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LL.M. Thesis

Commercial Law
Topic:

„The UNIDROIT Principles 2004 the Restatement of the lex mercatoria in the new millennium"

from Knut Michael Hink

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Declaration

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM degree in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Bibliography:

Books:

-"An international restatement of contract law: the UNIDROIT principles of international commercial contracts"

Bonell, Michael, Joachim

2nd enlarged edition,

Transnational Publishers, Inc Irvington-on-Hudson, New York 1997

-„Basic Documents of International Economic Law"

vol. 2 Editors Zamora, Stephen and Brand Ronald A.

C C H Canada 1990

-„Der internationale Vertragsschluß" (Free translation: The international closing of a contract)

Luig, Eva

Peter Lang GmbH, Frankfurt am Main 2003

-„Die Internationale Schiedsgerichtsbarkeit in der Schweiz (II)"

(The International Arbitration in Switzerland (II))

Editor. Bockstiegel, Karl-Heinz

Heymann 1989

LL.M Thesis:

„The Unidroit Principles 2004 the Restatement of the lex mercatoria in the new millennium"

from Knut Michael Hink

-"Die Hanse"

Dollinger, Philippe

4. erweiterte Auflage (4th enlarged Edition)

Kröner, Stuttgart 1989

-„Formalisierte oder schleichende Kodifizierung des internationalen Wirtschaftsrechts"

(Formalised or creeping codification of the international trade law)

Berger, Klaus Peter

Berlin, New York 1996

-"Global Trade Law"

Magnus, Ulrich (Editor)

European Law Publisher GmbH , München 2004

-"INTERNATIONAL TRANSACTIONS and the INTERNATIONAL LAW MERCHANT"

Booysen, Hercules

INTERLEGAL Pretoria 1995

-"Kommentar zum Bürgerlichen Gesetzbuch"

(Comment to the German Civil Code)

Pallandt, Otto , Heinrichs

63. Auflage München 2004

LL.M Thesis:

„The Unidroit Principles 2004 the Restatement of the lex mercatoria in the new millennium"

from Knut Michael Hink

-„L'Arbitrage commercial international"

Pr. éf de Berthold Goldman, Fouchard, Philippe

Paris: Dalloz 1965

-„LEX MERCATORIA AND ARBITRATION"

Carbonneau, Thomas E. (Editor)

Revised Edition

Juris Publishing, Inc. Kluwer Law International 1998

-"Rechtsfragen privatfinanzierter Projekte"

(Legal Problems in connection with privately financed projects)

Nicklisch, Fritz (Editor)

Müller juristischer Verlag 1994

-„Regeln der Auslegung internationaler Handelsgeschäfte"

(Rules for the interpretation of international trade deals)

Baumann, Antje

V&R unipress GmbH, Göttingen 2004

-„The Unification of International Commercial Law"

Ferrari, Franco (Editor)

LL.M Thesis:

„The Unidroit Principles 2004 the Restatement of the lex mercatoria in the new millennium"

from Knut Michael Hink

Nomos Verl. Ges.,Baden-Baden 1998

-„Towards a European Civil Code"

Editor Hartkamp, Arthur; Hesselink, Martijn W., Hondius, Ewoud H.; du Perron, C. Edgar;

Vranken J.M.B.

Dordrecht/Boston/London 1994

Articles and Essays:

-„A Tribute to Karl Llewellyn"

Corbin, Arthur L.

71 Yale Law Journal 1962 (Yale L. J.) 805

-„An Ex-Ante View of the Battle of the Forms: Inducing Parties to Draft Reasonable Terms"

Ben Shahar, Omir

The Berkley Electronic Press

http://law.bepress.com/unmichlwps/olinart32

-„Auf dem Weg zu einem Allgemeinen Teil des internationalen Einheitsprivatrechts"

(UNIDROIT-Principles 2004- The development towards a restatement of the general provisions of the international uniform private law)

Schilf, Sven

Internationales Handelsrecht (IHR) 2004 page 236 et seq.

LL.M Thesis:

„The Unidroit Principles 2004 the Restatement of the lex mercatoria in the new millennium"

from Knut Michael Hink

-„Außenhandel und Rechtssicherheit"

(Foreign Trade and legal certainty)

Leible, Stefan

Zeitschrift für Vergleichende Rechtswissenschaften (ZVglRWiss) 1998, 286 et seq.

-„"Battle of the Forms" Under the 1980 United Nations Convention on the Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles"

Viscallias, Maria del Pilar Perales

10 Pace International Law Review (1998) page 97 et seq

-„Culpa in Contrahendo, oder der Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen"

(Culpa in Contrahendo, or Damages for Void or Unperfected Contracts)

von Jhering, Rudolf

4 JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 1 1861

-"Das Internationale Wirtschaftsrecht" (The International Business Law)

Fischer, Peter

German Yearbook of International Law (GYIL) 19 (1976) 143 et seq

LL.M Thesis:

„The Unidroit Principles 2004 the Restatement of the lex mercatoria in the new millennium"

from Knut Michael Hink

„Das Unidroit Projekt für die Ausarbeitung von Regel für internationale Handelsverträge" (Das Unidrotit Projekt)

Bonell, Michael, Joachim

56 Rabels Zeitschrift für ausländisches und internationales Privatrect (RabelsZ) 1992 p.274 et s.

-"Der europäische Charakter des englischen Rechts"

(The european character of the English law)

Zimmermann, Reinhard

ZEITSCHRFIT FÜR EUROPÄISCHES PRIVATRECHT 1993, page 4 et seq.

-„Die Entwicklung des Internationalen Wirtschaftsrechts durch Verhaltensrichtlinien"

(The Development of the international commercial law through codes of conduct)

Horn, Norbert

44 Rabels Zeitschrift für ausländisches und internationales Privatrect (RabelsZ) 1980 p 423-454

-"Die erweiterten UNIDROIT Principles 2004"

(The enlarged UNIDROIT Principles 2004)

Brödemann, Eckart

Recht der Internationalen Wirtschaft (RIW) 2004 pages 721 et seq.

-„Die UNIDROIT Prinzipien für internationale Handelsverträge"

LL.M Thesis:

„The Unidroit Principles 2004 the Restatement of the lex mercatoria in the new millennium"

from Knut Michael Hink

(The UNIDROIT Principles for international commercial contracts)

Frick, Joachim G

Recht der Internationalen Wirtschaft (RIW) June 2001 416 et seq.

-„Die Unmöglichkeit der Leistung im internationalen Kauf- und Vertragsrecht"

(The non-performance in the internationale sales and contract law)

Fischer, Nicole N.

Berlin: Duncker und Humblot, 2001

-„Do the UNIDROIT Principles of International Commercial Contracts form a new lex mercatoria?"

Baron, Gesa

http://www.cisg.law.pace.edu/cisg/biblio/baron.html

-„Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws"

Farnsworth, Allan E.

Tulane Journal of International and Comparative Law (Tul. Int. Comp. L.) 1995 page 47 et seq

-„Force majeure and hardship: Application in the international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts" Rimke, Joern

http://www.cisg.law.edu/cisg/biblio/rimke.html

LL.M Thesis:

„The Unidroit Principles 2004 the Restatement of the lex mercatoria in the new millennium"

from Knut Michael Hink

-„Force Majeure Clause in International Trade Practice"

Draetta, Ugo

5 International Business Law Journal (Int'l Bus. L. J.) 1996 page 547 et seq.

-„GLOBAL HARMONISATION OF CONTRACT LAW - FACT OR FICTION"

Xavier, Grace

Construction Law Journal 2004, 20(1), 3-18

-„Good Faith in German Law and International Uniform Laws"

Schlechtriem, Peter

in Centro di studi e ricerche di diritto comparato e straniero, Saggi, conferenze e seminari,

Band 24, Rom1997

-„Hardship and Force Majeure"

Maskow, Dietrich

40 American Journal of Comparative Law (Am.J.Comp.L). 1992 page 657 et seq.

-„Hardship and Intervener Clauses"

Schmitthoff, Clive M.

Journal of Business Law 1980, page 82 et seq.

LL.M Thesis:

„The Unidroit Principles 2004 the Restatement of the lex mercatoria in the new millennium"

from Knut Michael Hink

-„Judicial Discretion Under the New Civil Code of the Netherlands"

Hartkamp, Arthur S.

40 American Journal of Comparative Law (Am. J. Comp. L.) (1992) pages 554 et seq

-„Kollidierende Allgemeine Geschäftsbedingungen in internationalen Kaufverträgen"

(Battle of the forms in international Sale of Goods Contracts)

Kröll, Stefan

Recht der Internationalen Wirtschaft (RIW) 2001 Heft 10 pages 736 et seq.

-„Kollidierende Geschäftsbedingungen im internationalen Vertragsrecht"

(Battle of the forms in International Contract Law)

Schlechtriem, Peter

in Karl-Heinz Thume (Editor) „Festschrift für Rolf Herber zum 70. Geburtstag" page 36-49

English translation and update http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem5.html

-„La Companie de Suez société internationale"

Goldman, Berthold

Le monde article available online see http://tldb.uni-koeln.de/static/monde.shtml

-„Lex Mercatoria Online"

Berger, Klaus Peter

Recht der Internationalen Wirtschaft (RIW) 2002, 256 et seq.

LL.M Thesis:

„The Unidroit Principles 2004 the Restatement of the lex mercatoria in the new millennium"

from Knut Michael Hink

-„Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability"

DeClerq, P.J.M.

15 Journal of Law and Commerce (J.L. & Com.) 1995 page 213 et seq.

-„The Battle of the Forms: Fairness, Efficiency, and the Best-Shot Rule"

Goldberg, Victor

76. Ore. L. Rev. (1997) pages 155 et seq

-„The Chaos of the Battle of the Forms: Solutions"

Murray, John

39 Vanderbilt Law Review (Vand. L. Rev.) 1986 pages 1307 et seq.

-„The CISG, the Unidroit Principles and the Principles of European Contract Law in a Global Commercial Code"

Lando. Ole

http://www.iue.it/Law/ResearchTeaching/EuropeanPrivateLaw/Conferences/Lando_CISG.pdf

-„The Concept of „Good Faith" in English Law"

Goode, Roy

Centro di Studi e ricerchi di diritto comparato e straniero, Saggi, Conferenze e seminari 22,

LL.M Thesis:

„The Unidroit Principles 2004 the Restatement of the lex mercatoria in the new millennium"

from Knut Michael Hink

Volume 2 Rom 1992

-„The Concept of the „Creeping Codification" of Transnational Commercial Law"

Berger, Klaus Peter

available under www.tldb.de

-„The Definitive „Battle of the Forms": Chaos Revisited"

Murray John

20 Journal of Law and Commerce (J. L. & Comm.) 2000 pages 1 et seq.

-"The Law Applicable to the Merits of the Dispute"

Lando, Ole

in „Essays on International Commercial Arbitration"

Editor Sarcevi

Boston, London 1991

-„The Law of International Commercial Transactions (Lex Mercatoria)"

.Berman, Harold J and Kaufmann, C.

Harvard International Law Journal 1978 (19) 221 et seq

-„The New Law Merchant and the Global Market Place - A 21st Century View of Transnational

Commercial Law"

Berger, Klaus Peter

www.tldb.de TLDB Document ID: 000002

-„The New Law Merchant: Legal Rhetoric and Commercial Reality"

Medwig, Michael T.

Law and Policy in International Business 1993 (24) page 589 et seq.

-„The New Lex Mercatoria: The First Twenty-five Years"

Mustill, Michael

Arb.Int`l 1988 page 86, 109

-„The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy"

Steyn, Johann

Denning Law Journal (Denning L. J.) 1991 pages 131 et seq.

-„The UNIDROIT-Principles of International Commercial Contracts: Why? What? How?"

Bonell, Michael Joachim

Tulane Law Review 69 (1995) page 1112 et seq.

-„Un Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights"

LL.M Thesis:

„The Unidroit Principles 2004 the Restatement of the lex mercatoria in the new millennium"

from Knut Michael Hink

Nowrot, Karsetn Beiträge zum Transnationalen Wirtschaftsrecht Sep. 2003

www.wirtschaftsrecht.uni-halle.de/Heft21.pdf

-„UNIDROIT Principles 2004 - The New Edition of the Principles of the International Commercial Contracts by the International Institute for the Unification of the Private Law"

(Unidroit Principles 2004)

Bonell, Michael Joachim

Uniform Law Review (ULR) 2004 page 5 et seq.

-„Uniform Commercial Law and International Self-Regulation"

De Ly Filip

in „The Unification of International Commercial Law"ed Ferrari, Franco, page 59 et seq.

-„Vertragsanpassung wegen Grundlagenstörung - Dogmatik, Gestaltung und Vergleich"

(Adaption of the Contract because of Hardship - Dogmatic, Design and Comparison)

Riesenhuber, Karl

Betriebs-Berater (BB) 2004 page 2697 et seq.

-„Verzinsung nach Art 78 UN-Kaufrecht"

(Interest calculation in accordance to Art. 78 CISG)

Ferrari, Franco

Internationales Handelsrecht (IHR) 2003, 153 et seq.

Cases Conventions and other legal Texts:

-Alcatel Australian Limited v Scarcella & Ors Matters CA 40797/97

16.July 1998 online under http://www.austlii.edu.au/au/cases/nsw/supreme_ct/1998/483.html

-Aminol Concession Agreement (1979)

International Legal Materials (ILM) XXI (1982) page 976 et seq.

-Convention on International Factoring from 1988

www.unidroit.org/english/conventions/1988factoring/1988factoring-e.htm

-Convention on the Law Applicable to the Contractual Obligations (Rome 19. June 1980)

www.rome-convention.org

-Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 May 1965

www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationas.of.other.states.washington.1965/

-Convention on Treaties of 13 May 1969

www.un.org/law/ilc/texts/treaties.htm

-Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v the Goverment of Ras al Khaimal (1987)

2 All England Law Reports (ALL ER) page 769 et seq

-ICC award No.8365

Journal du Droit International (Clunet) 1997 at 1078 et seq

-ICC Award No. 8385 (1995)

Journal du Droit International (Clunet) 1995 page 1061 et seq

-ICC Award No. 9875 (1999)

ICC International Court of Arbitration Bulletin 2001 No. 2 page 96 et seq.

Krell v Henry

2K.B. 740 (Eng. 1903)

-LIAMCO Concession Agreement (1955)

International Legal Materials (ILM) XX (1981) page 1 et seq

-Orion Cia Espanola de Seguros v Belfort Maatschappij voor Algemene Verzekeringen

(1962) 2 Lloyd`s Law Report (Lloyd Rep) page 257 et seq.

-Pillans and Rose v van Mierop and Hopkins

(1765) 3 Burrow`s Report (Burr.) 1663, 97 E. R. 1035

-Renard Constructions (ME) Pty Limited v Minister of Public Works

26 New South Wales Law Report (N.S.W. L.R.)234 (Ct. App. 1989)

-TOPCO Concession Agreement (1963)

International Legal Materials (ILM) XVII (1978) 1 et seq

-United Nations Convention on the Assignment of Receivables in International Trade from 2001

http://untreaty.un.org/English/notpubl/10-17_E.doc

-United Nations Convention on the Limitation Period in the International Sale of Goods

www.jus.uio.no/un.limitation.period.sog.convention.1980

- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(New York 10. June 1958)

www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html

Cited internetpages:

LL.M Thesis:

„The Unidroit Principles 2004 the Restatement of the lex mercatoria in the new millennium"

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www.unidroit.org

homepage of the International Institue for the Unification of Private Law

www.uncitral.org

homepage of the United Nations Commission on International Trade Law

www.tldb.de

Transnational Law Database administered by CENTRAL

www.icc.org

homepage of the International Chamber of Commerce

www.un.org

Homepage of the United Nations with access to several Conventions

I Introduction

This work tries to examine if somethink like a modern lex mercatoria exists, what if it exists is generally understood as the modern lex mercatoria and to answer the question if the UNIDROIT Principles of International Commercial Contracts (UPICC)[1] are an up to date restatement of this lex mercatoria.

