Lex Mercatoria Online: the CENTRAL Transnational Law Database at www.tldb.de

by PROF. DR. KLAUS PETER BERGER*

I. INTRODUCTION

SINCE ITS rediscovery in the early 1960s,[1] the discussion on the existence and practical usefulness of a theory of transnational commercial law, a new *lex mercatoria*, has been trapped in a vicious circle. A fierce 'trench fighting'[2] over the theoretical and methodical viability of this doctrine has dominated the discussion ever since.[3] As a consequence, legal practice was left to act alone in its search for tools to allow the application of the *lex mercatoria* in everyday legal practice. For legal theory, this problem was non-existent. It has always been a standard argument against the *lex mercatoria* that it was not, or only rarely, used in practice[4] and that its lack of practical and workable rules meant that it did not justify the development of practical approaches.[5]

Today, the picture has changed. Empirical studies show that transnational law is in fact being used in legal practice.[6] Lists of principles and rules of the *lex mercatoria* provide a picture of the increasing richness of this new body of law.[7] The problem remains, however, that practitioners and academics alike find it extremely difficult to get fast and easy access to the contents of the *lex mercatoria*:

---

* Professor Dr. Klaus Peter Berger, LL.M., Center for Transnational Law (CENTRAL), Münster University.

1 *See* Goldman, *Le Monde*, 4 October 1956, p. 3 (on the transnational character of the Suez Canal Company); Goldman, *Archives de philosophie du droit* (1964), p. 171 *et seq.*; Schmitthoff, in Schmitthoff (ed.), *The Sources of the Law of International Trade* (1964), pp. 3, 5 *et seq.*

2 *See* for the use of military language in the discussion on transnational commercial law Béguin in (1985) *McGill L J* 478, 479.

3 *See generally* Berger, *The Creeping Codification of the Lex Mercatoria* (1999), p. 32 *et seq.*

4 *See* Molineaux in (2000) 1 *J Int'l Arb* 147: 'The opponents see the lex mercatoria as a sort of legal Loch Ness monster – occasionally in the headlines as a result of a purported sighting but ultimately non-existent'.

5 *See* F.A. Mann in (1957) *British Yearbook of Int'l L* 20, 36: 'They [*i.e.* general principles of law] may, on occasion, be useful to fill a gap but in essence they are too elementary, too obvious and even too platitudinous to permit detached evaluation of conflicting interests, the specially legal appreciation of the implications of a given situation. In short, they are frequently apt to let discretion prevail over justice'.

6 The worldwide inquiry into the use of transnational law in international legal practice conducted by the Center for Transnational Law (CENTRAL) has revealed that about 69 per cent of the addressees had a positive or neutral attitude towards transnational commercial law while only 20 per cent rejected the concept, *see* Berger, Dubberstein, Lehmann and Petzold in Berger (ed.), *The Practice of Transnational Law* (2001), pp. 91, 112 *et seq.*

7 *See infra* n. 22.

> More than any other factor, the difficulty in determining the content of transnational laws has typically stood in the way of a serious discussion concerning the practical usefulness of the lex mercatoria. Practicability – or its lack – is the watchword.[8]

The Transnational Law Database (TLDB) developed by the Center for Transnational Law (CENTRAL) is designed to provide the hitherto 'missing link' between the theory of transnational commercial law and international legal practice. For the first time, practitioners and academics have at their disposal, by means of the Internet, a highly accessible online working tool for the practical application of transnational commercial law.

II. THE NEW PRAGMATISM

The development of the TLDB is an indication for the new pragmatism which has gained ground in the debate on the transnationalisation of international commercial law in the past decade.[9] This movement began with the publication of the UNIDROIT Principles for International Commercial Contracts (UPICC) in May 1996.[10] In their Preamble, the UPICC state that they 'may be used if the parties have agreed that their contracts be governed by general principles of law, the lex mercatoria or the like'. The UNIDROIT Working Group which drafted the UPICC did not engage in lengthy debates about the nature and theoretical viability of the doctrine of transnational commercial law. Rather, they adopted a pragmatic approach. Based on thorough functional comparative studies, they drafted a 'Restatement' of transnational contract law. This technique is used in the United States by the American Law Institute (ALI), but had hitherto been unknown in the field of international contract law, even though suggestions to engage in the drafting of such international Restatements had been made as early as 1968.[11] It is not surprising that in view of this pragmatic approach, the UPICC have met with considerable interest in international arbitral practice and have been used by numerous international arbitral tribunals since their publication in May 1996.[12] The same pragmatic approach was adopted with respect to the drafting of the Principles on European Contract Law by the Lando Commission. In spite of their nature as a mere Restatement, the Lando Principles are regarded as the 'law for transborder contracts'[13] in Europe. In fact, the private commissions who have

---

[8] Fortier in (2001) 17 *Arbitration International* 2 121, 124.

