Leaving the Shadow for the Test of Practice - On the Future of the Principles of European Contract Law

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1. Introduction

The post war period has seen a vigorous debate on the existence and the value of a lex mercatoria. Its protagonists1 lit the fire by developing theories of a transnational commercial law or modern2 lex mercatoria. Although the various theories differed widely with respect to the terminology and legal nature of a lex mercatoria, all approaches shared the view that it is derived from a comparative analysis and application of a set of common principles, rules and standards of international commercial law.3 The raison d'être of a lex mercatoria is that its application to cross-border transactions and their dispute settlement procedures is economically sound.4 Thus, their application would produce superior results compared to the application of a national law.

The analysis of a lex mercatoria came to a first climax in 1994, when the International Institute for the Unification of Private Law (UNIDROIT) in Rome presented its Principles of International Commercial Contracts (hereinafter UPICC).5 These principles which intend to set forth "general rules for international commercial contracts" were developed by an intensive study of the national laws of many nations, the 1980 UN Convention on Contracts for International Sale of Goods (hereinafter CISG) and widely acclaimed customs and usages in international trade.6 Since their introduction in 1994 the UPICC have received wide recognition both in academic research7 and teaching8 as well as in the practice9 of international contract drafting and commercial dispute resolution.10

The post war period also saw the building of the European Communities and the European Union (hereinafter EU). With the Economic and Monetary Union well underway, enlargement towards middle

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2 The term ‘modern’ is used to distinguish the idea of a contemporary lex mercatoria from the lex mercatoria which was the commonly accepted body of law governing trade in Europe in the Middle Ages.

3 Berger, Creeping Codification of the Lex Mercatoria, at 1 et seq.

4 Ibid.

5 The Principles are abbreviated in number of ways. The abbreviation UPICC is not common although it mirrors the common form of abbreviation used for conventions and bodies of national law.


11 For example the Annual Willem C. Vis International Commercial Arbitration Moot held annually since 1993 in Vienna, Austria; for a report see Bergsten, The Fifth Moot and Plans for the Sixth, 2 Vindobona Journal (1998) at 51 et seq.

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and eastern Europe apparently poses as one of the principal challenges for the EU in the forthcoming years. However, a voice has been raised that the EU must tackle another - somewhat less apparent - problem. It is in need of greater harmonisation of its various national legal systems. Particularly the contract law has been harmonised only in a fragmentary fashion with much emphasis laid on the protection of consumers. Certainty on the legal basis for cross-border transactions is one of the main catalysts of trade. However, there is no European-wide regulation of general contract law which applies in these transactions. While the 1980 Rome Convention on the Law Applicable to Contractual Obligations provides for a uniform conflict of laws approach, this may not be enough. Harmonisation with respect to the private international law does not mean that the same case will receive the same judgement anywhere in the EU.

These circumstances led Ole Lando in 1976 to the conclusion that Europe must move beyond harmonisation in private international law and must prepare for the establishment of a body of uniform contract law. He founded the Commission on European Contract Law with the goal to work out common principles of contract law for the countries of the EU. The commission presented the first part of its Principles of European Contract Law (hereinafter PECL) in spring 1995 - shortly after UNIDROIT had released its set of principles. In their first part the PECL cover some fundamental principles of contract law and rules concerning performance, non-performance and remedies in case of non-performance. In 1997 this work was released in French - the second official language of the commission. In November 1999, a new book covering Part I and II of the PECL was released. The PECL therefore now cover also the aspects of formation, interpretation and validity of contracts as well as the authority of agents. While an ’unofficial preview of the provisional complete and revised version’ that featured only the black-letter-rules but not the commentary could have been obtained through the Internet, the publication of the new version of the PECL was unexpectedly delayed for far too long.