For this purpose a description of the roots of the lex mercatoria is given and a survey of the modern development. For the achievment of a satisfying result an overview of the international institutions, organisations and projects and their work in the field of the international and transnational commercial law is presented. The main attention hereby is given to the International Institute for the Unification of private law (UNIDROIT) and CENTRAL. The different understanding and interpretation of the lex mercatoria is analysed and the different approach to the preparation of lists of principles for the international commercial law is surveyed. After a brief summery of the common principles a comparison of different solutions offered by the UPICC and the list of principles published by CENTRAL, other lists of principles, international conventions and national regulations for selected legal problems of importance in the field of the international commercial law is made. The comparison shall give the answer if the UPICC that were first published in 1994 and as an enlarged 2nd edition with only a few revisions in 2004, are still the up to date restatement of the lex mercatoria in the year 2005.

II Lex Mercatoria

The lex mercatoria is neither easy to define nor is it even simple to give sufficient proof of the pure existence. Even in the growing international commercial market in the new millennium with the various restatements of general principles, the international standard forms for special contracts, the decisions of the international arbitration organisations and the international conventions on the field of the commercial law, there are still those who do not accept the existence of the lex mercatoria.[2] Their view is based on a jurisprudence of positivism, which emphasises legislation as the only source of law.[3] The law shall only derive from the will of the sovereign and international law from the coincidence of the wills of many sovereign states.[4] It was also criticised that the absence of legal structure and sources, own substantive norms, private international law and compulsory rules make it impossible for the lex mercatoria to be an autonomous legal order capable to be the law that governs a contract.[5] Although some of these arguments are correct the reality of the commercial world sets aside the criticism. There are the customs, the standard term contracts, the restatements and the arbitration awards all this exists in the international trade because the merchants participate and create their contracts on an international and transnational market that is not regulated through a specific (national) legislation.[6] The merchants „create" the lex mercatoria by dealing and contracting with each other in the international trade world and

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[1] Full text of the UPICC is freely accessible under www.UNIDROIT.org; also in "Global Trade Law" page 66-88 Ulrich Magnus (Editor)
[2] Delaume „The Myth of the Lex Mercate and State Contracts" in Carbonneau (Ed.) „LEX MERCATORIA AND ARBITRATION" Rev. ed. page 131,132;
F. A.Mann „Introduction II" in Carbonneau (same as above) page xxiv, xxv
[3] Harold J. Berman and Felix J. Dasser „THE „NEW" LAW MERCHANT AND THE „OLD": SOURCES; CONTENT; AND LEGITIMACY" in Carbonneau (see supranote 2) page 60
[4] Berman and Dasser supranote 3; Klaus Peter Berger „The New Law Merchant and the Global Market Place - A 21st Century View of Transnational Commercial Law" www.tldb.de, section I No.6. b.
[5] Booysen, Hercules "INTERNATIONAL TRANSACTIONS and the INTERNATIONAL LAW MERCHANT" page 8
[6] similar Booysen supra note 5; Berman and Dasser supra note 3; Berger supra note 4

thus establish usage and customs.[7] The diversity and the inherent change of these usages, customs and other elements regulating the international trade makes it so difficult to characterise, define and point out exactly what the undoubtedly existing lex mercatoria is.[8] There exist because of the above mentioned and the missing of a legislative or administrative authority, which could dictate a binding definition, various different definitions of the lex mercatoria.[9] For the purpose of this work a wide definition is chosen and the international lex mercatoria is understood as the body of all the legal norms governing the activities of persons involved in the international trade.[10] The used wording of legal norms is absolutely not to be understood as norms of a specific legal system or any other norms created through legislative acts but any custom made rules or regulations that are widely accepted by the participants on the international commercial market. The international description of the lex mercatoria is meant in the way that the lex mercatoria is anational.[11] The anationality of the lex mercatoria is in first place to be understood in the way that the rules governing an international contract are despite an expressed choice of the parties never derived from any one national body of law. Even more important is the second facet of the anationality meaning that the lex mercatoria has its own normative values, which are independent from any national legal system.[12]

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[7] Grace Xavier „GLOBAL HARMONISATION OF CONTRCT LAW - FACT OR FICTION" Const. L.J. 2004, 20(1), page 11 et seq.
[8] Most Practitioners do not even question the existence of the lex mercatoria for example: Eva Luig „Der internationale Vertragsschluß" (Free translation: The international closing of a contract), Antje Baumann „Regeln der Auslegung internationaler Handelsgeschäfte" (Free translation: Rules for the interpretation of the international trade deals), Bonell Michael Joachim „An international restatement of contract law: the UNIDROIT principles of international commercial contracts"
[9] Booysen page 1-4; Keith Highet „THE ENIGMA OF THE LEX MERCATORIA" in Carbonneau supranote 3, page 133 seq.
[10] Medwig M. T. „The New Law Merchant: Legal Rhetoric and Commercial Reality" 1993 (24) Law and Policy in International Business 589, 590; Booysen supranote 5 page 3-4
[11] Fouchard, Ph. „Làrbitrage commercial international" Article 604 et seq
[12] Fouchard supranote 11

This wide and open approach to the modern lex mercatoria is going to leave the scope of the analysis unrestricted and thus lead to an entire and satisfactory result.

The use of the term modern lex mercatoria already indicates that there must also exist an old or ancient lex mercatoria. It is always important to have knowledge about the historical background to understand the discussions of the present.

1. The ancient lex mercatoria

The roots of the lex mercatoria must be seen in the Roman ius gentium[13] and Justinian`s Corpus Iuris.[14] Especially the ius gentium, which also governed the international trade and was developed from international treaties and by the praetor peregrinus who was a judicial official acting without legislative power can be regarded as the predecessor of the lex mercatoria.[15] The Roman law also established especially in the sector of the commercial trade a common basis in Europe. After the destruction of the Roman Empire the international trade stagnated and then was even reverberated because the working international infrastructure was destroyed together with the Empire.

In the eleventh and twelfth century the international trade in Europe started to blossom again.[16] The growth of commerce started a renaissance for the international trade and the trading community created a new system of law to regulate their transnational commercial activities.[17] The dealings in the market place formed the usages and customs, which were then applied by mixed courts that are comparable to modern arbitration tribunals. This special law for the merchants grew in the first place in the Italian cities and then came with

[13] Booysen supranote 5page 41
[14] Bonell supranote 7 page 3
[15] Booysen supranote 5 page 41
[16] Blaurock „The Law of Transnationall Commerce" in Franco Ferrari „The Unification of International Commercial Law" page 10

the merchants to the trade centres in Spain, France, Germany and the rest of Europe.[18] The trade was concentrated in the great markets, fairs and especially the growing ports.[19] The customs of the trade centres became the dominant codes in the different trade sectors and thus were applied transnationally across Europe. The codes of the customs or the guilds of these trade centres became universal law and the codified law of the cities was merely a restatement.

A very good example for this evolution of an universal law could be seen in Northern Europe where the law of the Hanse regulated the international trade.[20] The Hanse was a trade association of up to two hundred towns that survived for five hundred years. As an independent organisation with partially its own jurisdiction the Hanse developed rules and regulations that stood apart from and above the local law.[21] The Hanse and the Hanseatic League, which the Hanse joined in the 14th century, became a powerful international organisation with several privileges and was in territories under its aegis immune from the jurisdiction of the local authorities.[22] The Hanseatic league spread from Lübeck to London, Bergen and Nowgorod. In the courts of the Hanse „Altermänner" (older men) who were elected by the members of the Hanse ruled over commercial and criminal matters.[23] In their assemblies that took place on an irregular basis the Hanseatic League passed resolution,[24] which additionally to the case law of the Hanseatic courts created a customary law for the international trade. This customary law had an international character, regulated

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[17] Berman and Kaufmann „The Law of International Commercial Transactions (Lex Mercatoria)" Harv. Int. L.J. 1978 (19) 221, 224
[18] Xavier supranote 7 page 12
[19] Baron „Do the UNIDROIT Principles of International Commercial Contracts form an new lex mercatoria?" http://www.cisg.law.pace.edu/cisg/biblio/baron.html
[20] Blaurock supranote 16 page 11.
[21] Blaurock supranote 16 page 11
[22] Dollinger „Die Hanse" page 9
[23] Dollinger supranote 19 page 245
[24] Blaurock supranote 16 page 12; Rehme „Geschichte des Handelrechts" page 3

independently the commercial trade and was generally used thus was the lex mercatoria of its time.

The Hanse lost after its decline at the end of the 15th century through the dissolution of its privileges the monopoly over the international trade.[25] With the strengthening of the Nordic countries even a restruction of the Hanse failed to prevent the disintegration of the Hanse or the Hanseatic League towards the middle of the 17th century.[26] The customary law of the Hanse lost the validity with the fading influence of the Hanseatic League but parts of the codified maritime law survived and can partially still be found in moder maritime law rules and codifications.[27]

In England it was Edward I who enacted the carta mercatoria in 1303, which was intended to regulate the disputes arising in the commercial world between the merchants in an efficient way.[28] The trials should be held quick and a jury with half of the members being foreign merchants made the decisions. In the middle of the 14th century the quick-response courts of commerce or „piepowder courts" were already established. In these courts decisions were based on a common European law merchant and not the English common law.[29] The lex mercatoria as a transnational set of rules recognised by the merchants was accepted and applied by special courts.[30]

The ancient lex mercatoria as a result of the nationalisation and codification of the law in the European countries ceased to exist because the different countries all found it necessary to regulate their commercial law through a national body of law. Every state passed its own code or used its case law thus the universal, flexible and transnational law merchant could no

[25] Rehme supranote 21 page 141
[26] Dollinger supranote 19 page 12
[27] Blaurock supranote 16 page 12
[28] Blaurock supranote 16 page 13
[29] Zimmermann „Der europäische Charakter des englischen Rechts" (The european character of the English law) ZEP 1993 4, page 31

longer be applied through the national courts because they were bound by the national legislation. In England it was not a codification of the national trade law but the integration of the lex mercatoria into the common law, which was controlled through the national courts that in the end led to the disappearance of the necessarily international character and thus the lex mercatoria itself.[31]. The famous case of Pillans v van Mierop (1765)[32] were Lord Mansfiel held that the rules of the law merchant were questions of law to be decided by the courts and not only be applicable to the merchants but to all subjects, making this new approach absolutely clear. Thus the transnational lex mercatoria ended to exist but parts of it survived as national law. In France this nationalisation had already taken place with the formulation of the „Ordonnance du commerce" from 1673 and the „Ordonannce de la marine from 1681.

2. The modern lex mercatoria

In the last century international trade has especially after the end of world war II begun to rise again and is today of extraordinary importance for most countries. The enormous development in the last decades was supported through the end of the cold war and the progress in the communication technology, which led to the view of the world being a „global village".[33]

The economic growth and the changes in the socio-political environment led to a re-emergence of the lex mercatoria as part of the legal science, which started in the early twentieth century.[34] The discussion about a new or modern lex mercatoria was the response

[30] Blaurock supranote 16 page 13
[31] Baron supranote 19 section II. 2.
[32] Pillans and Rose v van Mierop and Hopkins (1765) 3 Burr. 1663, 97 E. R. 1035
[33] with the meaning described in www.wikipedia.org/wiki/Global_village as a description of the new globalisation made possible through the new technologies for example the world wide web and originating from Marshall Mc Luhan who first used the phrase in his book „The Gutenberg Galaxy"
[34] Booysen supranote 5 page 46

to the growing amount of cross boarder transactions in the commercial world.[35] Some of the first who realised the reappearance of a customary law in the international trade that was worth to be called a new international lex mercatoria were Grossmann-Doerth, Lambert[36] and Zitelmann[37]

Parallel to the revitalisation of the academic discussions, international formulating organisations were established. Already in the 1920`s the International Chamber of Commerce (ICC) a non-governmental organisation that was founded in 1919 started to formulate uniform standard rules and procedures for the international trade.[38] The aim of the organisation was and still is to promote international trade.[39] The Institute for the Unification of private law (UNIDROIT) was also founded in the post World War I era in 1926[40] (for details see below).

After the interruption of all transnational developments through the rise of nationalism and the second world war, it was especially the French comparatist Berthold Goldman who was responsible for the revitalisation of the transnational commercial law as part of the legal science from the early 1950`s onwards.[41] Especially the discussion about the nationality of the Suez Canal Company, which could be considered a juridical person of the private law, and his view that it is neither of English, French nor Egyptian nationality but „une société internationale, relevant directment de l'ordre juridique international" started a bigger dialogue about the lex mercatoria.[42] The particular organisation, activities and the capital structure made the company, in Goldman's view, in its legal nature and legal source

[35] Blaurock supranote 16 page 14
[36] Booysen supranote 5 page 46
[37] Berger supranote 4 section I. 2.
[38] see under www.iccwbo.org/home/menu_what_is_icc.asp; Baron supranote 17 page 3
[39] see under www.iccwbo.org/home/menu_what_is_icc.asp
[40] see under www.UNIDROIT.org; Bonell, supranote 8 page 5
[41] Berger supranote 4 section I. 3.

essentially international with a private law nature and a transnational character. In more general publications Goldman later argued that the lex mercatoria is an „ensemble" of general principles, which are created through the community of the merchants doing cross-border transactions.[43] His academic pupils Philippe Fouchard and Philippe Kahn developed, expanded and specialised the theories of Goldman particularly in the area of the international commercial arbitration and the international sales law.[44]

In England it was Clive Schmitthoff who was in the forefront of the debate about the modern lex mercatoria. He advocated the idea of a system of transnational law independent from national legislation and tailor-made for the international market.[45] The formulating agencies should through their co-operative work reach this goal. His view that the formulating agencies are of an enormous importance for the further development and promotion of the lex mercatoria, resulted in him being the founding father of the United Nations Commission on International Trade Law (UNCITRAL) in 1966.[46]

Not only in England and France but in all European countries existed or exist influential academics who promoted the idea of a new or modern lex mercatoria. These are for examples in Switzerland: Schnitzer and Lalive, in Germany: Horn, Siehr, Coing and Lorenz and in the Benelux countries: Sanders and Dabin. Other important mercantonists are besides others: Berman, Tarkman, Von Mehren, Fansworth, Berger and Bonell.[47]

For the development and growth of the modern lex mercatoria decisions made by arbitrators in disputes arising in the area of the international trade are of significant importance. These

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[42] Goldman „La Companie de Suez société internationale" available online http://tldb.uni-koeln.de/static/monde.shtml
[43] see Berger supranote 4
[44] Berger supranote 4 section I. 3.
[45] Berger supranote 4 section I. 4.
[46] Established by the General Assembly in 1966 (Resolution 2205 (XXI) of December 1966 see www.uncitral.org; Berger supranote 4 section I. 4.
[47] Booysen supranote 5 page 47

decisions laid down in writing, partially accessible in the Internet[48] with a legal reasoning are an important source of the modern lex mercatoria. There is however still a lively discussion if it is possibleto found awards only on the lex mercatoria as the law governing the contract and their enforceability in front of the national courts.[49] Despite this discussion there are several even older cases where awards were founded on the rules and principles of the lex mercatoria or where the parties agreed on the lex mercatoria being the law governing their contract.[50]

One of the first and most important of these awards was made in the case of the Deutsche Schachtbau- und Tiefbohrgesellschaft mbH (D) v Ras al Khaimah National Oil Co (R).[51]

The parties implemented in the contract, which dealt with oil and gas exploration an ICC arbitration clause. Both sides declined to continue performance of the agreement, arguing that it had been induced by misrepresentation. In the ICC arbitration (ICC No. 3572) that was held in Geneva like agreed upon in the contract the arbitrators had to answer the question which substantive law should govern the contract. The arbitration tribunal decided not to choose the law of the place of performance nor any other national body of law. Instead of this the award was judged in accordance to „internationally accepted principles of law governing contractual relations". In the award no further specifications of these principles were given. The D could enforce the award in England like a judgement although R argued

[48] see for example: www.tldb.de; www.UNIDROIT.info; www.unilex.info; www.cisg.law.pace.edu; www.lexmercatoria.org

[49] Carbonneau, Tom „The remaking of Arbitration: Design and Destiny" in „LEX MERCATORIA AND ARBITRATION" revised edition ED. Thomas E. Caarbonneau, page 38 et seq.; Blaurock supranote 16 page 9

[50] Railway contract between Turkey and the Companie générale pour l'exploitation des chemis de fer de la Turquie Europe (1872) Fischer GYIL 19 (1976) 143, 154; LIAMCO Concession Agreement (1955) ILM xx (1981), 1, 33; TOPCO Concession Agreement (1963) ILM XVII (1978) 1, 15; Aminol Concession Agreement (1979) ILM XXI (1982) 976, 1000; Channel Construction Contract 1987) Jayme in Nicklisch (ed) „Rechtsfragen privatfinanzierter Projekte" page 65, 73; ICC Award No. 7375 (1995) in Bonell supranote 8 page 249; ICC Award No. 8385 (1995) Clunet 1995 page 1061, 1066; ICC Award No. 9875 (1999) ICC International Court of Arbitration Bulletin 2001 No. 2 page 96 et seq.; more examples under www.unilex.info

[51] Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v the Goverment of Ras al Khaimal (1987) 2 ALL ER page 769 et seq.

that this should not be possible and would be against public policy because the substantive law on which the award was founded was not determined enough and ill defined. R appealed against the first decision but this appeal was dismissed. The judge based his decision on the case of Orion Cia Espanola de Seguros v Belfort Maatschappij voor Algemene Verzekeringen[52] in which it was already decided that the parties could agree that a part or the whole of their legal relationship could be determined through a foreign body of law or on the basis of principles of international law. The choice of a law that is not that of a state as the law governing the contract, should depend on the answer to the following three questions: (1) Did the parties intend to create legally enforceable rights and obligations? (2) Is the agreement of the parties sufficiently certain to create a legally enforceable contract? (3) Would it be contrary to public policy to enforce the award with the executive powers of the state?[53] The court held that it was an agreement where the parties wanted to created enforceable rights, that it was not too uncertain to choose international principles to govern the contract and that this was not against public policy.[54]

Not only the existence of these awards and contracts[55] but the idea of the lex mercatoria as the „best" law to govern an international commercial contract because it is made exactly for this purpose led to the result that there must be the possibility to found the awards on the lex mercatoria where the will of the parties is not declared differently. If an arbitrator should be able to found his award on the lex mercatoria it is necessary to find out what are the sources of this law.