[9] *See* Berger, *Transnational Commercial Law in the Age of Globalization* (2001), p. 27.

[10] *See* Bonell, *A Restatement of International Contract Law* (2nd edn, 1997), p. 16 *et seq.*

[11] Matteucci, Contribution to the discussion at the 4th conference of the organisations dealing with the unification of law from 22–24 April 1968 in Rome, in UNIDROIT, *Annuaire 1967-1968*, Vol. II, 267, 268; *see also* van Hecke, in *De Conflictu Legum* (1962), pp. 198, 207 *et seq.* for Europe.

[12] *See* Bonell, *supra* n. 10 at p. 240 *et seq.*; Berger in (1998) *Am J Comp L* 129; Bonell (ed.), *UNILEX International Case Law and Bibliography on the UNIDROIT Principles* (loose-leaf, June 2000); *see also* the collection of ICC awards reproduced in (1999) *ICC International Court of Arbitration Bulletin* (Fall) 33.

[13] *See* Blase, *Die Grundregeln des Europäischen Vertragsrechts als Recht grenzüberschreitender Verträge* (2001), p. 9 *et seq.*

drafted these Restatements are sometimes regarded as 'international law-makers'.[14]

The main reason for this new pragmatism lies in the phenomenon of globalisation and the changes of the socio-economic landscape that have come along with it. Globalisation implies not only the creation of a global marketplace in which contractual relations are 'virtualised', goods are sold and money is transferred within seconds around the world. It also symbolises a strong trend away from the sovereign rule-making monopoly of the nation States and from the 'Westphalian' model of inter-State relations to a decentralised law-making process by non-governmental organisations, to private rule-making,[15] to private governance structures and to a private civil society.[16] These socio-economic developments have in turn led to new perceptions of law and law-making and to attempts to redefine the hierarchy of legal sources.[17] These new theoretical perceptions have made it easier to accept new forms of decentralised rule-making at 'the periphery' of the legal process, the acceptance of which was inconceivable only a decade ago.

III. THE METHODICAL BASIS: THE 'CREEPING CODIFICATION' OF TRANSNATIONAL LAW

(a) The Concept

The TLDB is based on one of these new concepts, the 'creeping codification'[18] of transnational commercial law. This concept rests on three basic premises:

(1) First, the *lex mercatoria*, which is characterised by its openness, flexibility and informality, requires a codification technique which reflects these characteristics.
(2) Secondly, transnational commercial law is a worldwide phenomenon and requires a method of codification which allows instant and easy access to its contents at any time and everywhere over the world.
(3) Thirdly, the method of codification has to include recourse to the extensive case law of international arbitral tribunals and to international drafting

---

[14] *See* Wiedemann, *Juristenzeitung* 1998, 1176.
[15] *See* Gélinas in (2000) 4 *J Int'l Arb* 117, 122: 'There can be no doubt that business self-regulation is now here to stay, and that it is indeed a threat to traditional ways of thinking insofar as these cannot cope with the globalization of trade ... In this respect the challenge for the years to come ... will be that of redefining the allocation of responsibility for legitimate rule-making between states and business'.
[16] *See* Teubner, *Rechtshistorisches Journal* 1996, 255; De Ly, *Diritto Del Commercio Internazionale* 2000, 555; Calliess in Donges and Mai (eds), *E-Commerce und Wirtschaftspolitik* (2001), p. 189 *et seq.*; Hobe in (1997) *Global Legal Studies J* 191.
[17] *See* Berger, in Berger (ed.), *The Practice of Transnational Law* (2001), pp. 1, 14 *et seq.*
[18] *See* for the introduction of this terminology Berger, *International Economic Arbitration* (1993), p. 543; Berger in (1993) *Am Rev Int'l Arb* 1, 29; *see also* Lando, *The Harmonization of European Contract Law through a Restatement of Principles* (1997), p. 20.

practice as the 'social engineers' of the *lex mercatoria*.[19] This 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 characterised by a certain degree of 'analytical indifference' resulting from the fact that the international business community and its dispute settlement techniques were not a major focus of the research.

