not accepted by commercial legal practice (e.g. through general contract conditions or standard contract forms or the like) or by international arbitrators.

The situation is different with respect to general principles of law. Since the PECL have been drafted on the basis of the functional comparative analysis, they contain general principles of European contract law.⁶³ Again, this requires a closer look at the origins, structure and wording of each individual principle. It may happen that the drafting group did not just derive a principle through “private law analogies” from the domestic laws of the EU Member Countries. In some instances the Group went a step further and developed a new and better principle⁶⁴ on the basis of its extensive com

⁶¹ See K.P. BERGER, *The Creeping Codification*, *supra* n. 5, p207 et seq.

⁶² See for this terminology P. KARRER, in H. Honsell, N.P. Vogt & A.K. Schnyder (eds), *Internationales Privatrecht*, Helbing & Lichtenhahn, Basel und Frankfurt am Main, 1996, Art. 187, No. 71.

⁶³ See generally R. SCHULZE, *Allgemeine Rechtsgrundsätze und europäisches Privatrecht*, ZEuP 1993, 442, 458 et seq.

⁶⁴ See for this phenomenon of “gently pushing” W. SCHLESINGER, *Legal Essays in Honour of Hessel E. Yntema*, 1961, 65, 78; W. LORENZ, JZ 1962, 269, 274.

parative re-search. This “new” rule cannot be called a general principle of European contract law.⁶⁵

Conclusion

The relationship between the concept of the Creeping Codification of law and the Lando Principles can be expressed in four keywords: “informality”, “visibility” “multiplicity” and “transnationality”. Do the Lando Principles foster the development towards a European Civil Code? The answer must be ambiguous.

From the present perspective it appears that the creeping codification-approach to the unification of European contract law is a more promising venture than the traditional positivistic attitude. One should not forget Thibaut’s famous miscalculation that the drafting of a German Civil Code would not take more than “two, three or four years”.⁶⁶ How much more danger is there in the calculation of a realistic drafting period for such an ambitious and gigantic venture as a European Civil Code in an era of “decodification”?⁶⁷ Isn’t this the “quest for utopia”⁶⁸ described so aptly by Professor Markesinis?

From a long term perspective, the PECL may also be seen as paving the way for a true codification of European private law. The German Civil Code of 1900 owed much of its maturity to the conceptual groundwork laid by the historical school of jurisprudence and its successors, the pandectists.⁶⁹ This experience shows the right direction for today’s discussion on the unification of European contract law. The PECL and the practice gradually evolving around them provide an excellent laboratory for the use and necessity of European statutory contract law. Codes are not born out of nowhere but out of experience. The practice and experience based on the PECL will show whether a truly international, comparative methodology can be developed as an indispensable prerequisite for every codification of European or international contract law.⁷⁰ In the words of Ole Lando, “the methods advocated by the Savignys may also be useful for the Thibauts”.⁷¹

⁶⁵ In *ICC Award No. 7375* the tribunal applied the UNIDROIT Principles only “as far as they can be considered to reflect generally accepted notions and principles”; see Mealey’s International Arbitration Report, 1996, A-1 et seq; *Unif.L.Rev.* 1997, 598; M.J. BONELL, in CENTRAL (ed), *Transnational Law in Commercial Legal Practice*, supra n. 5, pp7, 37 et seq; A. REDFERN & M. HUNTER, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, London, 3rd ed 1999, p127.

⁶⁶ A. THIBAUT, supra n. 11, p64.

⁶⁷ The notion of “decodification” refers to the tendency to remove codified law (e.g. on consumer protection) from the classical major codes into specialised laws, see N. IRTI, *L’età della decodificazione*, Giuffrè, Milano 1979, p14 et seq.

⁶⁸ B. MARKESINIS, “Why a code is not the best way to advance the cause of European legal unity,” *ERPL* 1997, 519.

⁶⁹ R. ZIMMERMANN, supra n. 9, p81.

⁷⁰ See K.P. BERGER, *ZEuP* 2001 4 et seq.

⁷¹ O. LANDO, supra n. 11, 525; see also O. LANDO, in H.L. Wyers (ed), *Europäisches Vertragsrecht*, Nomos-Verlags-Gesellschaft, Baden-Baden 1997, pp81, 101.