2. History and State of Affairs of the PECL

The PECL presented in 1995 and 1999 are very similar to the UP-ICC. Their origins and the work of the drafting groups were largely the same. The PECL are also formulated as black-letter rules, with the goal to work out common principles of contract law for the countries of the EU. The commission presented the first part of its Principles of European Contract Law (hereinafter PECL) in spring 1995 - shortly after UNIDROIT had released its set of principles. In their first part the PECL cover some fundamental principles of contract law and rules concerning performance, non-performance and remedies in case of non-performance. In 1997 this work was released in French - the second official language of the commission. In November 1999, a new book covering Part I and II of the PECL was released. The PECL therefore now cover also the aspects of formation, interpretation and validity of contracts as well as the authority of agents. While an ’unofficial preview of the provisional complete and revised version’ that featured only the black-letter-rules but not the commentary could have been obtained through the Internet, the publication of the new version of the PECL was unexpectedly delayed for far too long.

13See also infra at The Success Story of the UPICC.
14On 13 October 1999 the European Commission proposed doubling to 12 the number of countries negotiating to join the European Union. They include Cyprus, the Czech Republic, Estonia, Hungary, Poland as well as Slovenia and now also Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia; see Norman, Brussels adds six to EU fast track, in Financial Times, 14 Oct. 1999, at 1. For the general issues relating to enlargement cf. Hamkens/Röttgers (ed.), Reform der EU - Mit oder ohne Mittel- und Osteuropa, 1996.
19Also known as the Lando-Commission in honour of its founder and chairman.
which are complemented by a more or less detailed commentary. Not surprisingly, both sets of rules show a fair deal of cohesion in terms of their content.\textsuperscript{24} Their mutual inspiration was facilitated by the fact that a number of experts served in both drafting groups.\textsuperscript{25} In particular both chairmen, Lando and Michael Joachim Bonell, were also members of the other group.

The short period of time which lay between the initial presentation of the two projects in 1994 and 1995 seems to suggest that there was either a race of private initiatives in the field of harmonisation of international contract law\textsuperscript{26} or a co-ordinated timing in the presentation. One desired effect of the co-ordinated release of both projects may well have been to enable a combined analysis of their academic and practical value. Rather than a discussion on the value of one of the projects, the analysis following the releases could have revolved around a comparison of the two sets of rules. Such an analysis would have been to the benefit of both projects. After preparation lasting 23 years for the \textit{UPICC} and 19 years for the \textit{PECL} both drafting groups must have felt that the value of their work would not have been adequately recognised if the other project was presented significantly earlier. Considering the number of scholarly writings, the reports on the use in dispute settlement and the influence in legislative activity\textsuperscript{27} one cannot deny the impression that until today the \textit{PECL} have remained in the shadow of the \textit{UPICC}. The \textit{UPICC} are at the center of attention in academic and practical debate. So far, the \textit{PECL} play little more than a minor role.

Interestingly enough, the delay of the publication of the 1999 version has brought the \textit{PECL} into conflict with another project which - although entirely different in its outset - has the same ultimate goal. The project for a European Contract Code by the Pavia Group around Guiseppe Gandolfi is scheduled to publish its findings in early 2000. In contrast to the \textit{UPICC} the collaboration of the Lando-Commission with the Pavia Group is negligible. The latter does not intend to find principles of contract law which are common to all national laws within the EU, but rather approaches the codification of contract law with a pragmatic attitude by looking at the most challenging topics of contract law such as the effect of contracts on ownership of movables and immovables.\textsuperscript{28} After reviewing the various national solutions, Gandolfi formulates a possible European regulation of the issue, which is subsequently distributed to the members of the Pavia Group for approval.\textsuperscript{29}

Bearing in mind on the one hand the recent publication of the 1999 version of the \textit{PECL} and on the other hand the challenge from the project by the Pavia Group, now is a crucial time for determining the future of the \textit{PECL}. If the \textit{PECL} are to step beyond their undoubted academic value and are to enjoy a future outside legal textbooks, they must face the test of practice. They must be catapulted to the forefront of attention in European legal research, education and practice.\textsuperscript{30}

\section*{3. The Success Story of the \textit{UPICC}}

The means to achieve much of the needed attention for the \textit{PECL} can be derived from the success story of the \textit{UPICC}. Undoubtedly, the spread of and the enthusiasm for the \textit{UPICC} is largely facili-
tated by the economic trend of globalisation. Commercial law must provide the international trading community with a legal framework which offers adequate solutions with a high degree of certainty. The national laws by their very nature and the rather patchy international uniform instruments do not provide this. The UPICC could indeed form the core for such a desired framework. Their careful elaboration and the expertise of the members of the drafting group must be seen as a guarantee of their quality.