(b) The List Procedure

(i) The purpose of the list

The concept of 'creeping codification' is based on an open list of principles, rules and standards of the *lex mercatoria*.[20] The list reproduces all those rules and principles of the *lex mercatoria* 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[21] into a single, open-ended set of rules and principles: the reception of general principles of law, the codification of international trade law by 'formulating agencies', the case law of international arbitral tribunals, the law-making forces of international model contract forms and general conditions of trade, and finally the analysis of comparative legal science.

Contrary to the UPICC and Lando Principles, 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. At the same time, the idea of an open-ended list shows that the creeping codification of the *lex mercatoria* 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. Both projects have

---

[19] Schmitthoff, *International Trade Usages* (1987), No. 71: 'Substantive law is often born in the womb of procedure. In keeping with their international character, the law which these international arbitral bodies create is transnational. It is the new lex mercatoria'.

[20] The idea was first introduced in Berger, *Formalisierte oder 'schleichende' Kodifizierung des Transnationalen Wirtschaftsrechts* (1996), p. 144 *et seq.*; *see also* Berger, *supra* n. 3 at p. 210; a first list appeared in Berger, *Internationale Wirtschaftsschiedsgerichtsbarkeit* (1992), p. 374; Berger, *supra* n. 18 at p. 544.

[21] *See* Gaillard in Berger (ed.), *The Practice of Transnational Law* (2001), at pp. 53, 65: 'if not a genuine legal order, transnational rules do perform, in actual practice, a function strikingly similar to that of a genuine legal system'.

different objectives. The Restatements only provide valuable incentives and starting points for the extension and evolution of the list.

(ii) The list as a 'codification' technique

The idea of drafting lists of general principles and rules of transnational law has a certain tradition in the context of the discussion on the modern law merchant.[22] However, the far-reaching consequences of this procedure for the concept of transnational law have never been realised. In almost all of these cases, the lists merely served as a means to prove that the *lex mercatoria* is not devoid of all contents.[23] In one case, the reproduction of a list even served the purpose of showing the stealth of the *lex mercatoria*.[24]

Consequently, a codifying effect of these lists was never discussed and no attempts were ever made to develop the list procedures into an independent and autonomous codifying technique for transnational commercial law. In fact, international legal practice has criticised the fact that the existing lists were not found in the normal places to which judges and arbitrators (and lawyers) turn: '[t]he occasional law review article is no substitute for a code or, in common law jurisdictions, line of judicial opinions'.[25] Likewise, international arbitrators have complained that 'as far as general principles of international business [law] are concerned, their list cannot be found in a single textbook'.[26] Today, the list approach has been recognised as a viable means for the codification of transnational commercial law: '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'.[27]

(iii) The open-ended character of the list

Even though the lists perform an important function as 'codificatory focal point'[28] this should not be confused with a definite manifestation and petrifaction of transnational commercial law.

---

[22] *See, e.g.*, the lists published by Paulsson in *Rev de l'Arb* 1990, 82; Blessing in Böckstiegel (ed.), *Die internationale Schiedsgerichtsbarkeit in der Schweiz (II)* (1989), pp. 13, 68; Molineaux in (1997) 1 *J Int'l Arb* 55, 64; *see also* the list published by the Cairo Regional Centre for International Commercial Arbitration (CRCICA), in CRCICA (ed.), *CRCICA Newsletter* (January 1997), p. 2; *cf. also* the list reproduced in ICC Award No. 8365, Clunet 1997, 1078, 1079; *but see* Gaillard, *supra* n. 21 at p. 55, arguing that the *lex mercatoria* is a method of decision-making rather than a list and that it should be defined by its sources and not by its contents.