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[52] Orion Cia Espanola de Seguros v Belfort Maatschappij voor Algemene Verzekeringen (1962) 2 Lloyds Rep. page 257 et seq.
[53] Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v the Goverment of Ras al Khaimal (1987) 2 ALL ER page 769, 779
[54] see supranote 53
[55] see supranote 50 for some examples

3. Sources of the lex mercatoria

It is inherent in the concept of an independent, international and transnational body of law that there is not only one source. This is an important difference to the regulations of the private international law, which is also called conflict of laws, where each national legislator formulates rules that regulate, which substantive national law should be applied when disputes arise from an international relationship, agreement or contract. For the lex mercatoria exists nothing like a legislator but it derives from different sources and the discussion about which of these are important or acceptable is still in progress.[56] The wide and open definition of the lex mercatoria as favoured in this work (see above) leads to an open approach to possible sources of the lex mercatoria. In this way the general and universal character of the lex mercatoria is maintained. It is although nearly impossible to provide a complete list of the elements and sources of the lex mercatoria.[57] Some of the most important elements and sources are:

a.) International Legislation

International legislation is not derived from acts of an international legislator (see above) it refers to all legislative measures that have an international character.[58] This very important source is divided between the Public International Law and the Uniform Laws.

In the first category rules of public international law on treaties can apply to contracts between a government or a government enterprise and a private party.[59] This restriction must not be maintained and generally acceptable principles can of course become part of the lex mercatoria, which is universal in character. The Vienna Convention on Treaties of 13 May

[56] „The New Lex Mercatoria: The First Twenty-five Years" Mustill, Michael Arb.Int'l 1988 page 86, 109
[57] Fouchard supranote 11 Nos. 575-630
[58] Blaurock supranote 16 page 14

1969[60] offers common legal principles, which could be applied in the mentioned way. The rules of Convention on the Settlement of Investment Disputes between States and Nationals of other States (International Centre for Settlement of Investment Disputes Washington 1965)[61] are also promoting international harmonisation on the transnational market.[62] The Rome Convention of 1980[63] is another Convention that created uniformity in the area of the private transnational law and thus these common principles can be seen as another source or inspiration for the lex mercatoria. Also the various treaties on patents, trademarks and copyright laws must be seen as sources for the lex mercatoria.[64]

In the second category the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG)[65] and its not so successful predecessor the Uniform Law on the Sale of Goods of 1964 must be seen as irreplaceable sources of the present lex mercatoria.

b.) General Principles of Law

The general principles of law are founding the legal common core of all participants on the international market and thus are one of the essential requirements for the existence of the lex mercatoria and a necessary source. Some of these general principles are pacta sunt servanda, freedom of contract and the principle that a party can terminate the contract when a substantial breach of the other party is evident.[66]

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[59] Lando, Ole „The Law Applicable to the Merits of the Dispute" page 144
[60] www.un.org/law/ilc/texts/treaties.htm
[61] www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationas.of.other.states.washington.1965/
[62] Lando supranote 59
[63] www.rome-convention.org
[64] Blaurock supranote 16 page 15
[65] CISG text available under www.unilex.info
[66] Lando supranote 59 page 145

c.) Customs and Usages

The customs and usages of the merchants must be seen as the essential roots of the lex mercatoria because through their transactions the merchants are the founders of the lex mercatoria (see above). There are customs that apply only on the international market or these that are so common and general that they also apply on the national market.[67] Some of these customs are already codified as compilations and applied as though they were binding law.[68] The most important of these compilations are the „Incoterms" and the „Uniform Customs and Practices for Documentary Credits" both published by the ICC.[69] The Force Majeure and Hardship clauses offered by various international and national arbitration organisations are used increasingly through the merchants on the international market and thus define a common understanding for the allocation of the risk in this problematic legal aspect in international contracts.

d.) Standard Form Contracts

There exist several Standard form contracts, which are used in a specific field of the international market. On the engineering sector the FIDIC publications[70] of standard contracts are used extremely often. Another example are the General Conditions for the supply of Plant and Machinery for Export published by the Economic Commission for Europe in 1953.[71] These standard terms are reflecting the common regulations the merchants are agreeing on when they participate on the international market. This is not restricting the

[67] Lando suprnote 59 page 145
[68] Blaurock supranote 16 page 17
[69] can be ordered under www.iccwbo.org
[70] see under www.fidic.org
[71] Lando supranote 59 page 146

freedom of contract but mirrors what is widely accepted as a just contract and thus is an essential source for the lex mercatoria.

e.) Rules of International Organisations

The International Organisation like the UN, UNCTAD, OECD and others all have special mostly non binding rules how contractual matters should be handled.[72] These rules have to be seen as codes of conduct and mainly contain general regulations about good faith and fair dealing. Although these rules are only guidelines for international organisations, the international character of these organisations, the international scope of the rules, the easy reformulation, easy accessibility and the intention of the creators to form a widely acceptable consent allows them to be an important and vivid source for the lex mercatoria.

f.) International Arbitration

The International arbitration awards are of an extraordinary importance as source and element of the lex mercatoria.

The awards granted in national, international or a-national arbitration[73], which is widely independent from the lex loci arbitri, are enforceable in front of the national courts since most states signed the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 10. June 1958)[74]. Arbitration as an efficient, neutral, relatively cheap and fast dispute resolution system has in the field of the international trade

[72] Nowrot, Karsetn „UN Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights" Beiträge zum Transnationalen Wirtschaftsrecht Sep. 2003 www.wirtschaftsrecht.uni-halle.de/Heft21.pdf; Horn, Norbert „Die Entwicklung des Internationalen Wirtschaftsrechts durch Verhaltensrichtlinien" 44 RabelsZ (1980) page 423-454
[73] Carbonneau supranote 49 page 33 et seq.
[74] www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html

become at least as important as litigation through national courts.[75] The arbitration awards are not yet forming a settled case law but providing arbitrators and other participants of the international trade market a useful guidance because an increasingly number of these awards is published and freely accessible.[76] In connection with the numerous commentaries to these awards, which are as easy accessible in the Internet,[77] the lex mercatoria is getting more and more determined. The arbitrators should recognise the great chance to form a common lex mercatoria. If this goal shall be reached the openness towards new solutions, the promotion of internationally acceptable rules and the courage to found the awards on internationally accepted principles must be present by the arbitrators.

g.) Codification of Principles

There are in the meantime several lists of principles or restatements of the lex mercatoria. The here relevant codifications are made from non-governmental organisation without legislative powers. The most important ones are the UPICC, the Principles of European Contract Law (PECL), the List of Principles published by CENTRAL, the UNCITRAL model laws (see in detail below) and other lists published by academics.[78] These lists must be seen not only as important restatements but also as good, accessible and relative comprehensive sources of the lex mercatoria. The amount of different lists must, although it is positive to have a wider discussion about the lex mercatoria, be seen with a critical view because all the different lists, with different rules, regulations and addressees claim to be the restatement of the one lex mercatoria. On the international market this could confuse the potential users of

[75] Blaurock supranote 16 page 16 et seq.
[76] Lando supranote 59 page 147
[77] supranote 48 (see for example: www.tldb.de; www.UNIDROIT.info; www.unilex.info; www.cisg.law.pace.edu; www.lexmercatoria.org)
[78] Mustill, Michael supranote 56 page 110 et seq.

the lex mercatoria because it gets uncertain, which rules and regulation are applied if they chose the lex mercatoria as the law governing the contract. It is for a further success of the lex mercatoria necessary to distinguish the different lists and to determine, which is the most widely accepted restatement.(see below)

Another element of the lex mercatoria that can not be characterised as a source but better as an inherent restriction is the ordre public.[79] An agreement shall not be enforceable if it violates international public policy. National mandatory rules are only of a minor importance and only public law norms, which can be characterised as peremptory and serve the public interest or protect a weaker party must be considered.[80] The common understanding what is contrary to public policy is the same in almost all national legislation and in the lex mercatoria and thus is a restriction in accordance to one of the legal bodies sufficient.[81]

4. Current challenges for the lex mercatoria

The recognition and further development of the lex mercatoria as an independent legal order continues. Even though the lex mercatoria does not constitute a complete legal system as known from the national bodies of laws it becomes increasingly determined and certain because more merchants and arbitrators choose or apply it. The need for interpretation and gap filling is inherent in any legal system and thus is not only necessary when the lex mercatoria is applied.[82] It is extremely important to promote a further unification and harmonisation of the lex mercatoria where the restatements can be an essentially helpful

[79] Booysen supranote 5 page 77 et seq; Mustill supranote 56 page 109 et seq.
[80] Booysen supranote 5 page 78
[81] Booysen supranote 5 page 80

tool. The lack of an internal structure or a superior organisation, which both existed as part of the Hanseatic League in the time of the ancient or medieval lex mercatoria, creates the danger of confusion or misunderstandings about the content of the lex mercatoria.[83] This problem could be solved through the formulating agencies if they work together for a further harmonisation and thus create a universally acceptable legal framework, which constitutes a complete restatement of the modern lex mercatoria. In the present the most comprehensive restatement are the UPICC, which were first published in 1994 and as an enlarged edition with only a few revisions in 2004. The question must be if the regulations laid down in the UPICC mostly in 1994 are still a current restatement of the lex mercatoria in the year 2005.

III The International Institute for the Unification of Private Law

The Institute for the Unification of Private law (UNIDROIT) is introduced as the first international organisation because the UPICC, on which the main emphasis of this work is laid, are published by this organisation.

1. The Organisation

UNIDROIT was founded in 1926 as an anauxiliary organ of the League of Nations.[84] UNIDROIT is nowadays an independent, international, intergovernmental organisation that is situated in Rome. The 59 Memberstates finance UNIDROIT[85]. The aim of the organisation was from the beginning to study methods for the co-ordination and harmonisation of the transnational private law especially in the area of commercial law, to formulate drafts for

[82] Baron supranote section II 4. (b)
[83] Blaurock supranote 16 page 25
[84] Brödermann, Eckart „Die erweiterten UNIDROIT Principles 2004" RIW 2004, 721

agreements, contracts, conventions and laws with the object to promote uniformity in the international law and to improve the international relations in this field.[86] UNIDROIT concentrated the work hereby from the beginning on private law relations mostly connected to two or more bodies of law.[87] The organisation is structured in three basic divisions. The Secretariat is doing the day to day work. The Governing Council deals with the more important affairs like the design of the work program and the General Assembly is the highest organ, which makes most of the important decisions for example about the budget of each year or the approval of the working program.[88]

Several drafts of UNIDROIT have been the basis for international conventions these were for example the Convention on the Contract for the International Carriage of Goods by Road from 1952, the Convention on International Factoring from 1988, the Convention on the Return of Stolen or Illegally Exhort Cultural Objects from 1995 and different others.[89] In an effort towards the unification and harmonisation of the transnational commercial law UNIDROIT published in 1994 the UPICC.

2. The UNIDROIT Principles of International Commercial Contracts (UPICC)

UNIDROIT published the first edition of the UNIDROIT Principles of International Commercial Contracts (UPICC) in 1994. The second enlarged and reviewed edition of the UPICC was published in 2004.

[85] For the List of the Memberstates see www.UNIDROIT.org
[86] Booysen supranote 5 page 68
[87] Booysen supranote 5 page 68
[88] www.UNIDROIT.org
[89] www.UNIDROIT.org under achievements a list of the prepared conventions is available

a.) Historical background and working method

The idea for the restatement of the principles of the transnational commercial law was inspired by the experience made in the United States with the American Restatement of Law.[90] The work on the first edition of the UPICC started after some basic preliminary studies of the Secretariat already in 1971, when the initiative was included in the work program.[91] As representatives of the different legal, sociological and economic orders of this time Professor René David for the civil law, Clive M. Smithoff for the common law and Tudor Pupesco for the socialist system founded a working group to find out if it is possible to realise a restatement of common principles for the international market. In 1974 in a first report the advice for the realisation of the project was given through the committee and a possible structure was presented.[92] Not before 1980, because of other projects that were seen as more urgent a special Working Group was set up and began with the drafting of chapters of the UPICC. The Members of this working group were all specialists in the field of contract law, international trade and comparative law even though most of the members were academics and only some judges or civil servants participated the emphasis was laid on the design of practical and applicable rules for the international market.[93] The aim was to create a set of rules that could be used from merchants in the whole world independent of the economic and political situation of their home countries.[94] All the experts although from different countries, with different socio-economic backgrounds representing their particular legal order and different ways of legal thinking were participating in their personal capacity and did not represent particular interest groups or governments thus the work could be

[90] Bonell supranote 7 page 19; Baron supranote 19 section III. 1. a)
[91] Bonell supranote 7 page 20
[92] Bonell supranote 7 page 20
[93] Bonell supranote 7 page 35 et seq.
[94] Bonell „Das UNIDROIT Projekt für die Ausarbeitung von Regel für internationale Handelsverträge" (Das Unidrotit Projekt), 56 RabelsZ (1992),274, 276

absolutely focused on the search and formulation of the best solution.[95] To find the best regulations for the international market the emphasis was not laid on the consideration and comparison of as many national bodies of law as possible but the creation of a sophisticated set of rules that reflects the common principles to the satisfaction of lawyers and merchants of the common law and civil law countries.[96] The comparison was concentrated on these legal orders and compilations of law that were of a more recent date and thus were better qualified for the comparative creation of a restatement that meets the special needs of the modern international trade market.[97] These codification were for examples the United States Commercial Code and the Restatement (Second) of the Law of Contracts, the Algerian Civil Code of 1975, the 1985 Foreign Economic Contract Law of the People's Republic of China, the drafts of the new Dutch Civil Code and the new Civil Code of Québec, these entered into force in 1992 and 1994, and the 1980 United Nations Convention on Contracts for the International Sale of Goods.[98] The selection of a regulation for the UPICC was not dependent on an arithmetical criterion but on the decision if the regulation was well suited for cross-boarder transactions and had the most persuasive value for this purpose.[99] The working groups using this method prepared the different chapters and in February 1994 the last readings of these chapters were held and a special Editorial Committee prepared the final version of the UPICC.[100] In May 1994 the Governing Council accepted the final version and the UPICC were published. For the creation of the enlarged UPICC in the version of 2004

[95] Frick, Joachim G. „Die UNIDROIT Prinzipien für internationale Handelsverträge", RIW 2001, 416, 417
[96] Baron supranote 19 section III. 1. b)
[97] Bonell supranote 7 page 35 et seq.
[98] Bonell supranote 7 page 32
[99] UNIDROIT supranote 1 Introduction page viii
[100] Bonell supranote 7 page 28

the same working scheme was used and a working group of selected experts[101] started the work in 1997.[102]

b.) The UPICC in the 2004 version

The UPICC in the here relevant new version contents the preamble, ten chapters and the comments rules to each Article with the explanation for the correct interpretation and simple case descriptions as examples. This work is not going to present all the old and new chapters but a brief summary of the provisions especially the new ones is given.

