

LEX MERCATORIA, SOFT LAW AND A CLOSER APPROACH OF UNIDROIT PRINCIPLES

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Abstract

Lex mercatoria or trade usages continue to be the core of the international legislation and principles. Soft law is a new variation of lex mercatoria with certain particularities.

Soft law is an instrument usually considered as non-binding but nevertheless with much potential for morphing into "[hard law](#)" in the future by two different ways: one is when declarations, recommendations, etc. are the first step towards a treaty-making process, in which reference will be made to the principles already stated in the soft law instruments or by the direct influence on the practice of states including European Court of Justice, creating customary law. As i mentioned before, soft law is a convenient option for negotiations that might otherwise stall if legally binding commitments were sought, because the choice would not have been between a binding and a non-binding text, but between a non-binding text and no text at all.

There is also the appearance of legality of the soft law because, due to the spreading of the information, the citizens often assimilate the soft law instruments as if they were legal instruments and slowly do not react against but moreover refer to these instruments frequently that ease the process to become legal norms.

The article emphasize a complex analyze of lex mercatoria starting with historical approach, juridical approach and also arguments against lex mercatoria.

The second part regards soft law from the social and comparative perspective. Also regards the relation between soft law, treaties and trade usages wit a special aproach on the Principles on Choice of Law in International Commercial Contracts, PECL and DCFR.

The last part describes the uniform and predictable frame under the UNIDROIT Principles.

Part.1. Lex Mercatoria

Chapter 1. Historical review on lex mercatoria

In 1622, Gerard Malynes¹ defined the lex mercatoria in his famous treatise 'Consuetudo Vel Lex Mercatoria, Or the Ancient Law-Merchant' as the

¹ Malynes, Gerard, Consuetudo, Vel Lex Mercatoria or The Ancient Law-Merchant (1st. ed., 1622). „I have intituled the Booke, according to the ancient name of *Lex Mercatoria*, and not *Ius Mercatorum*; because it is a Customary Law approved by the authoritie of all Kingdomes and Commonweales, and not a Law established by the Soueraigntie of any Prince, either in the first foundation or by continuance of time”

'customary law of merchants, more ancient than any written law . . . [and] built upon the foundations of Reason and Justice'. In his Commentaries on the Laws of England first published in the 18th century, *Blackstone*² wrote that 'no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandise; neither can they have a proper authority for this purpose. For which reason the affairs of commerce are regulated by a law of their own, called *the law merchant or lex mercatoria*.' „In despite of their similarity, there is an important intrinsic difference between these two views of the *lex mercatoria*. While *Malynes*' view was still *detached from any notion of the sovereignty*, *Blackstone*'s approach was no longer truly transnational but was *directly linked to the powers of domestic legislatures*. With the codification wave of the 19th century, the ancient *lex mercatoria* was absorbed by the major codes of that time, the old law merchant had fallen into oblivion.”³

In the *late 19th and early 20th century*, the enthusiasm for nationalism and the industrial revolution led to the idea of a *world private law* ('Weltprivatrecht'). Analyzed through comparative research of the legal systems of the civilized nations, the „world private law” should be superior to any domestic legal system as structure and substantive content and also implemented through a treaty of public law. Still, the idea was a „legal utopia” in the geo-political context of the early 20th century, that was dominated by sovereignty and nationalism.

The rediscovery of the medieval law merchant through the works of commercial lawyers⁴ after World War II brought also a great revival of the *borderless concept and* universal trade law of nations. This notion had received a great deal of attention and intellectual conceptualizing as early as the 17th century.

In the *late 1950s and early 1960s*, the concept of transnational commercial law was revitalized by *Berthold Goldman*. An article by *Goldman* published in the 'Le Monde' in 1956 and dealing with the nationality of the Suez Canal Company marks the beginning of this process.⁵ In *Goldman*'s view, this company was not of Egyptian, English, French or mixed nationality even though it could be considered as a juridical person of private law. Due to its particular capital structure, its organization and its activities, he regarded this company as '*une société internationale, relevant directement de l'ordre juridique international*'. The status of the Suez Canal Company, both in terms of its legal source and its legal nature, was in his view 'essentially international'. Thus, in *Goldman*'s view, the Suez Canal

² https://en.wikipedia.org/wiki/Commentaries_on_the_Laws_of_England - consulted at 14.08.2018;

³ „The New Law Merchant and the Global Market Place - A 21st Century View of Transnational Commercial Law” - Professor Dr. Klaus Peter Berger, LL.M., Center for Transnational Law (CENTRAL), University of Cologne, Germany

⁴ *Goldman*, 1964; *Schmitthoff*, 1964

⁵ *Goldman*, 'La Compagnie de Suez, Société Internationale', *Le Monde*, October 4, 1956, 3

Company, in despite of its 'necessarily territorial genesis and functioning', was of a private law nature but of a transnational character.