[23] *Cf.* Bonell, *RabelsZ* 42, 1978, 485, 498, n. 41; A. Bucher in Schwind (ed.), *Aktuelle Fragen zum Europarecht aus der Sicht in- und ausländischer Gelehrter* (1986), pp. 11, 15 *et seq.*

[24] The list published by Mustill in (1988) 4 *Arbitration International* 86, 110 was not intended to furnish proof of the richness of the *lex mercatoria*, but to provide the basis for a critical appraisal of that concept, *see ibid.*, n. 81a.

[25] Selden in (1995) *Ann Surv Int'l & Compl L* 111, 119.

[26] ICC Award No. 5953, Clunet 1990, 1056, 1059.

[27] Fortier, *supra* n. 8 at p. 127; *see also* Molineaux, *supra* n. 4 at p. 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'.

[28] *cf.* K. Schmidt, *Die Zukunft der Kodifikationsidee* (1985), p. 60 for the judiciary of the State.

It is one of the main tasks of scientific and practical research in the field of the *lex mercatoria* to avoid the creation of an inflexible, rigid and predetermined system that leaves no or only little room for the further development of this doctrine. This leads to a constant process of cross-fertilisation between the decision-making work of international arbitral tribunals and the list. The list derives a substantial input from the caseload 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 very well include a principle or rule that has been acknowledged in international arbitral or contract drafting practice.[29] Here lies the decisive advantage of this non-formalised codification procedure when compared to the formalised 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. Amendment and updating of the UPICC always requires initiation of a new formalised codification procedure. The updating of the lists, however, does not require a formalised 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*'.[30] 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,[31] 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 lists as a process of the constant evolution and change, they still provide the necessary prerequisite for the practical acceptance of the *lex mercatoria*: they create 'a certain degree of predictability'[32] 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 *lex mercatoria* of the aura of a '*laissez faire*-doctrine'.

At the same time, the goal to achieve legal certainty is not seen as an end in itself. Rather, the list technique leaves enough room for a teleological evolution of

---

[29] *cf.* Goldman, *Festschrift Lalive* (1993), pp. 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*.

[30] Mustill, *supra* n. 24 at p. 110; *cf. also* Stein, *Lex Mercatoria: Realität und Theorie* (1995), p. 161, speaking of a 'necessarily limited snap shot'.

[31] *cf.* for domestic law K. Schmidt, *supra* n. 28 at p. 75 *et seq.*

[32] Langen, *Transnationales Recht* (1981) Part I, No. 11; Samuel, *Jurisdictional Problems* (1989), p. 248 mentions as one of the basic arguments against the *lex mercatoria* doctrine the lack of predictability of decision-making.

the *lex mercatoria*. Therefore, the application of the *lex mercatoria* in practice always oscillates between two extreme positions without ever reaching one or the other: a decision in equity on one side and a decision according to codified written law on the other.[33] Both aspects influence the doctrine of a transnational autonomous law, but taken alone, they would mean the failure of the *lex mercatoria* doctrine.

IV. THE FUNCTIONING OF THE TLDB

(a) The Need for Flexibility and Practicality

The lists, which have been published so far, have been criticised for their lack of structure and difficulty of orientation.[34] The problem with this perfectly legitimate concern is that every attempt to 'structure' or 'formalise' the list runs counter to its informal character. However, the growth of the lists in the past years has made it necessary to adopt a technique which ensures their practicability and accessibility while at the same time preserving a maximum degree of openness and flexibility. Making the list accessible through an online database in the World Wide Web combines these two basic prerequisites in an ideal way. Using the World Wide Web as a global archive of transnational commercial law allows us to keep pace with the ever-changing world of international commerce while at the same time structuring the list within a flexible and easy-to-use electronic framework.[35]

(b) Purposes of the TLDB

(i) Disseminating knowledge about transnational law around the globe

A major purpose of the TLDB is to disseminate knowledge about the contents of transnational commercial law around the globe. Recent empirical studies have revealed that international practitioners hesitate to make use of this concept not because they have doubts about the methodical basis of the concept but simply because they lack the knowledge about transnational law and do not want to use standard business negotiations as a laboratory for 'innovative' solutions:

> When a legal relationship between the parties may be perfectly framed in a set of (specific, well-

---

[33] *cf.* Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (4th edn, 1990), p. 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 Statutes is required more and more' (translation by the author).