From a business perspective this situation forms an interesting market for the product ‘UPICC’. Additionally, UNIDROIT could also rely on its infrastructure as an effective means for taking its product to that market. Currently, the principles including the commentary are available in English, French, Italian and Spanish - the four official languages of UNIDROIT - as well as in Chinese, Czech, Dutch, German, Russian, Slovak and Vietnamese. These versions are available in stand-alone publications as well as in several works dealing at least in part with the UPICC. Moreover, the text of the black-letter rules alone had been translated into Arabic, Bulgarian, Croatian, Farsi, German, Hungarian, Japanese, Portuguese and Serbian. Finally, the Uniform Law Review published by UNIDROIT provides an excellent platform for essays and case reports on the progress of the principles. In numerous conferences and colloquia, the UPICC were made known to academics and practitioners. A second enlarged edition of the leading commentary on the UPICC had to be published within 3 years after the first edition.

After less than 6 years in public, the UPICC have been subject of an uncountable number of research essays. Law journals have dedicated substantial space or entire issues to the presentation of the UPICC and the Internet’s most prominent web site.

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31 Cf. infra at Necessary Steps for the Future.
32 The UN Convention on Contracts for the International Sale of Goods may be the only exception. Although even this instrument is limited in scope and provides for a great number of reservations by the contracting states.
33 The English, French, Spanish and Italian version are available at UNIDROIT, Rome, the Chinese version is available at Legal Publishers and Distributors, Beijing, the Czech version is available at CODEX Bohemia, the Dutch version is available at Koninklijke vermande; the Russian version is available at International Centre for Financial and Economic Development, the Slovak version is available at Iura Edition.
35 Translations of the complete versions into Arabic, Farsi and Portuguese as well as of the text of the black letter rules into Indonesian are in preparation.
38 Bonell, An International Restatement of Contract Law, 2nd ed., 1997; see also the remarks by Bonell in the preface to this second edition.
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for research material on the CISG now includes contributions on the UPICC.\textsuperscript{40} The focus of many of the essays and articles has not only been for academic purposes, but also with a distinct ambition to underline the practical value of the UPICC.\textsuperscript{41} This value has been documented by a growing number of arbitral cases in which the tribunal referred to the UPICC in one way or another,\textsuperscript{42} the most prominent case being the Channel Tunnel Construction Case.\textsuperscript{43} The UPICC have been a role-model and template for the rewriting of the civil law of eastern European states.\textsuperscript{44} Finally, the Annual Willem C. Vis International Commercial Arbitration Moot as the world’s most recognised educational event in its field encourages the use of the UPICC to solve problems arising from the application of the CISG.\textsuperscript{45} With an ever increasing number of student participants the service of this event to the spread and acceptance of the UPICC will be felt vigorously in future years as the participants join the legal profession.

All of these developments underline the immense recognition of the UPICC. Such results would not have been possible if the opportunities offered were not used by the drafters of the principles. Many members of the working group and others who have been affiliated with its work contributed initially to the publications on the UPICC. At the center of this group stands its chairman Bonell, who has tirelessly advocated the use of the UPICC in books, essays, conferences, symposia, colloquia and private discussions throughout the world. The success of the UPICC cannot be de-coupled from his name.