He argued that the new *lex mercatoria* was in fact an '*ensemble*' of general principles and legal rules growing out of a process of spontaneous, institutional lawmaking. This process is detached from domestic legal systems and escapes the realm of domestic lawmakers which is limited to the territory of the respective jurisdiction. Instead, the law is created within the community of merchants doing cross-border trade and commerce, the *societas mercatorum*.⁶ This doctrine of an autonomous, a-national legal order of transnational commercial law, of a 'third legal system' was later developed and expanded by his academic pupils *Philippe Fouchard* in the area of international commercial arbitration.

*Philip Jessup*⁷ considered, in 1956, that the term "transnational law" includes all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories". P. Jessup proposed that transnational law should encompass and simultaneously challenge public and private international law were the latter to maintain their explanatory and guiding potentials in an ever more integrating world. Commercial lawyers seized this moment and engaged for decades in a far-reaching enterprise of collecting, consolidating, codifying and harmonizing the various laws governing international trade.

Clive Schmitthoff advocated for the strong tendency of the international trade towards autonomous regulation.⁸ This development was promoted by international contract drafting and international commercial arbitration, since both areas are governed by the principle of party autonomy which leaves the necessary room for the development of transnational legal structures. *Schmitthoff's* main emphasis, however, was on the work and influence of international formulating agencies:

„It is the formulating activity of these international agencies which inspires hope for the ultimate emergence of a fully autonomous law of international trade. Commercial life is a many-splendoured thing, and out of the complementary activity of these international agencies must eventually arise the harmony of an integrated autonomous international trade law.”

„For *Schmitthoff*, the progressive liaison and cooperation between these institutions was 'the next step in the development of an *autonomous law of international trade*' since, in his view, the advance of an autonomous law of international trade depended 'on the willingness of the formulating agencies to

⁶ Goldman, *Archives de philosophie du droit* 1964, 189

⁷ *Philip Jessup, Transnational Law* (Yale University Press, 1956)

⁸ *Schmitthoff, International Business Law: A New Law Merchant, Current Law and Social Problems*, 1961, p. 129; *Schmitthoff, Rabelsz* (1964), 747; *Schmitthoff*, in *Horn/Schmitthoff* (eds), *The Transnational Law of International Commercial Transactions*, 1982, 19.

cooperate, to the benefit of all trading nations'. It is not surprising, therefore, that *Schmitthoff* was the founding father of the United Nations Commission on International Trade Law (UNCITRAL) in 1966. UNCITRAL has as one of its primary tasks the furthering of the '*progressive harmonization and unification of the law of international trade*' by coordinating 'the work of organizations active in [this] field and encouraging co-operation among them'. It plays a major part in the 'codification' of the principles and rules of transnational commercial law."⁹

In 1964, Berthold Goldman published the first in a series of articles in which he eventually argued that transnational commerce had generated not only a new transnational commercial law, but an actual *transnational legal order* that was autonomous from national laws and could displace such laws to govern international business transactions. He considered that "business norms could be elevated to the status of law and could, therefore, govern transactions independently from national laws"¹⁰.

In 1971, the Secretariat of UNIDROIT presented its idea for the drafting of general principles of international contract law in its Report to UNCITRAL on the '*Progressive codification of the law of international trade*'.

In May 1994 UNIDROIT published the Principles of International Commercial Contracts. A year later, the Commission on European Contract Law published Part I of the Principles of European Contract Law. In December 1999 this Group published a revised and expanded version of these Principles. The UNIDROIT Working Group issued in 2016 the fourth edition of the UNIDROIT Principles. In 1996, CENTRAL published its List of Principles, Rules and Standards of the Lex Mercatoria. In 2015 the Hague Conference on Private International Law were published Principles on Choice of Law in International Commercial Contract. The list, together with comprehensive references from arbitral case law forms the core of the lex mercatoria.