In the preamble the universal application of the UPICC is promoted. Especially the provisions added in the new version, which declare that the UPICC „may be applied if the parties have not chosen any law to govern their contract" and „may be used to interpret or supplement domestic law" make this more visible and are based on the success of the 1994 version (see below).[103] The UPICC shall in accordance to the preamble also apply if the parties have chosen the lex mercatoria to govern their contract.[104] The UPICC themselves thus claim to be the restatement of the modern lex mercatoria at least of the year 2004 and with the comparison made in this work it is hopefully possible to see if this is correct or not.

In chapter one the general provision are found. Besides the description of the basic principles like the freedom of contract in Article 1.1, the non requirement of any form in Article 1.2, the

[101] Members of the group were: Luiz Olavo Baptista (Brasil), Paul Crépeau (Canada) Samuel K. Date-Bah (Ghana), Adolfo Di Majo (Italy), Atkham El Kholy (Egypt), E. Allan Fansworth (USA), Paul Finn (Australia), Marcel Fontaine (Belgique), Michael P. Furmston (GBR), Arthur S. Hartkamp (Netherlands), Huang Danhan (China), Camille Jauffert-Spinosi (France), Alexander S. Komarov (Russia), Ole Lando (Danemark), Peter Schlechtriem (Germany), Takashi Uchida (Japan), Michael Joachim Bonell as supervisor. This group was supporter through different experts from UNCITRAL the ICC and other arbitration organisations. (Schilf, Sven „UNIDROIT Principles 2004-Auf dem Weg zu einem Allgemeinen Teil des internationalen Einheitsprivatrechts" IHR 2004, 236, 237)

[102] Bonell, „UNIDROIT Principles 2004 - The New Edition of the Principles of the International Commercial Contracts by the International Institute for the Unification of the Private Law" (UNIDROIT Principles 2004) ULR 2004 page 5 et seq section II. 1.

[103] Preamble of the UPICC supranote 1

[104] Preamble of the UPICC supranote 1

pacta sunt servanda principles in Article 1.3 and the principle of good faith and fair dealing in Article 1.7, the new Article 1.8 dealing with inconsistent behaviour by one party is added. In the view of a central European lawyer the restriction not to act inconsistent in the way mentioned in Article 1.8 would be without any doubt derived through the application and interpretation of Article 1.7 as well but the working group wanted to point out the importance of this principle and formulated the prerequisites.[105] In this chapter Article 1.10 about the requirements of a notice including the general acceptance of mailing addresses as valid addresses, Article 1.11 contending different definitions allowing besides others writing to be in any form as long as a record in tangible form is reproducible, and Article 1.12 about how time settings by the parties are computed, were added as well.

Chapter two regulates the formation and in the newly introduced second section the authority of agents. From Article 2.2.1 to 2.2.10 regulations on the authority of the agent and how his actions affect the legal relations between the principal and a third party excluding regulations for the relationship of the agent towards the principal (Article 2.22 (2)) are found. The UPICC are thus following the theory of separation founded by Laband and distinguish between the granting of the authority to act for the principal and the legal relation between the agent and principal on which this authority is based.[106] The Articles regulating the authority of agents are largely reflecting the rules laid down in the 1983 Geneva Convention on Agency in the International Sale of Goods, which was prepared through UNIDROIT. Even though this convention was not very successful and is only ratified by five states and thus

[105] Schilf, Sven „UNIDROIT Principles 2004-Auf dem Weg zu einem Allgemeinen Teil des internationalen Einheitsprivatrechts" IHR 2004, 236, 240
[106] Schilf supranote 101 page 241

because the ratification of ten is required has not yet entered into force[107] it is the model for the new sub-chapter and the rules should be interpreted in regard to this background.

In chapter three the unchanged regulation about the validity and in chapter four as well unchanged the ones about the interpretation are situated.

Section one of chapter five dealing with the content was supplemented by Article 5.1.9 regulating the release by agreement. Section two of chapter five dealing with third party rights is introduced by the 2004 version. The parties do not need to state the intention expressly that they want to confer a right on a third party and are not only free to do this but also to exclude the creation of any such right or to limit or make such a right depend on a certain condition.[108]

Chapter six section one with the rules for the performance and section two regulating the Hardship examination remained unchanged.

Chapter seven section one about non-performance, section two dealing with the right to perform, section three about termination and section four about damages remained in the 1994 version.

Chapter eight dealing with set-off was introduced by the 2004 version. In the case that two parties owe each other money or other performance of the same kind and one or both declare to set off the obligation of the other party a lot of unnecessary and expensive movement of goods or money is spared. For the international trade community such a regulation is of a high practical importance and absolutely useful in the international trade where transport- or remittance costs are higher than in comparable national situations.[109]

[107] Bonell „UNIDROIT Principles 2004..." supranote 102. section II. 2. (c)
[108] Bonell „UNIDROIT Principles 2004..." supranote 102 II 2. (d)
[109] Schilf supranote 101 page240

Chapter nine on the assignment of rights, the transfer of obligations and the assignment of contracts is also new. This new chapter is divided in the three sections as mentioned above and thus is the first attempt to lay down a comprehensive set of rules at an international level about these topics.[110] UNIDROIT had already prepared one of the two Conventions on this field but both have a much more restricted scope. The UNIDROIT Convention on International Factoring from 1988[111] and the United Nations Convention on the Assignment of Receivable in International Trade from 2001[112] were both not very successful in their practical application. The first was only ratified by six states and the later by three states.[113] The rules laid down in chapter nine of the UPICC are surely going to be more successful than these conventions because of the unrestricted approach of the UPICC and the different addresses the individual merchants that can choose the UPICC as the law that governs their contract.

Chapter ten on limitation periods is also completely new. The regulations are comprehensive and based in parts on the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods.[114] Like the mentioned Convention the UPICC adopt a two tier-system. This means that it provides a rather short general limitation period of three years other than the convention that provided a four year limitation, combined with a maximum cut-off period of ten years.[115] Another difference to the Convention is the fact that the commencement of the limitation is dependent not on the accrues of fact the claim can be founded on but the obligee's actual or constructive knowledge of this fact (Article 10.2 (1) UPICC). The limitation is suspended when the obligee asserts its right against the obligor no

[110] Bonell „UNIDROIT Principles 2004..." supranote 102 section II 2. (f)
[111] www.UNIDROIT.org/english/conventions/1988factoring/1988factoring-e.htm
[112] http://untreaty.un.org/English/notpubl/10-17_E.doc
[113] Bonell. „UNIDROIT Principles 2004..." supranote 102 section II 2. (f)
[114] www.jus.uio.no/un.limitation.period.sog.convention.1980
[115] Bonell. „UNIDROIT Principles 2004..." supranote 102 section II 2. (g)

matter if he does so in judicial or Arbitral proceedings or by an alternative dispute resolution, the later was not mentioned in the Convention. The parties can modify the limitation periods and after acknowledgement by the obligor the limitation period begins to run again. The set of rules is comprehensive and regulates as well the accrues of Force Majeure and death by one party (Article 10.8), the effects of expiration of the limitation period (Article 10.9) or that set off is still possible as long as the obligor has asserted the expiration of the limitation period (Article 10.10).

The current version of the UPICC thus is more comprehensive and can hopefully continue the success of the first version. The UPICC were already applied even though not always as the law that governs the contract in 77 Arbitral awards and 22 judgements.[116] These are just the published awards and especially after the scepticism which faced the UPICC when they were published and the comparison with the CISG that needed ten years for a wider acceptance this success could not be expected. The UPICC constitute a real alternative to the application of private international law rules because these rules can be seen as barriers of the international commercial trade.[117] For their purpose the UPICC must be an up to date restatement of the international commercial law. The concentration on an enlargement rather than a revision of the UPICC maybe already led to the result that some of the rules and regulation are not up to date anymore because any form of restatement has to be an „ongoing process".[118]

[116] www.unilex.info from the 15.09.2005
[117] Frick, supranote 95 page 423
[118] Bonell „UNIDROIT Principles 2004..." supranote 102 . conclusion

IV The Centre for Transnational Law (CENTRAL)

CENTRAL is presented because this organisation also published a list of principles for the transnational commercial law. This list of principles follows a different approach than the UPICC and thus is not a real competitor but makes it possible to compare the UPICC with the currently accepted rules and regulations of the modern lex mercatoria.

1. The Organisation

The CENTRAL is an institution for academic research and legal training of lawyers. It was established in May 1988 at the University of Münster (Germany). In the present it is assigned to the professorship of Prof. Dr. Berger, who is the founding father of CENTRAL, at the law faculty of the university of cologne (Germany).[119] CENTRAL has two different tasks. In the first place investigations about the transnational law and the new lex mercatoria are made. One of the biggest achievements in this field is the invention of the first and still the largest bibliography of the transnational law in the Internet where materials are freely accessible under www.tldb.de. The invention of the database was an enormous important step towards a bigger acceptance, recognition and discussion of the lex mercatoria.[120] The database as a source for the transnational commercial law and its exemplary character were necessary for the further development of the transnational commercial law.

The second task is the training of lawyers in the national and international commercial law where special and more general courses are offered. CENTRAL is financed through private sponsors.[121]

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[119] www.central.uni-koeln.de/content/e13/e763/index_ger.html
[120] Berger, Klaus Peter „Lex Mercatoria Online" RIW 2002, 256, 259-260
[121] www.central.uni-koeln.de/content/e13/e763/index_ger.html

2. The list of principles (LoP)

The LoP published by CENTRAL available in the Internet on the transnational law database (www.tldb.de) from 2001 on is in several points essentially different to the UPICC. The LoP follows the concept of the „creeping codification" of the lex mercatoria.[122] The basic idea is that the changing lex mercatoria as a law in action needs an appropriate tool for the summarising of the current principles guiding the commercial trade world in the present.[123] The traditional approach to formulate a static code like done in creating the UPICC is criticised as inappropriate for the restatement of the changing and flexible lex mercatoria.[124] For the LoP an open method of codification is chosen. The LoP published in the internet is not a static list of principles comparable with a national code but a loose and changing compilation of principles and thus the parties to a contract should not choose the LoP as the law governing their contract because an essential regulation or at least essentially for the agreement could change and this uncertainty is normally not acceptable for contract partners. The LoP although based on the same comparable methodology as the UPICC (see above) are not offering a fixed set of rules but try to reflect directly the changing principles of the lex mercatoria for examples derived from present arbitration awards.[125] The easy possible update of the list requires no formalised revision of a finalised code like the UPICC and thus the present version of the principles want to represent the current lex mercatoria at least as seen by CENTRAL.[126] The LoP can be seen as a compilation of the principles derived out of

[122] Berger, Klaus Peter „Lex Mercatoria Online" RIW 2002, 256; Berger, Klaus Peter „The Concept of the „Creeping Codification" of Transnational Commercial Law"(The Concept...) available under www.tldb.de section III
[123] Berger „The Concept..." supranote 122 section III.
[124] Berger „The Concept..." supranote 122 section II.
[125] Berger „The Concept..." supranote 122 section IV.
[126] Mustill supranote 56 page 110 who also promotes a list of principles reflecting the lex mercatoria in the present form.

the current transnational case law which has to be understood in a widest way including not only arbitration awards and judgements but also principles derived out of new standard form contracts, new customs, new codification, conventions etc.

The LoP is also not restricted on the regulation of the commercial contract law and thus is also in that point different to the UPICC. The LoP reflects a wider approach towards the international economic law, incorporating related topics of the commercial contract law such as international company law, conflict of laws, rules of evidence, the international law of expropriation and general arbitration law.[127] This shows the promoted open-end character of the list.

The LoP in the current version contains fifteen chapters with seventy-three regulations. In regard to the structure of the list the LoP and the UPICC are mostly identically and both begin with the general and then get to the more special regulations. The Chapters of the LoP are more loosely connected and it is visible that this is more a collection of principles than a code in the traditional sense.

A brief summary of the LoP is also given but unfortunately it is not possible to see or find out which principles are new or old in the way that they are part of the LoP in an unchanged version for a longer time.[128]

In the first chapter a general provision is found contending the principle of good faith and fair dealing in No. I.1 and also a so general regulations like the lex specialis principle in No. I.10.

Chapter two is dealing with the rules for the Agency. In the five Articles the topic is not regulated in a comprehensive way but the basic rules are laid down.

In chapter three the rules for the set off in No. III.1 and the assignment in No. III.2 are found.

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[127] Berger, Klaus Peter „Lex Mercatoria Online" RIW 2002, 256, 261-262

In chapter four the provisions regulating the contract are situated. It is surprising that these regulations are not found in an earlier chapter because the two former chapters are already dealing with more special kind of contracts and one of the general provisions in No. 1.10 is determining that „specialised law is prevailing over general laws" and normally in a structured code or list the general provisions are presented first and then the more special ones follow.

In chapter five the general principles for performance and in chapter six these for non-performance are found.

Rules about damages are contained in an extra chapter seven.

In a single chapter eight the Hardship regulation is found.

Chapter nine presents the principles guiding the payment and the non-payment of money debts.

In the next chapter unjust enrichment is regulated a topic that makes the wider approach of the LoP in comparison to the UPICC visible because in the UPICC a comparable regulation is missing. The underlying principle is accepted by most of the civil law and common law countries, where it developed in the last decades under the legal concept of the restitution although in a slidly different understanding. Often when contracts are not performed in the way the parties expected it the principle offers a fair result and can get important for the solution of a dispute. It is although not a regulation that traditionally is part of the contract law but is so close connected to it that UNIDROIT should maybe implement a similar rule when the next enlarged version of the UPICC is published.

In chapter eleven rules about corporations for the transnational law are found. This is also an area were the UPICC are not offering any rules because normally this is regulated with a

[128] The LoP gives no answer to this question for example a date of the first appearance of this principles in this version is not accessible but maybe thsi is changed in the future as Prof Berger answered with interest to this suggestion.

binding character through the national legislator. In the present this is the standard but the example of the Allianz AG, which is converting its legal form after the merger with the Riunione Adriatica di Sicurtà into a European Company (Societas Europaea)[129] is showing the trend towards internationalisation. For the activities of international companies on the world market the national boundaries do not play a very important role anymore. An exception to this rule must partially be made for the different tax regulations and restrictions.

In chapter twelve the general principle that compensation has to be paid for expropriation is laid down in No. XII.1. This principle should not be broken by states but that a state will feel bound by a list of principles for the international market seems not very realistic.

Some regulations about proof, means and evidence with a more procedural character are contained in chapter thirteen.

Two general principles about arbitration on the international market constitute chapter fourteen.

The last chapter fifteen contains two principles of the international private law or conflicts of law. The UPICC do not contain such regulations because they want to be applied instead of domestic legislation, which is determined through the rules of the international private law in dispute that are connected to more then one country. The wider approach towards the lex mercatoria as the law regulating not only the international commercial law but also the international economy as a whole[130] leads to the incorporation of these principles in the LoP.

Even this short overview made some inherent differences between the lists visible but for the focus of this work these differences are helpful in the determination if the UPICC are still an up to date restatement of the modern lex mercatoria in the year 2005.

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[129] www.allianz.com/azcom/dp/cda/0,,899677-49,00.html;
www.vwd.de/vwd/news.htm?id=23974352&navi=news&section=adhoc
[130] Berger, Klaus Peter „Lex Mercatoria Online" RIW 2002, 256, 261-262

V Other relevant Institutes, Organisations and Projects

In the context of this work it is not possible to present all institutes, organisations and projects that are concerned with the harmonisation, unification and codification of the international commercial law. Some of the more important organisations, conventions and projects and their approach and contribution towards the international commercial law are described to get a comprehensive picture of the modern lex mercatoria, establish a better foundation for the following comparison and to determine the status of the UPICC.