[34] *See* Basedow, *RabelsZ* 62, 1998, 555, 558.

[35] The TLDB thus provides the answer to concerns raised by Fortier, *supra* n. 8 at p. 126: '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'.

> known and complete) rules of transnational law, I would agree that the advantages that would arise from the knowledge of both parties of the applicable rules would be large.[36]

It is a complaint often heard from international practitioners that 'information on transnational law (such as reference books, court decisions and arbitration awards in prior cases etc.) is not available'.[37] At the same time, practitioners agree that 'knowledge about transnational law belongs to the arsenal of every internationally oriented lawyer'.[38] But dealing with these principles and rules in contract negotiations or arbitrations requires a 'level playing field': not only one side but both parties must have a sound knowledge of the concept of transnational commercial law.[39]

(ii) Doing away with the need for comparative research

The main purpose of the TLDB is to help international practitioners and academics to save the time and money that must be invested in comparative research in order to determine the components of the new *lex mercatoria*. Attorneys, in-house-counsel,[40] arbitrators or judges[41] always face a formidable task in determining the contents of this legal system through application of the functional comparative methodology:

> The arbitrator would ... face a formidable task of comparative research. Instead of having to consult, after application of the appropriate rule of conflict of laws, the rules of one single – no more – national system of law, he would have to assume the role of a full-fledged comparatist in charge of a research into perhaps a multitude of different national jurisdictions whose rules might be phrased in a language of which he is not in command. There might be fields of law, it is true, where such comparative research would have already been done, where a specific rule would therefore be easily detectable or where arbitral awards would have already flattened some paths in the jungle of the different national laws to be consulted. But an unforeseeable number of legal questions for which such research has never been carried out, would still have to be answered by arbitrators who, despite their often unusually extensive experience with

---

[36] Statement of a practitioner as response to the CENTRAL Enquiry on the Practice of Transnational Law, *see* Berger *et al*, *supra* n. 6 at p. 111; another practitioner responded: 'I want to see how it operates in practice first', *see ibid.*

[37] *ibid.*

[38] *ibid.*, p. 113.

[39] *See* the statement of an international business lawyer in *ibid.* p. 111: 'Negotiating with another party by invoking these principles requires that the other party is as well assisted by somebody who is aware of these principles and knows how to handle them. This is not always the case'.

[40] Mustill, *supra* n. 24 at p. 114 : 'Our hypothetical adviser is not an academic lawyer, established at an institution of learning in one of those European cities where the *lex* is most at home'; *cf. also* Schlesinger (ed.), *Formation of Contracts, A Study of the Common Core of Legal Systems*, Vol. I (1968), p. 10: 'In the absence of available comparative studies, it is exceedingly difficult for counsel to assemble the necessary data for the ad hoc purpose of a particular case pending before an international tribunal'.

[41] *See* Samuel, *supra* n. 32 at p. 249: 'one can not interview a significant sample of the business community during the course of every arbitration'; Mustill, *supra* n. 24 at p. 92: 'How could any tribunal, however cosmopolitan and polyglot, hope to understand the nuances of the multifarious legal systems?'; *cf. also* the statement of a Canadian judge cited by Dasser, *Internationale Schiedsgerichte und Lex Mercatoria* (1989), p. 14 on the comparative references provided by counsel who appear before him: 'C'est intéressant. Mais pour ma part, je laisse à des chercheurs aisés la captivante étude du droit comparé'.

foreign and international laws, would mostly be ill-equipped to perform this kind of a more academic function.[42]

Today, this function is performed through a simple mouse-click by the user of the TLDB. The comparative materials included in the TLDB consist of 640 documents (arbitral awards, statutes, conventions, model laws, standard forms, doctrines, etc.) with over 1,470 references for the 74 principles and rules included in the list which forms the core part of the Database.

(iii) Allowing for a transnational approach to decision-making by international practice

Based on the cost- and time-saving effects outlined *supra*, international practice can use the TLDB for a variety of purposes, for example:

- as a means to determine the applicable rules in a dispute, if the parties have chosen transnational commercial law or if the arbitrators decide to apply this concept to the case before them;
- as a means to allow for an autonomous interpretation of and for the filling of internal gaps in international conventions and other uniform law instruments;[43]
- as a means to allow for the 'internationally useful construction'[44] of domestic law in international disputes;
- as a means to supplement or correct a future European Civil Code in international commercial disputes;[45]
- as a means to provide information about transnational law to other sciences (politics, economics, sociology) which are also exploring the clash between the territorial limitations of the law and the transnationalisation of international commerce and trade in an era of globalisation.