These developments reflect a new and dramatic change in the discussion on the lex mercatoria: the extreme codification of transnational law'. „This reflects a change of paradigm in international commercial law, a marked shift away from formal rulemaking by international formulating agencies to private codification efforts. The making of transnational commercial law is 'privatized'. In this transnational context, however, 'codification' does not mean production but 'reproduction' of the law. Private Working Groups, even when they are acting

⁹ The New Law Merchant and the Global Market Place - A 21st Century View of Transnational Commercial Law" - Professor Dr. Klaus Peter Berger, LL.M., Center for Transnational Law (CENTRAL), University of Cologne, Germany

¹⁰ Berthold Goldman, *Frontières du Droit et < Lex Mercatoria >*, 9 ARCH. DE PHILOSOPHIE DU DROIT (1964); Berthold Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, Berthold Goldman, *Nouvelles Reflexions sur la Lex Mercatoria, in Etudes de droit International en l'honneur de PIERRE LALIVE* (Helbing & Lichtenhahn SA, eds. 1993).

under the umbrella of a formulating agency, are not the lawmakers of the *lex mercatoria*. The new *lex mercatoria* is created by the parties to international commercial transactions and their arbitral tribunals. Thus, the UNIDROIT and Lando-Principles are not 'Re-Statements' but 'Pre-Statements' of the new *lex mercatoria*. [...] Much more than any other area of law, *transnational law is living law, developing at an enormous pace and requiring a flexible and readily adaptable regulatory framework. This particular quality of modern civil law resembles the 'ongoingness' and 'vitality' of the former ius commune. It would be a mistake to capture this law in the tight meshes of a traditional codification.*"¹¹

Chapter 2. *Lex Mercatoria* – juridical approach

Lex mercatoria can be analyzed either **by its content** or **by its sources**¹². In its works, Emmanuel Gaillard considers that „the specificity of transnational rules lies in the fact that these rules are derived from various legal systems as opposed to a single one, and more generally from various sources, rather than in their allegedly differing content. In other words, their specificity is one of source, not of content.”¹³

Other approaches considered *lex mercatoria* is to be found in lists (the elaboration of such substantial list is that of UNIDROIT Principals, considering that provides the necessary predictability of the outcome which is valued by the parties in international commerce). Another concept of defining *lex mercatoria* by content of transnational law is perceived like a method of decision-making rather than as a list.

Julian Lew considers *lex mercatoria* as being „created by and for the participants in international trade and applied by arbitrators to settle international trade disputes. The *rules of the lex mercatoria* are founded on usages developed in international trade, standard clauses and contracts, uniform laws, general principles of law and international instruments. Trade usages are undeniably important in international trade and often included in standard contracts or standard clauses. They are often drawn up by the commercial organisation of a business sector and are used by the members of that sector”¹⁴

As a conclusion, *lex mercatoria* is formed by a multitude of sources of international trade law as it considers both national statutes, international agreements, contractual clauses, trade usages, customary law, general principles of law and codes of conduct.

Among national laws there has traditionally been a *split between common law and civil law* countries as to the acceptability of *lex mercatoria*. While in civil law

¹¹ Idem infra 8

¹² GILLES CUNIBERTI, in the article „Three theories of *lex mercatoria*” (published in Columbia Journal of transnational law, 2014)

¹³ Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?*, LCIA Arbitration International, Vol. 17, No. 1, 2001, pg. 61

¹⁴ Ibidem 2, pg. 453

jurisdictions the principal *si* widely accepted, in common law countries such as England, the general attitude remains negative.

A different question may arise: if we agree that *lex mercatoria* can be the rules of law based on which the arbitrators can issue an award, is this award enforceable when it reaches to the national court control?

As an answer, The International Law Association adopted a resolution at its 1992 Conference in Cairo, according to which arbitration awards "based on transnational rules (general principles of law, principles common to several jurisdictions, international law, usages of trade, etc) rather than a particular national law" are enforceable (i) if the parties have agreed that the arbitrator may apply transnational rules, or (ii) if the parties have remained silent concerning the applicable law. Furthermore, decisions of national courts have confirmed the principles of the resolution and the application of *lex mercatoria*.

Chapter 3. Arguments against *lex mercatoria*

Still, *lex mercatoria was strongly argued* in the doctrine, being considered in early stage that „this theory was 'reinvented' by 'the powerful grand old professors from France and Switzerland' in order to 'enable western companies to ensure - at least statistically - their domination and their profits in their business relations with ex-colonial governments'"¹⁵ and also was seen as a 'global law without a state'¹⁶, an autonomous transnational commercial law that breaks with two classical taboos: Private agreements cannot produce law without authorization or control by the states and Law cannot exist and cannot be applied beyond the realm of domestic states and international relations without a 'global rule of recognition.