1. United Nations Commission on International Trade Law (UNCITRAL)

UNCITRAL was founded by the General Assembly of the UN in 1966. The aim of the organisations is the further progressive harmonisation and unification of the international trade by co-ordinating the work of organisations active in this field, promoting the ratification of international conventions regulating the international trade, preparing adoptable conventions, model laws and uniform laws, promoting the use and creation of international trade terms, customs and standard contracts, supporting a uniform interpretation and application of international conventions and collecting relevant information about the international trade including the case law.[131]

Besides the very important role as co-ordinator of the different organisations working on the harmonisation of the international trade the most valuable attribution was probably the preparation of the CISG, which is now signed by 69 countries. The CISG is regulating the international sale of goods and as an international convention applies automatically if the parties are situated in contracting states and do not chose a domestic legal system to govern

their contract.[132] The easy and acceptable application of an international convention is definitely an advantage but on the other side the regulations of these conventions are very vague because of the different interests of the ratifying states resulting in the formulation of general rules reflecting only the compromise, which was acceptable for all.[133] The exemption to this rule in the CISG is the incorporation of the right to get interest paid with the consequence that the Arabic countries won't sign the convention because the Koran forbid to take interest and so do the national laws of these countries.[134] Even with these wide regulation that are restricted on the sale of goods the CISG is a milestone in the harmonisation and unification of the international trade. UNCITRAL prepared different important convention like the UN Convention on Carriage by Sea of 1978 (The Hamburg Rules), the UN Convention on the Liability of Operators of Transport Terminals in 1991 and various others.[135]

UNCITRAL also designed various model laws, which can be used by national governments or international formulating agencies as blueprints for their codification or be adopted without changes.[136] In this way the harmonisation of the different set of rules is promoted and a further harmonisation on the international level can be achieved in the future. For the international commercial arbitration such a law was designed by UNCITRAL in 1985, which can be converted into domestic law without entailing international obligations.[137] The UNCITRAL Model Law on Electronic Commerce (1996) is one of the recent and for the

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[131] www.uncitral.org/uncitral/en/about/origin.html
[132] Fischer, Nicole N. „Die Unmöglichkeit der Leistung im internationalen Kauf- und Vertragsrecht" page 35
[133] Leible, Stefan „Außenhandel und Rechtssicherheit" ZVglRWiss 1998, 286 et seq. page 310
[134] Ferrari, Franco „Verzinsung nach Art 78 UN-Kaufrecht" IHR 2003, 153 et seq. page 153
[135] see under www.uncitral.org/uncitral/en/uncitral_texts.html
[136] Booysen supranote 5 page63
[137] Blaurock supranote 16 page 17

comparison of this work relevant works[138] because special regulations or revisions in the 2004 version of the UPICC about the e-commerce are rare.

2. Working Group on the Principles of European Contract Law (PECL)

The work on the PECL started back in 1982 when the Commission on European Contract Law, also known as the „Lando Commission" named after the founder and first chairman Ole Lando was set up.[139] The working method and the composition of the working group was similar to the one chosen by UNIDROIT, with the members of the working group being restricted to lawyers from the former European Community, now European Union.

In 1995 the first part of the PECL was published containing the general provisions, performance, non-performance and remedies. In 1999 the second and in 2003 part three of the PECL were published.[140] After these enlargements the PECL are a comprehensive set of rules for the contract law.

The main difference of the PECL and the UPICC is the scope of application.[141] The PECL shall be in accordance to Article 1.101 (1) be applied as general rules of contract law in the European Community. The UPICC instead are setting rules for international commercial contracts.[142] The territorial difference is derived out of the universal approach of UNIDROIT and the inherent limitation of the PECL to the European Union. The PECL are not restricted on commercial contracts and thus different to the UPICC must for example incorporate

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[138] in Global Trade Law supranote 1 page 1-9 with the „Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce" page10-60 and the „UNCITRAL Model Law on Electronic Signatures (2001)" page 61-65

[139] Bonell supranote 7 page 86

[140] Homepage of the Commision on European Contract law:
http://frontpage/cbs.dk/law/commission_on_european_contract_law/index.html

[141] Bonell supranote 7 page 94

[142] Preamble of the UPICC in „Global Trade Law" supranote 1page 66

consumer protection regulations.[143] The PECL shall be the starting point for a Common European Code of Private Law whereas the UPICC are the restatement for the use of the international merchants.

The set of principles are having a lot of similar regulations. Where they differ, without the reason being the wider approach of the PECL, the question must be what list is offering the better solution.

3. The International Chamber of Commerce (ICC)

The ICC was founded in 1919, is a private organisation and still situated in Paris. The court of arbitration of the ICC was established in 1922 and besides the American Arbitration Association (AAA) it is still the most important private organisation dealing with international arbitration.[144] The procedural rules for the arbitration process designed by the ICC are widely accepted, influentive, and are used as model for legislator or other private organisations. An even more important contribution for the harmonisation of the international trade are the codification of parts of the international customs in form of the International Rules for the Interpretation of Trade Terms (INCOTERMS) and the Uniform Customs and Practice for Documentary Credits (UCP).[145]

On the sector of the international trade are various other organisations that unificates this area by the publication of standard form contracts (see above) or codification of the customs and usages of the merchants. There also exist several other list of principles such as the lists

[143] Bonell supranote 7 page 95
[144] Blaurock supranote 16 page 17
[145] texts in „Basic Documents of International Economic Law" vol. 2 Editors Zamora and Brand

published by different academics like the ones from Belssing[146] Mustill[147] and others[148], the List published by the Arbitration Centre of Cairo (CRCICA)[149] and even in an ICC award in 1996 a list of eight principles and rules that form part of the lex mercatoria were formulated by the arbitrators.[150] Besides these lists the amount of standard form contracts especially for specific areas such as the petroleum, the engineering, the transport or other specific industries are steadily rising.[151] This work is not going to examine all of these different sometimes very special texts but tries to determine if the UPICC are a restatement of the general principles inherent in at lead most of these texts and thus constituting a roof or umbrella as the general law that can govern all these contracts.

VI Comparison of relevant regulations in selected areas

The comparison of this work will concentrate on some selected areas and through this analysis tries to decide if the UPICC are an up to date restatement of the lex mercatoria. The UPICC are not only compared with the regulations of the LoP but also with other relevant rules offered by model laws, restatements or national legislation. The choice of the LoP as the main source for the comparison is based on the similar scope of this set of rules and especially on the fact that the LoP proclaims to give the reliable picture of the status quo of transnational commercial law.[152] The concept of the creeping codification (see above) and the easy possible, non formal change of the LoP support this proclamation.

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[146] Blessing, Marc „Die Internationale Schiedsgerichtsbarkeit in der Schweiz (II)" Ed. Bockstiegel, Karl-Heinz page 68 et seq.
[147] Mustill supranote 56 page110-114
[148] Berger „The Concept..." supranote 117 section III. 1.
[149] CRCICA newsletter January 1997 at 2 et seq. TLDB
[150] ICC award No.8365, Clunet 1997 at 1078, 1079 et seq
[151] De Ly Filip „Uniform Commercial Law and International Self-Regulation" in „The Unification of International Commercial Law"ed Ferrari, Franco, page 59,62-63 with a detailed list
[152] Berger „The Concept..." supranote 122 section III. 5.

The basic principles like pacta sunt servanda, party autonomy, freedom of contract and good faith are representing a common core of both lists but the single regulations differ more or less. It is in this work not possible and would not lead to the desired result to compare all the different regulation and thus the emphasis is laid on some especially for the market in the new millennium important rules.

1. Good faith and pre-contractual liability

The concept of good faith is recognised by and one of the guiding principles of the UPICC and the LoP. In Article 1.7 UPICC and in No.1.1. LoP the two sets of rules formulated the duties of the parties to act „in accordance to good faith and fair dealing in international trade" and use hereby nearly the absolute identical language. The notions of good faith as understood especially by the UPICC are although presented here because the uniformity of the UPICC ad the LoP is not representative for the international market. In the different national trade markets the recognition and understanding of the good faith principles are differing extremely. The recognition as restatement of the lex mercatoria and success of the UPICC are depending on the international and general acceptance of the offered solutions especially on areas, where the national legal orders are fundamentally different. This is even more important when such a rule or principles is seen as the Magna Carta of the international trade law[153] or as the most important regulation in the international contract law or international private law.[154] An overview of the understanding of the good faith principles in the UPICC followed by a comparable description of the approaches in different national orders and a short explanation of the acceptance of pre-contractual liability will lead to a

[153] Berger, Klaus „Formalisierte oder schleichende Kodifizierung des internationalen Wirtschaftsrechts" (Formalisierte...) page 165
[154] Hesselink, Martijn W. „Good faith" in „Towards a European Civil Code" Editor Hartkamp a.o. page 287

sufficient answer if the UPICC in accordance to the scope of this work are establishing a representative common core for the international commercial world.

Besides the formulation of the general principle in Article 1.7 UPICC there are various other regulations in which the general notion of good faith is inherent. These are especially the Articles 1.8, 2.1.14 II, 2.1.15, 2.1.16, 2.1.17, 2.1.18, 2.1.20, 4.8 II (c) and 5.1.2 (c). Even though the notion of good faith is recognised in several regulations of the UPICC a definition is not incorporated.[155] The incorporation of the addition in Article 1.7 that the good faith duty has to be regarded in the „fair dealing in international trade" is showing that the notion of good faith shall be applied as an objective legal requirement and not in a subjective way.[156] Not the behaviour and understanding of the parties and a subjective understanding of good faith is formulated but the objective criteria what in the international business world is required by the good faith principle is laid down in the UPICC. The combination of good faith and fair dealing in Article 1.7 UPICC is leading to a harmonisation with the otherwise in the UPICC used term of the „reasonable commercial standards of fair dealing" and thus promote a universal objective interpretation.[157] The reference to the international trade should also prevent that good faith is interpreted in regard to the different national legal regulation and lays the emphasis on the recognition of an international standard accepted between the merchants and visible in the usages and customs.[158] The code of conduct of the merchants on the international market is establishing a source of interpretation for the good faith doctrine and can even differ in its level and form depending on the special trade sector.[159] A very important role in the interpretation and determination of the good faith concept of the

[155] Luig supranote 8 page 275
[156] Schlechtriem, Peter „Good Faith in German Law and International Uniform Laws" (Good Faith...) in Centro di studi e ricerche di diritto comparato e straniero, Saggi, conferenze e seminari, Band 24 page 20
[157] Bonell, Michael Joachim „The UNIDROIT-Principles of International Commercial Contracts: Why? What? How?" (The UNIDROIT-...) Tulane Law Review 69 (1995) page 1138
[158] Bonell supranote 7 page 138;Schlechtriem (Good Faith...) supranote 156 page 20

UPICC is the one of the judges or arbitrators who in their decisions have to develop this doctrine.[160] If this interpretation is done in a harmonised way a greater certainty is derived in the understanding of good faith on the international market. In this context it is important to determine the different functions of the general principle of good faith as laid down in Article 1.7 UPICC. The main function of this Article is the supplementation of contracts, rules and principles where gaps are impossible to avoid.[161] The parties or the legislator can not think about all possible situations or circumstances so that inevitably gaps will occur in almost every document, which than have to be filled in accordance to the principle of good faith and fair dealing. This principle would have been derived by the correct interpretation of Article 1.7 but is also for contracts explicitly formulated in Article 4.8 II (c). It is also possible and practised in the civil law countries that new obligation can be developed out of the principle of good faith what is explicitly laid down as a possibility for the UPICC in Article 5.1.2 (c).[162] Another function of Article 1.7 is to create the possibility for the development of new legal remedies, which are not contained in the code or the contract but seem necessary to guarantee a fair result.[163] The doctrine of good faith is one of the pillars on which the UPICC is founded and is generally applicable for the whole relationship of the parties from the negotiations (see below) to the conclusion of the contract and its performance to the post-contractual obligations.[164]

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[159] Luig supranote 8 page 276; Berger supranote 153 (Formalisierte...) page 165; Bonell supranote 7 page 138
[160] Schlechtriem (Good Faith...) supranote 156 page 20-21
[161] Schlechtriem (Good Faith...) supranote 156 page 9
[162] Luig supranote 8 page 274 and supranote 1129; Schlechtriem (Good Faith...) supranote 156 page 14
[163] Schlechtriem (Good Faith...) supranote 156 page 13
[164] Bonell supranote 7 page 137

a.) Different approaches to the concept of good faith

In the different national legal orders the acceptance and approach of the notion of good faith are differing widely. The main legal systems in the western industrial countries the common and the civil law are following different approaches in the recognition of good faith. Even though the main difference must be seen by the distinction of these two blocks neither in the civil law nor in the common law countries themselves exist a common understanding.

In the Civil law the most famous regulation dealing with the good faith notion is the one of the German Civil Code in §242[165], which states that „the debtor is obliged to perform in such a manner as faith and credit with regard to the custom requires". In connection with this regulation an enormous amount of case law was produced. In the German law the doctrine is not only understand in an objective but also in a subjective way. This understanding is shared in the most European civil law countries.[166] In Germany this decision is visible in the wording „good credit" (Guter Glaube) that is understood in a subjective way as the knowledge or non existing knowledge of a special party unlike good faith (Treu und Glaube) that has to be understood as the objective level of reasonableness as regarded in the common sense of the community with the resulting duties for everybody.[167] This understanding of the doctrine of good faith is also represented in Artt. 1375, 1175 Codice Civile and in the new Dutch Civil Code. In this new and thus for the scope of this work very interesting code the notion of good faith is seen as a guiding principles for all branches of the Dutch law of obligations and contract law.[168] The good faith notion is regarded as important in three different functions, which are partially also relevant in the UPICC. The interpretation must be done in

[165] in accordance to Farnsworth, Allan „Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws" Tul. Int. Comp. L. 1995 page 51
[166] Hesselink supranote 154 page 287
[167] Palandt/Heinrichs §242 BGB supranote 3; Hesselink supranote 154 page 288-293
[168] Hartkamp, Arthur S. „Judicial Discretion Under the New Civil Code of the Netherlands" 40 Am. J. Comp. L. (1992) page 554

accordance to good faith, where necessary supplementation of contracts and statutes are made, the good faith doctrine has to be the guiding force, and at last good faith has a derogative character, which means that a normally binding rule or obligation is not applied if this otherwise would lead to an unfair or unreasonable result and a violation of the good faith principle would occur.[169] Good faith is a superior principle in the civil law and is applied in an unrestricted way.

The common law was traditionally very reluctant to recognise a general principle of good faith at all.[170] This is especially true for England where the good faith doctrine was not seen as a guiding principles and even the promotion of recognition through some important judges like Lord Manfield who back in 1766 referred to good faith as „the governing principle ... applicable to all contracts and dealings" could not break this resistance.[171] The English courts rejected the acceptance of a general principle of good faith because this was seen as contrary to the interests of contracting parties because in this position each party wants to achieve an advantage and the good faith notion was regarded as impracticable.[172] This shall not mean that not in certain regulations the notion of good faith was inherent in England as well but the general principle, which implements a duty on the parties, was not regarded as part of the common law.[173]

The growing acceptance in most common law countries started with the incorporation of the principle of good faith in the UCC, where more than fifty sections expressly mention good faith.[174] In section 1-203 of the UCC a general obligation of good faith is contained, which is

[169] Hartkamp supranote 168 pages 554-555
[170] Bonell supranote 7. page 141 and supranote 90; Farnsworth, Allan „Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws" Tul. Int. Comp. L. 1995 page 52
[171] Farnsworth supranote 165 page 51
[172] Luig supranote 8 page 265
[173] Goode, Roy „The Concept of „Good Faith" in English Law" pages 6-8
[174] Farnsworth supranote 165 page 52

limited to the enforcement or performance of the contract or duty. In section 1-201 (19) good faith is defined as „honesty in fact in the conduct or transaction concerned". For the incorporation of the good faith principle in the UCC was especially Professor Karl Llewellyn responsible who before he became chief reporter for the UCC taught at a university in Germany and there was inspired by the rule of §242 in the German Civil Code.[175] Before the recognition of the good faith principle through the incorporation in the UCC only in the common law doctrine of the states New York and California this principle was incorporated.[176] After the incorporation of the good faith doctrine in the UCC the same was done in the Restatement (Second) of Contracts. In §205 was formulated that „every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement". Although both sets of rules have no binding force the incorporation has promoted to a great acceptance of the good faith notion and influenced the other common law countries as well.