This list of possible uses of the TLDB for international practitioners and academics is by no means exhaustive. Time will show whether the TLDB can also be used in other fields related to the transnationalisation of international commerce.

(iv) Providing a means for the 'codification' of transnational commercial law

The fourth task of the TLDB is to provide a means for the 'codification' of transnational commercial law. The *lex mercatoria* as 'law in action' requires a degree of codificatory flexibility and subtlety that goes far beyond that which any

---

[42] Sandrock in (1992) *Am Rev Int'l Arb* 30, 50; *cf. also* De Ly, *De Lex Mercatoria* (1989), p. 365; Triebel and Petzold in *RIW* 1988, 247; Toope, *Mixed International Arbitration* (1990), p. 95; Spickhoff, *RabelsZ* 56, 1992, 124.

[43] *See* Kronke in (2000) *Unif L Rev* 13, 18: 'Some of the road ahead [of mitigating the effects of the specific and fragmentary character of international conventions] may be covered by creeping unification'.

[44] *See* for this concept Berger, *Festschrift Sandrock* (2000), p. 49.

[45] *See* Lando in (2000) *Scandinavian Studies in Law* 343, 404.

code, model law, convention or restatement can provide. Thus, in the context of the *lex mercatoria*, the term 'codification' assumes a new meaning. CENTRAL is not the 'legislature' of the *lex mercatoria*. In fact, there is no single 'legislature', since the *lex mercatoria* as reflexive law reflects the conduct, customs and habits of the community of merchants. Therefore, 'codification' in this context means that the TLDB puts the various principles and rules of the *lex mercatoria* into a readable form and, by reproducing the comparative references for each of those principles and rules, allows the user to make his own judgement on the 'comparative persuasiveness' of these sources. This individual judgement is always necessary, since the TLDB merely establishes a presumption that the principles and rules reproduced in it form part of this evolving legal system.

(c) Using the TLDB

When designing the technical framework for the TLDB, the CENTRAL Team[46] followed two guiding principles:

- access to the Database must be free because transnational law is, by its very nature, 'public domain law';
- access to the principles, rules and materials contained in the Database must be made as easy as possible, *i.e.* the user must be able to work with the TLDB at once without having to study a voluminous user's manual.

These two principles were implemented through a simple and easy-to-use database structure.

When accessing the Database at www.tldb.de, the user sees the TLDB homepage, which provides a brief statement of the purpose of the TLDB. The user may then select various buttons from a navigation bar at the left side of the screen. The first button leads to general information about the TLDB. This text contains hyperlinks to other materials such as Gerard Malynes' famous book on *Consuetudo vel Lex Mercatoria* of 1622 which is shown with its original frontispiece;[47] the article by Berthold Goldman in *Le Monde*, 4 October 1956, which symbolises the beginning of the discussion on the new *lex mercatoria*;[48] or an explanation of the theoretical concept of 'creeping codification'.

With the second button on the navigation bar, the user has access to the list of principles, rules and standards of the *lex mercatoria* as the core element of the TLDB. The user can click on each rule or principle and is then guided to the comparative references, which have been included in the TLDB (arbitral awards, domestic statutes, international conventions and model laws, standard contracts,

---

[46] The Team was headed by Professor Klaus Peter Berger, executive director of CENTRAL; Holger Dubberstein, former senior research assistant at CENTRAL designed and programmed the database and the front end program; Olaf Heeke, senior research assistant at CENTRAL, was responsible for database administration, collection of the materials and the supervision of the copying, text editing, scanning and tagging of the materials as well as their inclusion into the database by the student team.

[47] Malynes, *Consuetudo Vel Lex Mercatoria* or *the Ancient Law Merchant* (1622).

[48] *See supra* n. 1.

academic sources) and structured according to a recurring pattern. Many of these texts are reproduced in full text versions. Parts of those texts which are reproduced in a language other than English, have been translated into English.