Another argument against *lex mercatoria* is the relative vagueness and ambiguity of the principles and rules which are said to constitute the new law merchant.¹⁷

The new *lex mercatoria* does not offer rules of decision that can be compared to national laws in terms of precision or comprehensiveness. If the true benefit parties can (and should) expect from the law governing their contract is precise default rules that enable them to reasonably assess their future obligations under that contract, *lex mercatoria* seems, at best, woefully inadequate. As the purposes of establishing **lex mercatoria as a separate and distinct commercial law** cannot be met if it is defined as a **decision-making method**, the only remaining question,

¹⁵ Dezalay/Garth, *Dealing in Virtue*, 1996.

¹⁶ Teubner, *Rechtshistorisches Journal* 1996, 255 et seq.; Teubner, in Teubner (ed.), *Global Law without a State*, 1997

¹⁷ This approach can be seen in Sandrock, Otto, *Arbitration Agreements and Groups of Companies*, in: *Festschrift Pierre Lalive*, Basel, Frankfurt a.M. 1993, at 625, where *lex mercatoria* is argued in favour of the national laws that offer enough principles and theories to determine the juridical situations.

then, is whether *lex mercatoria* as a list of rules-that is, the new "codified" *lex mercatoria*-can one day achieve the goal of precision and legal certainty well enough to be considered satisfactory by commercial actors.

A critical question for assessing whether *lex mercatoria* could be a suitable alternative to national laws is, therefore, whether it affords the necessary degree of legal certainty that commercial parties require.

Part.2. Soft Law

Chapter 1. Social approach of the soft law

Dinah L. Shelton tried to observe, in an independent approach, the social context that may lead to the conclusion that a soft law would be more easily observed by being perceived as legitimate and fair instead of binding.

She considered that: „any community, efforts to resolve social problems do not invariably take the form of law. Societies strive to maintain order, prevent and resolve conflicts, and assure justice in the distribution and use of resources not only through law, but through other means of action. Issues of justice may be addressed through market mechanisms and private charity, while *conflict resolution can be promoted through education and information, as well as negotiations outside legal institutions*. Maintenance of order and societal values can occur through moral sanctions, exclusions, and granting or withholding of benefits, as well as by use of legal penalties and incentives. In the international arena, just as at other levels of governance, law is one form of social control or normative claim, but basic requirements of behavior also emerge from morality, courtesy, and social custom reflecting the values of society. They form part of the expectations of social discourse and compliance with such norms may be expected and violations sanctioned.

Legal regulation, however, has become perhaps the most prevalent response to social problems during the last century. Laws reflect the current needs and recognize the present values of society. Law is often deemed a necessary, if usually insufficient, basis for ordering behavior. The language of law, especially written language, most precisely communicates expectations and produces reliance, despite inevitable ambiguities and gaps. It exercises a pull toward compliance by its very nature. Its enhanced value and the more serious consequences of non-conformity lead to the generally accepted notion that fundamental fairness requires some identification of what is meant by "law," some degree of transparency and understanding of the authoritative means of creating binding norms and the relative importance among them. A law perceived as legitimate and fair is more likely to be observed."¹⁸

¹⁸ DINAH L. SHELTON, *SOFT LAW*, Handbook of International Law (forthcoming, Routledge Press, 2008)

Chapter 2. Comparative definition

The term "**soft law**" refers to quasi-legal instruments which *do not have any legally binding force*, or whose *binding force is somewhat weaker* than the binding force of traditional law, often contrasted with soft law by being referred to as "**hard law**". Traditionally, the term "soft law" is associated with [international law](#), although more recently it has been transferred to other branches of domestic [law](#) as well.¹⁹

By another doctrinal approach, „**Soft law** is a type of social rather than legal norm. While there is no accepted definition of “soft law,” it usually refers to any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior. Soft law “expresses a preference and not an obligation that state should act, or should refrain from acting, in a specified manner.” This “expressed preference” for certain behavior aims to achieve functional cooperation among states to reach international goals”.²⁰

As we may see, the term seems similar with lex mercatoria. Still, seemed to be necessary another wording to incorporate as well various kinds of quasi-legal instruments of the [European Union](#): "codes of conduct", "guidelines", "communications" etc. In the area of law of the European Union, soft law instruments are often used to indicate how the [European Commission](#) intends to use its powers and perform its tasks within its area of competence. The resolutions and recommendations of the [Council of Europe](#) are also soft law. These represent the views of the [Parliamentary Assembly of the Council of Europe](#), but are not legally binding for the 28 member states.