4. Specific Value of the PECL

What then is the value of the PECL? Their future will be essentially decided on the question whether it has its own ‘market’. Are the PECL and the UPICC two similar sets of rules for the same purpose?\textsuperscript{46} The PECL focus on Europe. The Europeanisation of trade has long taken place. Hence, the PECL cannot ride on the back of the enthusiasm which this trend might have provided at earlier times. Instead, the focus of EU debate is on its institutional reform and the eastern enlargement. Legal harmonisation is not ‘chic’ in Brussels today. But a solemn focus on the input which the PECL might deliver for a European Contract Code or a European Civil Code is too short-sighted. The volume of cross-border trade in the EU

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\textsuperscript{41} The CISG Web Site maintained by the Institute for International Commercial Law at Pace University - School of Law, New York at \url{http://www.cisg.law.pace.edu}.


\textsuperscript{44} Schlechtriem, UNIDROIT Principles (Einheitliche Prinzipien für Verträge) und Werkvertragsrecht, in: FS von Craushaar, at 157 et seq.

\textsuperscript{45} The UPICC have influenced the drafting of the Russian Civil Code, the Estonian Law of Obligations and the Civil Code of the Republic of Lithuania, cf. SiSU lexmercatoria.org

\textsuperscript{46} Since 1994/95 the use of the UPICC was encouraged in all cases of the Moot. The competition of 1998/99 even included a contract which was solely governed by the UPICC.
is immense. For example, more than half of Germany’s exports are devoted to the other member states of the EU.\textsuperscript{47} Another ten percent of exports is devoted to Eastern Europe, whose countries are preparing for an admission into the EU.\textsuperscript{48} Already today, the \textit{PECL} can be used in these transactions and the dispute settlements thereof. While preparing a contract the parties may refer to the \textit{PECL} as a checklist or use it as a reference for the definition of terms.\textsuperscript{49} They may decide that the contract shall be governed by the \textit{PECL} either as the sole set of rules or as a supplementary set siding the application of the CISG or a national law. The choice of the \textit{PECL} as governing law should be upheld by arbitral tribunals, if their lex fori has incorporated the UNCITRAL Model Law on International Commercial Arbitration.\textsuperscript{50} It is thus argued that the \textit{PECL} will establish themselves in European trade while the \textit{UPICC} will be the dominant set of rules used in global trade surpassing the European borders.

However, three advantages of the \textit{PECL} over the \textit{UPICC} are evident which could prove to be the catalyst for success of the \textit{PECL}.

First, the \textit{PECL} in their complete version will deal with more issues than the \textit{UPICC}. The drafters of the \textit{PECL} add to the first version chapters on formation, interpretation, and validity of contracts as well as the authority of agents. Whereas the question of authority of agents is expressly excluded from the scope of matters governed by the \textit{UPICC},\textsuperscript{51} the complete version of the \textit{PECL} deal with this issue extensively.\textsuperscript{52} Not only does it address the issue of direct representation, but also deals with the questions arising from indirect representation.

The future work of the Commission on European Contract Law focuses on the one hand on the invalidity of contracts arising from illegality and immorality. Once rules for these issues have been laid down, only invalidity arising from lack of capacity will not be addressed by the rules on validity in the \textit{PECL}.\textsuperscript{53} On the other hand the Commission is undertaking research on the questions of conditions, interest on interest, set-off, assignment of claims, assumption of debts, plurality of debtors and creditors, prescription, and discharge. These issues are not addressed in the \textit{UPICC}. Since their combined launch in 1994/95 the Lando-Commission has been more vigorous in tackling these new legal questions.\textsuperscript{54}

Second, the \textit{PECL} set forth general rules for contract law\textsuperscript{55} whereas the \textit{UPICC} restrict their application to commercial contracts.\textsuperscript{56} The term ‘commercial’ is intended to exclude consumerbeen incorporated into the German Code of Civil Procedure as of January 1, 1998. For a detailed study cf. Berger (ed.), Das neue deutsche Schiedsverfahrensrecht / The New German Arbitration Law, 1998.

\textsuperscript{52}Cf. Art. 3.1 \textit{UPICC}.