Alternatively, the user may access the Database through the third button on the navigation bar, which leads to the TLDB's search engine. Here, the user can search for individual principles or rules or for names of authors of texts which have been included in the Database.

Whenever the user is confronted with an unfamiliar abbreviation or a short title of a publication which is reproduced in the TLDB, they may refer to the bibliography or the list of abbreviations behind the fourth and fifth button on the navigation bar.

(d) The TLDB as a Communication Tool

The open-ended character of the list of transnational commercial law which forms the core part of the TLDB requires constant attention and updating. This goal cannot be achieved by the CENTRAL Team and its Board of Trustees[49] alone. It requires a worldwide process of continued discussion between those who participate in the creation of transnational law: international arbitrators, international practitioners, international businessmen and academics. The informal communication tools included in the TLDB allow all participants in international trade to be united in what has been called a 'law-finding community'.[50] This can be achieved in various ways. With the help of the 'Comments' button at the end of each principle or rule contained in the TLDB every user may send specific e-mail comments to the TLDB Team at CENTRAL. Alternatively, the user may choose to send a general e-mail comment through the 'Contact' Button at the end of the navigation bar. Finally, the CENTRAL Team has included in the Database a 'discussion forum' which allows an open, informal and worldwide dialogue between users of the TLDB, the CENTRAL Team and all those interested in the process of the codification of transnational commercial law.

---

[49] The members of the CENTRAL Board of Trustees are: Prof. Michael Joachim Bonell, Rome; Prof. Richard Buxbaum, Berkeley; Prof. Dr. Felix Dasser, Attorney at Law, Zurich; Yves Derains, Attorney at Law, Paris; Prof. Ulrich Drobnig, Hamburg; Prof. Franco Ferrari, Bologna; Prof. Alejandro M. Garro, New York; Emmanuel Gaillard, Attorney at Law, Paris; Prof. Roy Goode, Oxford; Prof. Zhou Hanmin, Shanghai; Prof. Gerold Herrmann, Vienna; Prof. Norbert Horn, Cologne; Prof. Hans van Houtte, Leuven; Sigvard Jarvin, Attorney at Law, Paris; Prof. Ole Lando, Copenhagen; Prof. Filip de Ly, Rotterdam; Prof. Pieter Sanders, Rotterdam.

[50] *Cf.* Berger, *supra* n. 3 at p. 233; *see also* Fortier, *supra* n. 8 at p. 126; *see* for legal unification in the field of international commercial law Wallace in Horn and Schmitthoff (eds), *The Transnational Law of International Commercial Transactions* (1982), pp. 81, 85.

V. CONCLUSION

The TLDB endeavors to untie the Gordian knot of transnational commercial law: the need for a workable and highly practical, yet flexible and adaptable codification technique. The World Wide Web provides the ideal framework for a global archive of the *lex mercatoria* while the concept of an open list of principles and rules that is never completed does justice to its character as 'law in action'. Thus, the virtual world of the Internet is not only a place where new principles and rules, a '*lex mercatoria informatica*', are developing.[51] The cyberspace also provides the substratum for a new informal and flexible 'codification' technique, thereby creating an objective point of reference for commercial people striving to transnationalise their business relationships. The underlying concept of the creeping codification provides the necessary 'enforced informality in methodology'[52] which is needed to ensure the rapid revision and constant and informal updating of the list of transnational principles and rules which forms the core of the TLDB. The development of the Database is founded on a pragmatic view of the relationship between international business and the law. This notion of commercial pragmatism has been described by Radbruch in his *Introduction to Legal Science*:

> More than in any other field of law, the rules of commercial law, a living law, not paper law, can be found not in the statutes themselves but have to be derived from the legal process as such. More than in any other field of law, commercial law provides an example for the struggle of the law with the interest and the influence of the interest on the law, for a limited control of the norms over the facts and for the ultimate normative force of the facts – in short, commercial law reveals what economic history has always taught us about the relationship of commerce and law.[53]

---

[51] Caprioli and Sorieul in *Clunet* 1997, 323, 330; Mefford in (1997) *Indiana J Global Legal Studies* 221.
[52] Fortier, *supra* n. 8 at p. 126.
[53] Radbruch, *Einführung in die Rechtswissenschaft* (1958), p. 113 (translation by the author).