Although lex mercatoria was supposed to be a spontaneous process, soft law displays more an organized processes, being created through highly organized hybrid private-public decision making processes. Using the wording „new lex mercatoria” may blur the distinction between private and public as well as between spontaneous and organized processes, developing in the interstices of the relations between intergovernmental agencies and organizations (UNCITRAL, UNIDROIT, IMO) and private, highly organized, bodies (ICC, ILA).²¹

Soft law has an *important normative component*, even though it is considered as being created outside of formal law and being factbased, flexible, and practice focused, evolving out of the needs of businesses party to international business transactions. Also, the strong normative power reside also from the recognition by arbitration tribunals as describing how businesses actually construct deals and as evidence of bad faith conduct.

¹⁹ https://en.wikipedia.org/wiki/Soft_law

²⁰ DINAH L. SHELTON, *SOFT LAW*, Handbook of International Law (forthcoming, Routledge Press, 2008)

²¹ Larry A. DiMatteo, Soft law and the principle of fair and equitable decision making in international contract arbitration, link <http://cisgw3.law.pace.edu/cisg/biblio/dimatteo7.pdf>

This 'social phenomenon' is what was previously addressed as the "new *lex mercatoria*". However, the difficulty jurists have in recognizing and categorizing the many laws and norms subsumed in the notion of „global pluralism“ can be traced to a more simple explanation the difficulty in dealing with the international and complex nature of commercial transactions. The continued specialization of the world's market economy and the variety of producers of soft law instruments has led to a wealth of soft law sources.

It is considered in the doctrine the much of the *lex mercatoria* remains a matter of soft law. Arbitration panels are in many ways a close remnant of the merchant tribunals. The *lex mercatoria* is a source of law that fits well in the more informal rules of evidence and the varied expertise found in arbitration panels. Commercial arbitrators are necessarily more informed on the *lex mercatoria* than are trial judges that must deal with a variety of subjects, both commercial and noncommercial.

Chapter 3. Primary and secondary soft law

Common forms of **soft law** includes normative resolutions of international organizations, concluding texts of summit meetings or international conferences, recommendations of treaty bodies overseeing compliance with treaty obligations, bilateral or multilateral memoranda of understanding, executive political agreements, and guidelines or codes of conduct adopted in a variety of contexts. In some instances a given text may be hard law for some states and soft law for others. A decision of the European Court of Human Rights or the Inter-American Court of Human Rights, for instance, is legally binding on the state or states participating in the proceedings but not on other states parties to the relevant human rights treaty. The jurisprudence of both courts is authoritative and may be preclusive or persuasive in domestic courts of all member states, but it is not legally binding on them. It is also a feature of soft law that it may address non-state actors, including business entities, international organizations, nongovernmental organizations and individuals, while treaties rarely impose direct obligations on any entities other than states. As a general matter, soft law may be categorized as primary and secondary.

Primary soft law consists of those normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization. Such an instrument may declare new norms, often as an intended precursor to 5 adoption of a later treaty, or it may reaffirm or further elaborate norms previously set forth in binding or non-binding texts. The UN Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, 1955, and approved by the UN Economic and Social Council in 1957, is an example of a primary declarative text.

Secondary soft law includes the recommendations and general comments of international supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other ad hoc bodies, and the resolutions of political organs of international organizations applying primary norms. *Most of this secondary soft law is pronounced by institutions whose existence and jurisdiction is derived from a treaty and who apply norms contained in the same treaty.* Secondary soft law has expanded in large part as a consequence of the proliferation of primary treaty standards and *monitoring institutions created to supervise state compliance with treaty obligations.* Sometimes the underlying treaty is quite general in nature. The Charter of the Organization of American States provided the framework for the OAS General Assembly to constitute the Inter-American Commission on Human and confer upon it the authority to supervise compliance with the rights and duties contained in the American Declaration of the Rights and Duties of Man, including the power to make recommendations to specific states. Thus, an institution established by soft law received a mandate to apply primary soft law to create secondary soft law.