\textsuperscript{53}Cf. Art. 3.101 - Art. 3.304 \textit{PECL}.

\textsuperscript{54}Cf. Art. 4.101 \textit{PECL}, which reads: ‘This Chapter [concerning validity] does not deal with invalidity from illegality, immorality or lack of capacity.’

\textsuperscript{55}The UNIDROIT Working Group has only relatively recently resumed a review of the current principles and work on issues such as agency, limitations of actions, assignment of contractual rights and duties, contracts for the benefit of a third party, set-off, and waiver. Interestingly enough, the Working Group has assigned a special report on the adaptations of the \textit{UPICC} in the light of electronic commerce; cf. Report on the First Session of the Working Group for the preparation of a second enlarged edition of the Unidroit Principles of International Commercial Contracts, reprinted at <http://www.unidroit.org/english/principles/wg-1998.htm>.

\textsuperscript{56}Cf. Art. 1.101 \textit{PECL}.


\textsuperscript{48}Cf. Deutsche Bundesbank (ed.), Monatsbericht März 1999, at 64.

\textsuperscript{49}Cf. Deutsche Bundesbank (ed.), Monatsbericht März 1999, at 64.

\textsuperscript{50}For this mode of application with respect to the \textit{UPICC} cf. Bonell, International Restatement, 2nd ed., at 238 et seq.

\textsuperscript{51}Cf. Article 17 of the UNCITRAL Model Law. The UNCITRAL Model Law has
contracts.\textsuperscript{57} The \textit{PECL}, on the contrary, expressly include consumer contracts in their scope. Such a wide application may seem rather illusionary considering the conflict of laws rules concerning consumer contracts commonly in operation in the EU. On the one hand the rules protecting the consumer in their country of domicile demand adherence irrespective of the choice of law.\textsuperscript{58} On the other hand inclusion of arbitration agreements in consumer contracts is restricted.\textsuperscript{59} The practical imposition of the application to consumer contracts set aside, it is already the mere orientation on consumer contracts which add value to the \textit{PECL}. By considering the rather weak position of consumers in contract negotiation, academics and practitioners might find that the drafters of the \textit{PECL} have balanced the interests of the parties more evenly and regulated certain legal questions in more detail than the \textit{UPICC}.

Finally, the overwhelming advantage of the \textit{PECL} is their future prospect of inclusion in a codification. No global treaty with respect to contract law is foreseeable.\textsuperscript{60} Although the \textit{CISG} is one of the most successful international legal harmonisation initiatives,\textsuperscript{61} its scope is limited,\textsuperscript{62} the options for reservations numerous\textsuperscript{63} and a number of its articles bitterly disputed.\textsuperscript{64} In Europe the chances for an overarching codification of the contract law are much higher. Even though legal harmonisation is not at the core of the Brussels bureaucracy today, the force of economic integration increased by the introduction of the EURO will demand a legal framework identical in all member states of the EU. Legal harmonisation follows economic harmonisation. This has been the experience of German unification at the end of the 19th century and the beginnings of the European Communities in the 1950's and 60's.

Europe shares a common legal tradition often referred to as the \textit{ius commune}.\textsuperscript{65} Although in parts greatly different, the various national laws have Roman law as their common core. British common law with its apparently distinct difference is undergoing Europeanisation by developing more statutory law. The differences between the United Kingdom and the civil law continent are constantly decreasing\textsuperscript{66} thus enabling the integration of the British system into the European development of a common civil or contract code.

The work of the Lando-Commission was backed by the European Parliament in a resolution in 1993.\textsuperscript{67} With the parliament gaining in strength and influence in the EU, this fostering relationship will be of some importance towards the inclusion of the \textit{PECL} in the process of harmonisation.