In England the duty to incorporate the regulations for examples in the area of consumer protection dictated by the European Union makes it necessary to change at least partially the attitude towards the notion of good faith. Even before this necessarily became more important a rising acceptance of a general principles of good faith developed not at least under the international influence.[177] Some judges and academics see the promotion and incorporation of a general notion of good faith and fair dealing in the contract law of the common law as an urgent need.[178]

[175] Corbin, Arthur L. „A Tribute to Karl Llewellyn" 71 Yale L. J. 805 (1962)
[176] Farnsworth supranote 165 page 52
[177] Farnsworth supranote 165 page 54
[178] Steyn, Johann „The Role of Good Fith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy" 1991 Denning L. J. page 131, 141

The development towards recognition of a general principle of good faith and incorporation in the common law is even more visible in Australia. In two decisions the recognition of the good faith notion was promoted in a very clear way. Already in 1992 in a case between a governmental agency and construction company the judge imposed a duty upon the parties to act in accordance to good faith and fair dealing in the performance of the contract.[179] In another decision in 1998 through the Australian New South Wales Supreme Court the duty was imposed on the parties to act in accordance to good faith and fair dealing and that this duty has to be regarded in the performance of the contractual duties by the parties.[180] The court recognised the general principle of good faith and in the reasoning explicitly founded this on Article 1.7 of the UPICC. The court followed the decision laid down in this Article that in international and here also in national trade the general principle of good faith has to be regarded by the parties. This is an excellent example for the unifying force the UPICC can have when also the national courts are willing to see, accept and apply at least the main principles. In the common law countries the recognition of a general duty to act in accordance to good faith at least in the enforcement and performance of a contract is rising enormously.

It is not surprising that in the PECL a comparable regulation to Article 1.7 UPICC is found in Article 1:201. The scope of application is here not limited to international contracts because the PECL are intended to be applied also in national disputes. The only substantive difference is that also a subjective notion of good faith is incorporated.[181] This is caused by the greater influence of the European civil law nations in comparison to the UPICC that are representing the global market where more common law countries exist.

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[179] Renard Constructions (ME) Pty Limited v Minister of Public Works 26 N.S.W. L.R.234 (Ct. App. 1989)
[180] Alcatel Australian Limited v Scarcella & Ors Matters CA 40797/97 16.July 1998 online under http://www.austlii.edu.au/au/cases/nsw/supreme_ct/1998/483.html

The CISG in comparison has only incorporated a vague compromise in Article 7 CISG. It is only stated that this convention shall be interpreted in accordance to good faith. The interpretation through the courts developed that a general acceptance of the principle of good faith, which applies directly to and between the parties, is incorporated in the CISG.[182] The regulation of the CISG led to an enormous discussion and should not be examined here in detail because the rules laid down in the UPICC are in comparison clearer, more certain and represent the modern developments in a better way. The decision to implement good faith as an important principle in the UPICC but to restrict it on the objective notion is a just and fair compromise for the international commercial world. The merchants do not need to be protected as good as consumers because they have more detailed knowledge of the usage, costumes and trade regulations.

Although the classic differences in the main legal orders are getting smaller through the developments in the common law countries there are still immense differences what will be also shown in the examination of the different approaches towards the liability of the parties in the pre-contractual phase.

b.) Pre-contractual liability

The discussion about the liability of the parties in the pre-contractual negotiations is even more diverse than the one about the recognition of the general good faith doctrine and its subjective or objective character.

In most civil law countries the liability in the pre-contractual phase is recognised and based on the culpa in contrahendo (fault in negotiation) doctrine, which was invented by Jhering back in

[181] Luig supranote 8. page 277
[182] Luig supranote 8. page 272

1861 and is rooted in the good faith notion.[183] Already before the contract is concluded the special relation as potential contract parties imposes certain duties on the parties and if they fail to act in accordance to these duties they are liable for the loss of the other party caused through the violation of the precontractual duties.[184] The rights and duties derived from the application of this concept are absolutely independent from the conclusion of the contract. Besides the regulations of delict, the imposed duties should lead to a fairer and prevent unjust behaviour of the parties in a situation where they are already closer connected than normally through the beginning negotiations.[185] In the pre-contractual liability also some other obligations are incorporated that impose a liability for negligent behaviour for example when an accident occurs in a public store because material was not stored in the correct way, falls down, hits and injures the client. The party that is not acting in accordance to these pre-contractual duties is liable for all the damages caused by the other party's reliance on the conclusion of the contract.[186]

This concept is applied through the Austrian courts and Spanish courts, which have developed it out of the good faith notion laid down in several regulations.[187] In Austria for examples this concept is derived out of the analogue application of §§ 866, 874, 873 s. 3, 932 I of the Austrian civil code (ABGB).[188] In Germany this concept was founded on the general notion of good faith in §242 BGB and was formulated after the revision of the whole chapter on contractual obligations in §311 BGB. In the new Dutch contract law this concept is also accepted. The Dutch Supreme Court ruled that the damages resulting out of a violation of

[183] von Jhering, Rudolf „Culpa in Contrahendo, oder der Schadensersatz be nichtigen oder nicht zur Perfektion gelangten Verträgen", 4 JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 1 1861
[184] Schön, Erwin „Allgemeines Vertragsrecht und Kaufvertragsrecht-ein Rechtsvergleich Österreich, USA, Spanien und UN-Kaufrecht" page 140
[185] Schön supranote 184 page 140
[186] Schön supranote 184 page 141
[187] Schön supranote 184 page 140-144

the culpa in contrahendo principle could be based on the injured party's expectations.[189] The compensation can if the contract was close to the conclusion incorporate the profits the party would have made had the contract been performed.[190] The pre-contractual liability based on the good faith principle is extended to a very high level in the civil law countries.

In the common law a general liability in the pre-contractual negotiations is not accepted.[191] In some cases parties were held liable in application of the theories of misrepresentation, promissory estoppel, or restitution.[192] Even in the common law countries where the general notion of good faith is accepted (see above), the parties are not liable in the negotiations of a contract in accordance to the good faith doctrine. In the UCC in section 1-203 is expressly stated that the parties only have to regard the good faith principle in „every contract or duty within the act". The Act is not imposing any pre-contractual obligation on the parties and every contract can also only be understood in the way that a valid contract, which has to exist is meant.[193] In the common law the parties close preliminary agreements, agreements to negotiate, memorandums of understanding or a letter of intent to achieve a pre-contractual liability of the other party. Then the good faith principle applies but only after the preliminary contract is concluded and limited to the agreed terms of this contract.[194] The discrepancy of the approach in the common law countries and the civil law countries in this point is immense and it is nearly impossible to find a solution for the international market that is absolutely sufficient for both sides.

The UPICC are regulating the pre-contractual liability in Article 2.1.15 and thus an excessive interpretation of the general good faith principle laid down in Article 1.7 is not necessary. In

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[188] Schön supranote 184 page 140 supranote 322
[189] Hartkamp supranote 168 page 557
[190] Hartkamp supranote 168 page 557
[191] Farnsworth supranote 165 page 57-59; Schön supranote 184 page141-143; Bonell supranote 7 page 142-143
[192] Fansworth supranote 165 page 57
[193] Schön supranote 184 page 142

the first subparagraph the basic principle that parties are free to negotiate and not liable for the non conclusion of a contract is formulated. This represents the common law understanding.[195] In subparagraph two the civil law acceptance of a precontractual liability is laid down and states that a party who negotiates in bad faith is liable for the losses of the other party. In subparagraph three bad faith is defined in particular as the beginning or continuing of negotiations when the intention to reach an agreement is not present. The LoP are presenting a similar rule in No.IV.7.1 and also the PECL are recognising the principle of culpa in contrahendo. The general acceptance of such a pre-contractual liability of the parties by the international restatements is hopefully not leading to a rejection of these sets of rules by the common law countries but to the further development of the good faith notion. The UPICC are offering a compromise between the two legal systems because besides the incorporation of the pre-contractual liability, the loss of the party is different to the most civil law countries limited and does not include the lost profits.[196] Even though losses in Article 2.1.15 UPICC are not defined in this way in a comparison with Article 7.4.2 where harm is defined as "any loss that is suffered and any gain of which it (the party) was deprived", this mentioned understanding of loss must be derived.[197]

c.) Conclusion

The general acceptance of the good faith notion in the UPICC must be welcomed and even the common law countries are developing their legal systems in this direction with the USA and their UCC in the forefront.[198] The UPICC are not absolutely following the civil law

[194] Schön supranote 184 page 142
[195] Schön supranote 184 page 144
[196] Fansworth supranote 165 page 58
[197] Fansworth supranote 165 page 58
[198] Fansworth supranote 165 page 64

approach and instead of the incorporation of a subjective notion of good faith like in the civil law countries predominate restrict good faith to the objective standard, which makes this compromise more acceptable for the common law countries as well. The including of a pre-contractual liability will be seen with criticism by the common law countries but here also the restriction in comparison to the civil law countries and the LoP in accordance to the granted losses should create an acceptable compromise. The disclaimibility of the good faith notion declared in Article 1.7 II of the UPICC and inherent in the pre-contractual liability because there exists no contract that could restrict this principle and if there is an agreement Article 1.7 applies. The UPICC although following the civil law approach is offering an acceptable compromise for the international market and already led to a harmonisation on the international market like the Australian cases showed and thus is in this important field the only possible restatement of the lex mercatoria in the new millennium.

2. Form and e-commerce

The UPICC in Article 1.2 and the LoP in No. IV.3.1. declare that no form is required for the conclusion of a valid contract. In Article 1.2 of the UPICC this is extended for all statements or any other acts and in No. IV.3.1.of the LoP this shall apply for all contractual obligations. The approach of both lists is based on the international consensus in this point like reflected by the CISG where the requirement of a specific form is also the exemption.[199]

In the time of the rising importance of electronic commerce it is more interesting how the UPICC are dealing with this new form of communication. The new 2004 version of the UPICC is only changed in a few regulations in comparison to the 1994 version for the

[199] Articles 11 and 12 CISG

adoption of the practice in electronic contracting.[200] The working group on this topic found it not necessary to create an additional chapter or new Articles. In Articles 1.2 and 2.1.18 (former 2.18) the word „writing" was replaced by „a particular form" and in Article 2.1.8 (1) (former Article 2.8 (1)) the reference to telegrams and letters was deleted and the rule was formulated more general to include electronic messages for the calculation of the start for the acceptance period.[201] In Article 1.10 is in the same words as in the old Article 1.9 stated that a notice besides others reaches a person when this notice is delivered to the mailing address and in Article 1.11 also unchanged „writing" is defined as „any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form."

The LoP is only in the chapter XIII („Proof, Means of evidence") dealing with the electronic communication technology and the requirements of the written form for this purpose. In No. XIII.2. is stated that „a written contract may be proved through any means of modern telecommunications (Telex, Telefax, btx, EDI etc.), if it provides a record of the information contained therein and can be reproduced in written form". For the written form it still seems to be necessary that the contract was written and only for the provement of the existence of this written document it is possible to use the electronic technology and even this only when it is possible to reproduce the contract in written form. This shows that the „stored" contract is not seen as a written contract only the printed version can be used as evidence to prove the existence of a written contract.

On the first view this is similar to Article 1.11 and the definition of „writing" in the UPICC. The UPICC although accepts any form as written as long as the information can be produced in a written form. In comparison to the LoP there must not exist a contract written on paper

[200] Bonell „UNIDROIT Principles 2004..." supranote 102 section II. 1.

or any other tangible form as long as it is possible to produce the contract in this form. In comparison with the LoP the regulation also the declaration of the mailing address as valid address seem better suited for the uprising e-commerce and the use of electronic contracts, which are available in the internet.

The comparison of the UPICC with the LoP in this field is not sufficient because of the few regulations offered by the LoP and thus a comparison with the UNCITRAL Model Law on Electronic Commerce (UMLEC)[202] is made.

The UMLEC is offering in the first chapter from Article 1 to 4 general provisions. In Article 2 some important definitions are formulated. The data message is defined in Article 2 (a) in a very wide and general way to keep the scope of application of this model law (Article 1) as unrestricted as possible. Also the electronic data interchange (EDI) is defined in Article 2 (b) as the „electronic transfer from computer to computer". After these general provisions the application of legal requirements to data messages are regulated in chapter two. These Articles constitute the legal recognition of data messages (Article 5, 5 bis) and the adoption of legal requirements for this purpose. This approach goes beyond the regulations formulated by the UPICC because not only some requirements are adapted to the new needs but also the legal enforceability of declarations made in the form of data messages is promoted. This different and more open approach to this new form of communication is getting visible in Article 6 of the UMLEC with the definition of writing which does not require the production of a tangible form because the data message is seen as sufficient. The data message should be seen as an acceptable and enforceable way of communication with legally binding character (Article 5, 5 bis, 9, 10). The UPICC have adapted few regulations for the needs of the

[201] Bonell „UNIDROIT Principles 2004..." supranote 102 section II. 1.

electronic commerce but the data message is not yet as accepted as the written form. The UPICC are not fully accepting the data messages although some regulations are open for the use of this new form what can be seen in the replacement of writing through the particular form in some Articles (see above) and the wider definition of writing in comparison to the LoP. In the present this reserved and limited acceptance of data messages is reflecting the situation in most national legislation and the usages of the international merchants thus is still the adequate approach for the formulation of an international restatement of commercial law. An innovative rule of a national legislator is formulated in the new Chinese CL in Article 11 where the „written forms mean the forms which can show the described contents visibly, such as a written contractual agreement, letters and data-telex (including telegram, telex, fax EDI and e-mail)". The rising acceptance of the electronic communication is reflected and only the visibility of the declaration is required. A similar regulation is found in the section 24 III of the Czechoslovak International Trade Code where „(N)otifications sent by cables or teletypes or appearing in commercial documents obtained in a mechanical way shall be considered to have been made in written form". UNIDROIT must consider if an incorporation of at least some of the regulations of for example the UMLEC is not appropriate and necessary to keep pace with the international acceptance, development and use of the electronic commerce when the next revision of the UPICC is prepared. This should also after a certain standard has been established on the international market contain regulations about the requirements for electronic signatures and originals.[203]

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[202] in „Global Trade Law" supranote 1 page 1-9 with the „Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce" page10-60 and the „UNCITRAL Model Law on Electronic Signatures (2001)" page 61-65

[203] see the „UNCITRAL Model Law on Electronic Signatures (2001)" page 61-65 in „Global Trade Law" supranote 1

3. The use of Standard Terms and the Battle of the Forms

In the international trade the use of certain general conditions as part of an offer or an acceptance and thus also of the resulting contract occurs in the majority of cases.[204] There are different kinds of general conditions that are incorporated in contracts. The parties can for example agree to apply the INCOTERMS or the UCP 500 (see above) and will normally incorporate these rules unproblematically by a reference in the contract.[205] Different to the incorporation of these general conditions, upon which the parties have expressly agreed, are the situations where standard terms are used because the parties normally do not negotiate about these terms.[206] The pre-prepared regulations normally are used by each party and attached to the offer and to the acceptance. How to incorporate these partially differing terms into the contract is one of the oldest problems in modern contract law that is widely seen as among the most difficult ones for contract doctrine to solve.[207]

In the LoP special regulations for the handling of this problem are missing. The few general rules on the conclusion of the contract in chapter IV section 2 are not appropriate and do not offer a sufficient solution. The regulations of the UPICC are thus compared with other sets of rules, national laws and suggestions, which are better representing the modern approaches for the resolving of this difficult contractual problem.