Chapter 4. The relationship between soft law, treaties and custom

Despite their limited juridical effect, non-binding instruments have an essential and growing role in international relations and in the development of international law. In practice, non-binding norms are often the precursor to treaty negotiations and sometimes stimulate state practice leading to the formation of customary international law. In fact, soft law has many roles to play in relation to hard law. A non-binding normative instrument may do one or more of the following:

- (1) codify pre-existing customary international law, helping to provide greater precision through the written text;
- (2) crystallize a trend towards a particular norm, overriding the views of dissenters and persuading those who have little or no relevant state practice to acquiesce in the development of the norm;
- (3) precede and help form new customary international law;
- (4) consolidate political opinion around the need for action on a new problem, fostering consensus that may lead to treaty negotiations or further soft law;
- (5) fill in gaps in existing treaties in force;
- (6) form part of the subsequent state practice that can be utilized to interpret treaties;
- (7) provide guidance or a model for domestic laws, without international obligation,
- (8) substitute for legal obligation when on-going relations make formal treaties too costly and time-consuming or otherwise unnecessary or politically unacceptable.

Non-binding norms have a potentially large impact on the development of international law. Customary law, for example, one of the two main sources of international legal obligation, requires compliance (state practice) not only as a result of the obligation, but as a constitutive, essential part of the process by which the law is formed. In recent years, non-binding instruments sometimes have provided the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom and have assisted to establish the content of the norm. The process of drafting and voting for non-binding normative instruments also or alternatively may be considered a form of state practice.

Soft law texts also may be drafted to consolidate a trend towards changes in customary law or stamp with approval one among conflicting positions on a legal issue.

Compliance with entirely new non-binding norms also can lead to the formation of customary international law. In recent years, non-binding instruments sometimes have provided the necessary statement of legal obligation (*opinio juris*) to precede or accompany States practice, assisting in establishing the content of the norm.

The relationship between soft law and treaties is also complex. In probably the large majority of instances, soft law texts are linked in one way or another to binding instruments. First, as the fourth category above summarizes, soft law can initiate a process of building consensus towards binding obligations needed to resolve a new problem. Examples of this are seen in the preambles to numerous multilateral agreements concluded in recent years, which refer to relevant non-binding normative instruments as precedents.

In the field of human rights, for example, regional and global treaties almost without exception invoke the Universal Declaration of Human Rights as a normative precursor. The Declaration itself states by its own terms that it was intended as "a common standard of achievement" that could lead to binding agreement. In fact, in the human rights field, nearly all recent multilateral conventions at the global level have been preceded by adoption of a non-binding declaration.

The European Union has turned to soft law to introduce some flexibility into its regulatory system in the face of adhesion by new member states with weaker economies and political institutions. The EC thus has moved to deregulate and "simplify," ostensibly to remove "outdated" and "unnecessary" regulation, in the process *advocating 'soft law' as an alternative to traditional regulatory instruments such as directives.*

The result has been controversial, especially as a means to improve the deteriorating working environment in Central and Eastern Europe. Critics say that this could be an example of moving from hard law to soft law in order to weaken pre-existing standards. Others note that nonbinding rules of conduct have in fact

had operational effects in European law. In the social field, formally non-binding rules emerged through the *Open Method of Co-ordination*. Although EU soft law has no formal sanctions and is not justiciable, it employs non-binding objectives and guidelines to bring about changes in social policy, relying on shaming, diffusion of the norms through discourse, deliberation, learning and networks to induce compliance. Soft law is used because social policy and welfare standards are particularly critical to governments and traditionally the exclusive domain of national legislatures. States are very reluctant to turn over competence in these matters, especially where there is no pre-existing formula or agreed standards. The EU cannot insist on uniform measures but must ensure easy and rapid revisability of norms and objectives.

Using data from 107 countries, one study sought to explain why countries comply with soft law standards. The results showed reputational considerations were significant, but also found a *consistent positive effect of democratic systems on implementation*. In some instances, compliance with non-binding norms and instruments is extremely good and probably would not have been better if the norms were contained in a binding text. In fact, *in many cases the choice would not have been between a binding and a non-binding text, but between a non-binding text and no text at all*.