\textsuperscript{57}As already their name suggests, cf. also Preamble of the \textit{UPICC}.
\textsuperscript{58}Bonell, An International Restatement of Contract Law, 1997, at 51.
\textsuperscript{59}Reithmann/Martiny, Internationales Vertragsrecht, at 633.
\textsuperscript{60}Cf. §1031 para. 5 ZPO (German Code of Civil Procedure): If a consumer is involved, arbitration agreements must be signed as a separate document.
\textsuperscript{61}In fact the lack of this prospect brought UNIDROIT in the first place to the conclusion that it should not opt for a draft convention but rather non-binding set of rules; cf. Bonell, A Restatement of Principles of International Commercial Contracts: An Academic Exercise or A Practical Need?, RDAI 1988, at 873 (886).
\textsuperscript{62}For an updated list of the countries that have signed and adopted the Convention, turn to \url{http://www.un.or.at/uncitral/status/status.pdf}.
\textsuperscript{63}See Art. 1 - 5 \textit{CISG}. The \textit{CISG} is narrowed to apply only to sales contracts. Consumer purchases - though not consumer sales - as well as combined contracts with a dominating service element are excluded. Even if applicable, the \textit{CISG} itself does not address questions concerning the validity of the contract nor the effect on the ownership of the sold goods. It leaves these questions to be regulated by the national law applicable by virtue of the conflicts of laws rules.\textsuperscript{64}See Art. 92 et seq. \textit{CISG}. Especially the reservation of the writing requirement for the conclusion, amendment or termination of the contract (Art. 96, 12 \textit{CISG}) might pose problems with respect to the trade on the internet.
\textsuperscript{65}See only the relationship between Art. 48 and 49 \textit{CISG}.
\textsuperscript{66}Cf. in general Knütel, Rechtseinheit in Europa und römisches Recht, in \textit{ZeuP} 1994, at 244 et seq.
\textsuperscript{67}Gordley, Common law und civil law: eine überholte Unterscheidung, in \textit{ZeuP} 1993, at 498 et seq.
5. Necessary Steps for the Future

The drafting of a European contract code is still far off. However, the PECL must leave the shadow of the UPICC now and must be taken to the `market'. This requires a widely diversified marketing strategy aimed at research as much as at education and practice.

Research into the PECL should be encouraged by conferences such as the symposium held in early 1999 at the Max-Planck-Institut. European journals may concentrate on the presentation of essays on the PECL focusing on a comparison with both national laws of the EU and international legal instruments such as the UPICC and the CISG. Spread of research books and essays could be increased by an Internet database similar to the one provided for the CISG.

The text of the PECL should be made available to students and practitioners at attractive prices. Students could be encouraged to evaluate their national legal problems by comparison to the solution found in the PECL. Furthermore, law faculties across Europe should be encouraged to organise a Moot competition which focuses on the fragmentarily harmonised private law as well as the PECL. While the well established Jessup-Moot Court has its European counterpart, the Willem C. Vis International Commercial Arbitration Moot has not. There is a gap to be filled.

Practitioners must be made familiar with the application of the PECL in drafting contracts as well as dispute settlement. One could also look at a revision of the 1980 Rome Convention to allow for the choice of rules of law such as the PECL as the law governing the contract.

Most important, however, is the institutionalisation of the Commission on European Contract Law with similar facilities as UNIDROIT. Instead of dissolving the Commission after the presentation of their next results, it should be integrated into a wider institution devoted to the unification of private law in Europe. Such an institution could speedily enable the translation of the PECL into all European languages and could encourage the implementation of the internet database, the academic work in the European journals and the Moot competition.

Unless such measures are taken in the near future, the success of the PECL is in danger. The careful work of several decades could be lost or at least diminished to that of an interesting comparative law study. The result would be a long delay in the European harmonisation process for many years, which is nothing less than an economically significant lost opportunity. The legal profession would have failed to serve the European people.

* This article coincides with the publication of Part I and II of the Principles of European Contract Law prepared by the Commission on European Contract Law. Published in the “The Vindobona Journal of International Commercial Law and Arbitration” Volume 3 Issue 1, 1999 ISSN 1439-9741

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