The UPICC are dealing with the problems in connection with the standard terms from Article 2.1.19 to 2.1.22. In Article 2.1.19 a reference to the general rules guiding the conclusion of contracts is contained. As a consequence the standard terms can be only incorporated in the

[204] Viscallias, Maria del Pilar Perales „"Battle of the Forms" Under the 1980 United Nations Convention on the Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles" 10 Pace International Law Review (1998) page 97 et seq. section III.
[205] Viscallias supranote 158 section III.
[206] Bonell supranote 7 page 153 where the case which often occurs is presented that the adherent party does not even read the terms completly or understand fully their legal implications

contract if an expressed or implied reference is made and an implied reference will only be accepted where the incorporation correspond to the usage established by the parties or is widely known and regularly observed by merchants in this particular trade.[208] In some national laws the requirements for the incorporation of the standard terms are much higher like in Germany where in accordance to §§ 305 et seq. BGB the reference must generally be stated expressly or these of the Italian Civil Code where in accordance to Article 1341 (1) the adhering party must have known or ought to have known of their existence. These requirements are higher also because they are not restricted to commercial contracts like the UPICC. For the protection of the adherent party significant exceptions to the general regulations of contract law in the UPICC are made in the Articles 2.1.20 to 2.1.22.[209] The ineffectiveness of a term is regulated in Article 2.1.20 if that term is of a so surprising character in regard to its content, language or presentation that the adherent party could not reasonably expected its consequence. A comparable regulation is also found in different other sets of rules and is widely accepted to safeguard a just result when standard terms are incorporated in a contract. The same is true of the regulation in Article 2.1.21, which states that terms, which are not standard terms, prevail over standard terms.[210]

The most difficult problem arising out of the use of standard terms by both parties is the non-compliance and colliding of these terms the so called „Battle of the Forms" and how the exact content of the contract should be determined in this case. If the buyer sends attached to his offer his standard terms and the seller with the acceptance his in some points differing

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[207] Ben-Shahar, Omir „An Ex-Ante View of the Battle of the Forms: Inducing Parties to Draft Reasonable Terms" The John M. Olin Center for Law & Economics Working Papers Series, Paper 32, Introduction http://law.bepress.com/umichlwps/olin/art32

[208] Bonell supranote 7 page 152-153

[209] Bonell supranote 7 page 153

[210] In §§ 305 et seg BGB and Article 1341 et seq. Codice Civile

standard terms the question is which terms are validly incorporated in the contract. In the national and international codification exist at least three different solutions.

a.) The „last shot" rule

The traditional common law and also the old German approach implies that each form because of the different terms to the other form is constituting a rejection to the offer and can not be seen as acceptance but as a counter offer and thus the last form that is sent becomes part of the contract.[211] The regulation is therefore called „last shot" rule. This solution preserves the offer/acceptance concept on which most rules for the contract formation are based because generally only if the acceptance corresponds exactly with the offer a contract is concluded. Where the acceptance contains alterations to the offer this acceptance constitutes a counter-offer, which rejects the previous offer and makes a new outstanding offer.[212] If one party starts to perform the contract the latest sent offer is accepted. Besides the preservation of the general contract doctrine an advantage must be seen in the fact that the courts can easily determine which terms are part of the contract and thus the content of the contract is clear. Following the „last shot" doctrine the acceptance is seen in the beginning of the performance. The problem is that till then a valid contract does not exist and no party can rely on the otherwise agreed contract because the differing terms hinder its valid conclusion.[213] This can lead to unfair results when one party refuses to perform the contract and claims that a valid contract does not exist. Another problematic point is that nothing in the parties' behaviour suggests that the last or any other shot includes

[211] Lando. Ole „The CISG, the Unidroit Principles and the Principles of European Contract Law in a Global Commercial Code" (The CISG...) page 9
http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/Conferences/Lando_CISG.pdf ; Ben-Shahar supranote this minus 4 section II. B.
[212] Ben-Shahar supranote this minus 5 section II. B.
[213] Viscasillas supranote 158 section IV, Lando (The CISG...) supranote 165

the acceptance of boilerplate terms.[214] The last shot or mirror image rules lead to the scenario that each party tries to send his form as the last and in this attempt both parties continuously send letters to each other where their standard terms are attached. This result is definitely not satisfactory for the commercial market.

In Article 19 CISG the mirror image rule is laid down because a reply that adds new or different terms which materially alters the contract is not recognised as an acceptance but a counter offer and in subparagraph three of Article 19 CISG the definition, of what these material terms are, is so wide that nearly every alteration is contained. As a result every declaration by the parties where the standard terms are attached are containing material alterations and thus are not seen as an acceptance but a counter offer.[215] This regulation in context with Article 18 (3) CISG in which the acceptance by the manifestation of conduct is regulated gives rise to the last shot rule.[216] In practice, however, the vague formulation in the CISG has lead to the result that the national courts apply a version of the knockout rule or the last shot rule depending on the decision made in their domestic codification. In Germany for examples a seller „fired" the last shot and in his terms disclaimed liability and significantly reduced remedies the German Supreme Court held that since this conflicted with the buyer's term, the implied warranty of merchantability and the statutory remedies apply.[217] The court explicitly stated that where the CISG applies that the non-contradictive terms become part of

[214] Ben-Shahar supranote this minus 7 section II. B.
[215] Kröll, Stefan „Kollidierende Allgemeine Geschäftsbedingungen in internationalen Kaufverträgen" RIW 2001 pages 736, 740
[216] Schlechtriem Peter „Kollidierende Geschäftsbedingungen im internationalen Vertragsrecht" (Kollidierende...) in Karl-Heinz Thume (Editor) „Festschrift für Rolf Herber zum 70. Geburtstag" page 36-49 English translation and update http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem5.html section II. 1.; Ben-Shahar supranote this minus 8 section II. D.
[217] BGH decision of 9. January 2002 VIII ZR 304/00 (English translation in http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020109g1.html)

the contract and the others are substituted by the statutory provision.[218] U.S courts followed the same approach, which is inconsistent with the wording of Article 19 CISG.[219] These cases show that the rule is not accepted on the international market and the changes in the German approach should be seen as a model.[220]

b.) The „first shot" rule

The first shot rule is based on the notion that the oferee who accepts an offer must take it as it is and in this way the standard terms of the offerer are incorporated in the contract.[221] The disadvantage of the last shot rule is that every party is trying to send the last confirmation and thus incorporate his standard terms before the contract is performed. The problem although is not solved because here every party tries to be the one who sends the first offer for example by an explicit rejection of the offer combined with a counter offer. The results are as dissatisfactory as the ones received by the application of the last shot rule but suprisingly the new and generally progressive Dutch Civil Code in Article 6:225 (3) adopted this rule.

c.) The „knockout" rule and the regulations of the UPICC and the PECL

In the last decades the knockout rule was developed[222] increasingly used and incorporated in the national legislation like for example in the revised section of the German Civil Code.[223] When both parties use standard terms only these terms become part of the contract, which are common in substance and the non complying are not incorporated but „knock each other out". The resulting gaps in the contract are supplemented by the statutory rules. The

[218] BGH decision of 9. January 2002 VIII ZR 304/00 (English translation in http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020109g1.html)
[219] see for different examples Ben-Shahar supranote this minus 12 section D
[220] Schlechtriem (Kollidierende...) supranote minus 5 section I.
[221] Lando (The CISG...) supranote page 9
[222] Schlechtriem (Kollidierende...) supranote minus 7 section I

international restatements of contract law the UPICC and the PECL are both favouring this approach. The UPICC in Article 2.1.20 and the PECL in Article 2:209 are nearly formulating the same requirements for the conclusion of a contract in the case when the parties use non-complying standard terms. The contract is concluded and contents the common standard terms if none of the parties clearly in advance indicated, „that it does not want to be bound by such a contract" or later without undue delay informs the other party of the non acceptance of such a contract. The PECL declares for the former case that this has to be done in an explicit form excluding the use of a standard term. The same result is derived by the correct interpretation of the wording in Article 2.1.20 UPICC. The use of boilerplate clauses do not lead to the result that the terms of one party prevail. Both regulations agree that despite the existence of conflicting terms a valid contract can be concluded.[224] A difference between the conclusion itself and the content is made. The supplementation of the gaps resulted through the knock-out regulation is done by the courts but only where the substance of the formulated terms is not identical. In both sets of principles is not defined when a term is not only in its wording different to the other term but in its substance. The courts must determine this and thus they are not as limited as in the first two approaches and shows that this doctrine is promoting a more active role of the judges. The practical inconveniences of the last shot rule that each party tries to fire the last shot are avoided and the incorporation of the common terms in connection with the application of the statutory rules as gap fillers is a practical and fair solution for the international trade market.

d.) The regulation of the UCC

[223] Kröll, Stefan supranote minus 8 page 737
[224] Schlechtriem (Kollidierende...) supranote minus 9 section III. 2.

The regulation of the UCC in section 2-207 is presented in a single subsection because it is not following one of the traditional approaches and can also not be defined as a regulation, which strictly applies the knock-out rule.[225] The imense importance of the battle of the forms regulations can be seen in the fact that this new conceptual solution is perhaps the most litigated section in contract law and the amendment proceedings of Article 2 were very problematic.[226] Section 2-207 of the UCC states:

„(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on asset to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties, which recognizes the existence of a contract, is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this Act."

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[225] Ben-Shahar supranote minus 18 section C supranote 21; Schlechtriem (Kollidierende...) supranote minus 10 section IV.
[226] Ben-Shahar supranote minus 19 Introduction

In subsection (1) a modified version of the first shot rule is implemented. The offerer shall determine the content of the contract and even when the acceptance or a written confirmation differs partially the contract shall be concluded because this „operates as an acceptance". In this way the common law doctrine of the last shot is inverted.[227] The contract although should not be concluded in the way that only the terms of the offerer become part of the contract but also the terms of the acceptance at least where this is made a condition and the implementation is possible in accordance to subsection (2). The possible incorporation of diverging terms where these terms are not changing the substance of the contract and the parties have not declared that they want to avoid this incorporation and the otherwise retainment of the terms of the offerer results in a modified version of the first shot doctrine. The case that the acceptance or written confirmation contains different or additional terms, which can not be incorporated in accordance to subsection (2) is regulated in subsection (3). Even though the incorporation of the terms is stated as the rule in subsection (2) in most cases this incorporation is impossible because the terms of the acceptance or written confirmation alter the offer materially or the general objection to the use of the terms of the offerer is included. Then a modified version of the knockout rule in accordance to subsection (3) has to be applied. In the case of colliding terms, which do not form a contract in accordance to subsections (1) and (2), the conduct of the parties establishes a contract and the terms of this contract is determined by the knockout rule. Thus the contract contains the common terms supplemented by the provisions of the Act but different to the pure knockout rule the contract only comes into existence through the conduct of the parties. In theory the regulation is offering a good solution for the needs of the international trade but in practice the application of the rule, its exemptions and undefined

[227] Viscasillas supranote 158 section V. A. 2.

regulations for examples the missing of a determination of materially altering terms was very difficult and let to enormous amount of litigation.[228] A lot of criticism arose and for some commentators „the section has become an enigma"[229], has established „chaos" on the area of the battle of forms[230] Even a recourse to the old mirror image/last shot rule was promoted and behind this background it is not surprising that the inventors of the CISG were not following the approach of the UCC.[231]

e.) The „best-shot" or „reasonable-shot" rule

Omir Ben-Shahar[232] who based his approach on the best shot rule developed by Victor Goldberg[233] invents the concept of the reasonable shot rule.

Both concepts promote an active role of the judge or arbitrator. The colliding terms in the battle of the forms should not be replaced by statutory rules but the judge or arbitrator should determine which term is better[234] or more reasonable[235] and this term is part of the contract. The choice of the arbitrator or judge should in accordance to these concepts be limited to the one or the other term and no third option should exist. The difference of the two concepts is the criterion for the selection of the term through the arbitrator or judge.[236] Goldberg's rule lays the emphasis on the fairest term while Ben-Shahar's concept requires the choice of the more reasonable term. The new concept could be criticised as unpractical

[228] Ben-Shahar supranote minus 19 Introduction
[229] Viscasillas supranote 158 section V. A.
[230] Murray, John „The Chaos of the Battle of the Forms: Solutions" 39 Vand. L. Rev. (1986) page 1307 and Murray John „The Definitive „Battle of the Forms": Chaos Revisited" 20 J. L. & Comm. (2000) 1, 47
[231] Viscasillas supranote 158 section V. A.
[232] Ben-Shahar, Omir „An Ex-Ante View of the Battle of the Forms: Inducing Parties to Draft Reasonable Terms" The John M. Olin Center for Law & Economics Working Papers Series, Paper 32, http://law.bepress.com/umichlwps/olin/art32
[233] Goldberg, Victor „The Battle of the Forms: Fairness, Efficiency, and the Best-Shot Rule" 76. Ore. L. Rev. (1997) pages 155 et seq.
[234] Goldberg supranote minus 1 page 166
[235] Ben Shahr supranote minus 2 section II. D.
[236] Ben Shahr supranote minus 2 section II. D. 1. supranote 34

but Ben-Shahar refuses this and compares this concept with the established final offer arbitration (FOA). In the FOA, which is mostly used in salary disputes, where the parties submit a declaration towards the arbitrator and he chooses the one that seems more appropriate.[237] The result is derived by a comparable analysis. The arbitrator or judge who is confronted with colliding terms could instead of replacing these terms chose the more reasonable or fairer term. This would promote the formulation of reasonable and fair standard terms and could lead to a harmonisation on this area.[238]

f.) Comparison and Conclusion

The emphasis of the comparison must be whether or not the regulation of the UPICC are the most appropriate rules for the international trade market and thus represent the lex mercatoria.

The application of the traditional concepts the first shot or last shot rule leads to the most certain outcome because the contract contains the one or the other standard terms. These concepts offer a high degree of certainty for the parties. The already above mentioned critique that the concepts are not offering sufficient solutions for the problem inherent in the use of boilerplate terms and the mechanical sending of written confirmation in the hope to fire the last shot, is absolutely correct. The concept of the first shot leads to the result that the offer is rejected and a new offer is made and so the first shot is hopefully fired. This is especially problematic in the cases where the parties have not started to perform the contract or anything comparable and thus a valid contract does not exist because all the sent

[237] Ben Shahr supranote minus 2 section II. D. 1.
[238] Ben Shahr supranote minus 2 section III A.

and received letters were only counter-offers.[239] On the other hand is the promoted neutral solution offered by the knockout rule not really neutral. The PECL, UPICC, German Civil Code and the UCC are contending rules, which are significantly closer to the buyer's standard terms than to those of the seller.[240] If a gap that resulted through the application of the knockout rule is filled with the rules of the Code this often favours the buyer and is not resulting in an absolutely fair outcome. Another unsolved problem exist when the knockout rule applies if both parties declare explicitly that they want to be bound by their standard terms either before the conclusion of the contract or a short while after the contract would have been closed.[241] This critique must to a certain degree be rejected because if both parties are strongly resist on the implementation of their standard terms, it is up to the parties to negotiate which terms are acceptable or if they do not want to conclude a contract at all. The combination of different concepts offered by the UCC is in the practice not resulting in a satisfying outcome.[242] The different regulations are not clearly defined and a strict delimitation is missing and causes misinterpretation and uncertainty. The new concepts of Ben-Shahar and Goldberg are offering clear solutions in regard of the conclusion of the contract. Problematic is the criterion on which the arbitrator or judge should decide between the colliding terms and the contract that will be the product of such a selection of different terms is definitely not easy to interpret nor is a basic contractual concept retained. The formulation of such an article is going to be extremely difficult and also the handling of this article and the so determined contract. Especially the common law is not going to accept such an active role of the judge or arbitrator, which would be required by this concept.

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[239] Viscasillas supranote 158 section IV, Lando (The CISG...) supranote 165 page 9; Ben Shahr supranote section II. B.
[240] Ben Shahr supranote section II. C.
[241] Schlechtriem (Kollidierende...)supranote section III. 2.
[242] Murray supranote

The knockout rule is still the best solution that is available for this complicated legal problem. The substitution of colliding terms through statutory rules is the fairest, most efficient and most practical regulation.[243] The UPICC are presenting a regulation, which is based on the civil law codification or the developments initiated by the courts of these countries and is also acceptable for the common law lawyers and thus establishes the best suited rule for the international market. UNIDROIT although must be aware of the ongoing discussion in this area and maybe a new concept is going to succeed in the future and the UPICC must be revised.

4. Hardship and Force Majeure

Hardship and Force Majeure are the main legal concepts dealing with the problems of changed circumstances and constitute an exemption to the principle pacta sunt servanda.[244] Both concepts are regulated in the UPICC and the LoP. The difference between Hardship and Force Majeure is that the former is at stake where the performance of the concerned party has not become impossible but much more burdensome while the later regulates situations where the performance has at least temporarily become impossible for the disadvantaged party.[245]

a.) Hardship

Hardship is generally characterised through three elements. First the circumstances must have arisen beyond the control of the parties, because self-induced Hardship is irrelevant;

[243] After critique with the same result Schlechtriem (Kollidierende...) supranote at the end section V. 6.
[244] Rimke, Joern „Force Majeure and Hardship: Application in the international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts" section II 3. www.cisg.law.edu/cisg/biblio/rimke.html
[245] Maskow, Dietrich „Hardship and Force Majeure" ; 40 Am.J.Comp.L. 1992 page 657, 663

second the circumstances must be of fundamental character for the contract; third, they must be absolutely unpredictable and foreseeable.[246]

The Hardship regulation is found in the UPICC in an own subsection from Articles 6.2.1 to 6.2.3 and in chapter VIII of the LoP with the single regulation in No.VIII.1. The regulations are very similar and differ only in details.

In Article 6.2.1 the pacta sunt servanda principles and that not every aggravation of the contractual obligation leads to the application of the Hardship regulations is pointed out. A comparable regulation is missing in the connection with the Hardship rule in the LoP but the principle of pacta sunt servanda is explicitly mentioned in No.IV.1.2. In Article 6.2.2 of the UPICC a clear and descriptive definition of Hardship is formulated. A comparable definition is contained in No.VIII.1. (a) of the LoP. The definition in the UPICC is a bit wider because the first requirement includes not only the cases where the events occur after the conclusion of the contract but also the events of which the aggrieved party only had knowledge after the conclusion of the contract. The regulation of the UPICC protects the disadvantaged party and with the restriction in Article 6.2.2. (b) that the events could not have been reasonably taken into account the protection is limited to a fair and reasonable standard. This limitation is exactly the same as in No.VIII.1 (a) ii) of the LoP. In the Hardship definition of the UPICC the requirement that the event must be beyond the control of the disadvantaged party is stated, which is not regulated in the LoP. This requirement has more a clarifying character and must be through the correct interpretation of the principle of good faith and fair dealing in the LoP also be fulfilled to affirm Hardship.

The effects of Hardship in both lists are that the disadvantaged party can claim or request renegotiations. In the UPICC this right is combined with the duty to make the request

[246] Schmitthoff, Clive M. „Hardship and Intervener Clauses" J. Bus. L. 1980, page 82, 85

without undue delay and give the reasons on which it is based. This duty is helpful for the protection of the other party and is stated in a general form in No. IV. 5.8. of the LoP where the duty to inform the other party of any problems occurring in connection with the performance is laid down and expressly based on the notion of good faith and fair dealing in the international trade. Both lists give the parties a reasonable time for the renegotiations that has to be determined in the given circumstances and in accordance to the general principle of good faith.[247] If they fail to reach an agreement either party can resort to the courts[248]. They can then after determining that Hardship is given terminate the contract at a date and on fixed terms or adept the contract in a way the equilibrium is restored. Both lists give the courts the authority to rewrite the contract even though in a limited area.[249]

The UPICC and the LoP are dealing with the problem of Hardship nearly exactly in the same way and even the comparison with another international list of principles with the PECL and the regulation in Article 6:111 is not presenting an alternative. This is very surprising compared to the diverse regulations and approaches to Hardship through the different national sets of rules.

In France the courd de cassation is not allowing any restriction of the principle pacta sunt servanda (laid down in Article1134 of the French Civil Code) because of unpredictable circumstances. Generally the only excuse for non-performance is Force Majeure (see below) with the exemption of the doctrine of impévision formulated by the Conseil d'Etat in respect to public law contracts.[250] Hardship as a legal principle is as well generally not accepted in Belgium and Luxembourg that follow the approach of France.[251] The parties in these

[247] Bonell supranote 7. page 131 and the supranote 61 on the same page
[248] court includes arbitration tribunal as defined in the UPICC in Article 1.11
[249] Bonell supranote 7 page 132
[250] Bonell supranote 7 page 132 in the supranote 64
[251] Riesenhuber, Karl „Vertragsanpassung wegen Grundlagenstörung - Dogmatik, Gestaltung und Vergleich" BB 2004 page 2697

countries incorporate Hardship clauses to solve the problem that the courts do not offer a solution.[252]

In England the concept of frustration is comparable with the principle of Hardship as mentioned above. In the famous Coronation case[253] this concept was invented. An apartment was rented only for one day and for a high rent because it afforded a very good view on the Coronation parade of Edward VII. Even though the parade was cancelled because of an illness of Edward VII the landlord resist on his rent and sued the tenant. The court decided the contract was frustrated because of the essential and fundamental different execution then intended by the parties. The concept of frustration is now recognised for different reasons such as impossibility, physically for examples the destruction of the subject matter or legal reasons for example illegality or by the occurrence of a radical change in the circumstances on which the contract is based so that the contract has been vitiated and its existence and execution would amount to a new and different contract[254] If the contract is frustrated the judge cannot adapt the contract to the new circumstances. The contract is terminated and after the invention of the Law Reform (Frustrated Contract) Act 1943 a division of the costs can be ordered by the judge and is seen as restitution.[255]

In the United States of America in both sets of rules in the U.S. Restatement (Second) of Contracts in Section 261 and in the Uniform Commercial Code (UCC) in Section 2-615 regulations are found that deal with situations regarding changed circumstances. The sections are not regulating Hardship in the above mentioned way. They present a concept of commercial impracticability, which is broader, than that of the classical Force Majeure but is more limited than the Hardship rules and only allows the termination of the contract in

[252] Riesenhuber supranote 165 page 2697; Fischer Nicole N. supranote 132 pages 94-98
[253] Krell v Henry 2K.B. 740 (Eng. 1903)
[254] Rimke supranote 158 section III. 1.

restricted cases and not its adoption.[256] The courts are not following this approach so far and are very reluctant to this concept and only see impossibility as an excuse for non-performance.[257]

In Italy the disadvantaged party in a case of Hardship can terminate the contract if the other party is not offering an acceptable and adoptable alternative. The regulation in Article 1467 Codice Civile thus is very broad and determines additionally a wide control of the courts.[258]

In Germany Hardship („Wegfall der Geschäftsgrundlage") is regulated in the new version of this section of the German civil code (BGB) in § 313. The former concept developed by the courts is only changed by determining that the disadvantaged party can request adaptation of the contract from the other party and thus the adaptation is not seen as an ipso iure finding of the court anymore. The old approach that was still valid when the UPICC were first published could not handle situations very well where more than one solution or option for the adaptation of the contract was possible because the judges had to decide how to adapt the contract and no right for renegotiations was granted.[259] The new regulation is very similar to the one of the UPICC but fails to determine the details for the renegotiations.

The Dutch regulation can be found in Article 6:258 of the new Netherlands Civil Code (NBW) and is very similar to the old German approach although the adaptation is determined by the judge and not seen as an ipso iure consequence of the changed circumstances. In Article 6:258 of the NBW no right to renegotiation is granted but the consequences that can be ordered by the court are similar to the regulation of the UPICC.[260]

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[255] Riesenhuber supranote 165 page 2697
[256] Rimke supranote 158 section III. 2.
[257] Draetta, Ugo „Force Majeure Clause in International Trade Practice" 5 Int'l Bus. L. J. 1996 page 547, 548
[258] Riesenhuber supranote 165 page 2697
[259] Riesenhuber supranote 165 page 2698
[260] Bonell supranote 7 page 132 in supranote 64

The approach of the different international lists are hopefully promoting the recognition of the necessity of a Hardship regulation and lead to a harmonisation and unification on this area. The regulation of the UPICC can absolutely be used as a model clause because of the exact, comprehensive and practicable character of the offered solution.[261] The duty to renegotiate the contract seems more appropriate than the termination for examples in the Coronation case it would have been easy to adapt the contract and just change the date if this had been possible. The compromise of the UPICC regulation between the common law and the German, Dutch and Italian approach must be seen as a consent for the international market.[262] The regulation is reflecting the lex mercatoria as part of an international set of rules and besides this should be used as a model clause for national or international commercial contracts.

b.) Force Majeure

Force Majeure rules are found in Article 7.1.7 of the UPICC and No. Vi. 3. of the LoP. The main statement that non-performance is excused if this is due to an uncontrollable and unforeseeable impediment, which is beyond the control of the parties and could not have been taken into account, is identical. In the LoP examples for such impediments are expressly stated. In both rules the situation that the impediment is only temporary is regulated. Then the performance is suspended for a reasonable period. Only in Article 7.1.7 (3) of the UPICC a duty of the disadvantaged party to inform the other party in a reasonable time after the party had knowledge or ought to has knowledge of the impediment, is contained. Like mentioned above the same result is achieved by the general duty to inform the other party of any problem that arises in connection with the performance of the contract like stated in No.

[261] see the preampel of the UPICC (supranote 1.) paragraph seven where the model character is promoted

IV. 5.8. of the LoP. In the UPICC the Force Majeure generally excuses the non-performance of the disadvantaged party and this party is only liable for damages if the other party does not receive the notice of the impediment within a reasonable time. In the LoP the party's non-performance is also generally excused through Force Majeure and this party is liable for damages and can terminate the contract only in the case of a temporary impediment where the period of non-performance becomes unreasonably long and amounts to a fundamental non-performance. Besides this difference a comparable regulation to Article 7.1.7 (4) UPICC, which states that a party has the right to „terminate the contract or to withhold performance or request interest on money due" is missing in the LoP. The regulation of the UPICC is more comprehensive and the connection of the duty to send the other party a notice concerning the impediment with the right of the other party to claim damages if the notice is not received in a reasonable time amounts in a fairer result because the risks are allocated in a more appropriate way.

Also in comparison to Article 79 CISG the solution offered by the UPICC is preferable because of the greater certainty and clearer content of the regulation.[263]

In the international trade Force Majeure clauses are often used to find a sufficient solution for the contracting parties. These clauses are often drafted generally and offer a definition of Force Majeure, include a non-exhaustive list of events, which by agreement of the parties constitute Force Majeure and include the requirement that the disadvantaged party must give notice of the event in a determined period.[264] Some of these clauses define Force Majeure in a wide way and by this include events where the performance has not become impossible but

[262] Riesenhuber supranote 165 page 2701
[263] Rimke supranote 158 section VII B 1.
[264] Draetta supranote 171 page 551

for examples has become exorbitantly more burdensome from a commercial point of view.[265] This practice is blurring the distinction of Hardship and Force Majeure and can lead to problems with the delimitation of these two concepts. Also the requirement of the unforseeability of the event is either defined in a very vague and relaxed way or could like some authors suggest left out entirely,[266] even though this element is mutually accepted by national and international sets of rules. The enforcement of the contract is seen as important as in the above discussed solutions offered by UNIDROIT and CENTRAL and normally the impediment leads to a suspension of the performance and only after the fruitless ending of this period the contract can be terminated.[267] An innovative and new approach is to contain in the Force Majeure clause a right to renegotiate the terms of the contract and give the parties the chance to adapt it to the new situation where this is possible.[268] There may be circumstances where the performance is not possible anymore but the disadvantaged party can offer a similar performance and the contract could be adapted. Some even suggest incorporating in these clauses the right to recourse to arbitration, other alternative dispute resolutions, or expertise procedures.[269] The later presented suggestions are only appropriate in rare cases but the right to renegotiation could be incorporated in the regulation of the UPICC. The generally absolute good and well suited regulation for the international trade would after an incorporation offer a more flexible handling of these situations and the enforceability of the contract would be supported. The disadvantage would be the distortion of the concepts of Hardship and Force Majeure. At the moment the participants of the international market tend to use the „old" Force Majeure clauses but UNIDROIT should be

[265] Draetta supranote 171 page 552
[266] Draetta supranote 171 page 552
[267] Schmitthoff supranoote page 165
[268] DeClerq, P.J.M. „Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability" 15 J.L. & Com. (1995) page 213,245
[269] Draetta supranote 171 page 551

aware of a possible change in this specific usages. It is hereby not necessary that the majority of merchants choose the clause in which the right to renegotiations is included but if more and more do so UNIDROIT should adjust the UPICC, which are currently in this point still reflecting the present lex mercatoria.

VII Result and Assessment of the Comparison

The comparison was focused only on a few selected topics but the excellent solutions offered by the UPICC are examples for the general quality of the whole list. The chosen topics dealt with problems from the precontractual phase, certain requirements for the conclusion of the contract, the incorporation of specific regulations in the contract and regulations that lead to the termination of the contract. In this way even though only a few regulations were analysed a general idea of the excellent suitability of the UPICC for the international market is given. The criticism of Berger that the UPICC as a restatement of the transnational law as law in action is too static[270] must be denied. The UPICC are an excellent example of how open and user-friendly a code for the transnational market can be formulated. Berger does not realise or underestimate the possibility to interpret the principles laid down by UNIDROIT in accordance to the changing needs of the international market. The adjustment to new developments or trends in the international commercial law is guaranteed for example through the repeated use of „reasonable" (66 times in the UPICC) because what is reasonable is defined through the current understanding among the merchants, judges and arbitrators. The same is true for the general clause of „trade usage" or „in the international trade", which are used 9 times in the UPICC. The UPICC can be adapted for the needs of the transnational commercial trade in the new millennium through the correct interpretation

of the principles by the merchants, courts and arbitrators. The changing and rising international trade although will make it necessary for UNIDROIT to review the UPICC and when needed add or change different principles or chapters. The development on the sector of the electronic commerce or the mentioned new approach to the battle of forms are examples of two very different legal fields, the rise of a new legal discipline and a new approach to an old legal problem that show how important a continuous discussion about the solutions offered by the UPICC is. This is also true for the possible incorporation of new chapters for example about unjust enrichment.[271] The new regulations added in the 2004 version about agency, limitation periods and so on are demonstrating that UNIDROIT is on the right way to finalise the project and constitute a comprehensive restatement for the international commercial law. If the further development of the UPICC is done with the same high quality by UNIDROIT and the awareness of new trends is kept where needed the success of the UPICC will continue and rise in the future. Some of the regulations are although are very vague and the advantage of the flexible interpretation could lead to a totally unsatisfactory result that each arbitrator only rules what he accepts as a fair or reasonable result. A stricter guideline for the interpretation of the regulations should be given otherwise the aim of harmonisation and unification is only achieved on the surface.

VII Conclusion

The high quality of the UPICC and the good solutions offered by the UPICC makes this set of rules undoubtedly the tailor-made standard for the transnational commercial market. It is

[270] Berger „The Concept..." supranote 122 section III.
[271] see in section IV 2. of this work and the regulation in chapter X of the LoP

although hard to answer if the UPICC have to be seen as the restatement of the lex mercatoria in the new millennium. The opinion what has to be understood as the modern lex mercatoria are differing so widely like shown above that a generally acceptable answer will be nearly impossible. The missing of a transnational common understanding of the lex mercatoria and its content leads to the dilemma that a restatement is never accepted by all participants of the international market.

In the time of the changing geo-political and specially the economic global world national borders do not bind the merchants anymore and a transnational regulation for the rising needs of the merchants is necessary. It depends on the merchants and their referees the arbitrators to apply the UPICC and in this way promote global harmonisation of law. If the UPICC is used by the merchants and become an even more important part of the international trade the diverse opinions will fade and a greater unification is derived. The problem and a point of critique is that the UPICC are only offering solutions for a part of the relation of the parties. Only if the dispute is concentrated on a contract law dispute the UPICC are offering a sufficient solution. Very often the argument between the parties starts to involve other areas as well. In these cases the UPICC are not offering a sufficient solution and thus make it very complicated for the arbitrator to apply them for the settlement of the dispute. When the parties want their contract governed by the UPICC they clearly have to indicate that because if they only choose a term like the lex mercatoria or general principles it will still depend on the arbitrator to decide if in his view the UPICC have to be applied. The national governments should also accept the UPICC as the transnational law for the transnational commercial market and in a Rome II Convention include the UPICC as an applicable law. UNIDROIT has for a further success start to complete the UPICC and make them more comprehensive. A chapter regulating international arbitration process should be

implemented as well to reach a higher unification and a comparable interpretation of the UPICC through the arbitrators.

Currently there exists no comparable, as comprehensive list that is offering an alternative to the UPICC on the global trade market and thus their use should be promoted. With the success of the UPICC in the first decade after their initial publishing and the future perspective it should be accepted by all as the restatement of the lex mercatoria in the new millennium.