The growing complexity of the international legal system is reflected in the increasing variety of forms of commitment adopted to regulate state and non-state behavior in regard to an ever-growing number of transnational problems. The various international actors create and implement a range of international commitments, some of which are in legal form, others of which are contained in non-binding instruments. The lack of a binding form may reduce the options for enforcement in the short term (ie, no litigation), but this does not deny that there can exist sincere and deeply held expectations of compliance with the norms contained in the non-binding form.²²

Chapter 5. Non-binding - as expressed in the Principles on Choice of Law in International Commercial Contracts, PECL and DCFR

On characteristic of the soft law is the „non-binding force“ of the Principles. The explanations from the preface of the principles and also the principles itself provides an accurate explanation of „soft law“ without using this wording:

„The preface of the publication of the *Principles on Choice of Law in International Commercial Contracts (the “Hague Principles”)*, the first normative soft-law instrument developed and approved by the Hague Conference on Private International Law. The Hague Principles are *not formally binding*; they provide a comprehensive blueprint to guide users in the creation, reform, or interpretation of

²² DINAH L. SHELTON, *SOFT LAW*, Handbook of International Law (forthcoming, Routledge Press, 2008)

choice of law regimes at the national, regional, or international level. The Hague Principles have already proven their usefulness in early 2015, when they served as a model to the legislator of **Paraguay** in promulgating a law on the Law Applicable to International Contracts. The Permanent Bureau hopes that other jurisdictions will follow this pioneering initiative, reaffirming the usefulness of the Hague Principles as an inspiring international standard, which has, as a further most encouraging sign of their approval by the international legal community, received UNCITRAL's endorsement in July 2015. [...]

I.8 As their title suggests, the Principles do not constitute a formally binding instrument such as a Convention that States are obliged to directly apply or incorporate into their domestic law. Nor is this instrument a model law that States are encouraged to enact. Rather, it is *a non-binding set of principles*, which the Hague Conference encourages States to incorporate into their domestic choice of law regimes in a manner appropriate for the circumstances of each State. In this way, the Principles can guide the reform of domestic law on choice of law and operate alongside existing instruments on the subject (see Rome I Regulation and Mexico City Convention both of which embrace and apply the concept of party autonomy).

I.9 As a non-binding instrument, the Principles differ from other instruments developed by the Hague Conference. While the Hague Conference does not exclude *the possibility of developing a binding instrument in the future*, it considers that an advisory set of non-binding principles is more appropriate at the present time in promoting the acceptance of the principle of party autonomy for choice of law in international contracts and the development of well-crafted legal regimes that apply that principle in a balanced and workable manner. As the Principles influence law reform, they should encourage continuing harmonisation among States in their treatment of this topic and, perhaps, bring about circumstances in which a binding instrument would be appropriate.

I.10 While the promulgation of non-binding principles is novel for the Hague Conference, such instruments are relatively common. Indeed, the Principles add to a growing number of non-binding instruments of other organisations that have achieved success in developing and harmonising law. See, *e.g.*, the influence of the UNIDROIT Principles and the PECL on the development of contract law."²³

PECL

Similar provisions can be found in Principles of European Contract Law (PECL)

Article 1:101 - Application of the Principles

1) These Principles are intended to be applied as general rules of contract law in the European Communities.

²³ <http://www.ejtn.eu/PageFiles/12473/Hague%20Principles%20with%20comment.pdf>

(2) These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.

(3) These Principles may be applied when the parties: (a) have agreed that their contract is to be governed by "general principles of law", the "lex mercatoria" or the like; or (b) have not chosen any system or rules of law to govern their contract.

(4) These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.

The PECL were inspired by the [United Nations Convention on Contracts for the International Sale of Goods](#) (CISG) from 1980; however, they are a so-called *Soft Law*, such as the American Restatement of the Law of Contract, which is supposed to restate the Common Law of the United States. Therefore, the PECL do not represent a legally enforceable regulation: "The term 'soft law' is a blanket term for all sorts of rules, which are not enforced on behalf of the state, but are seen, for example, as goals to be achieved.

In the formulation of the PECL the Lando Commission also used various European legal systems. In comparing these legal systems, there are often considerable differences with regard to certain regulations.

In this manner, the *PECL succeed in bridging the gap between the civil law of the European continent and the common law of the Anglo-American system by offering regulations which were created to reconcile the divergent views of two systems.*

At the same time, the PECL provide assistance to judges in national courts and arbitrators in arbitration proceedings deciding cross-border issues. Should there not result any satisfactory solution from the national laws, "the Court [...] may adopt the solution provided by the Principles knowing that it represents the common core of the European systems."

Written in a language known to all parties and using a uniform terminology, the PECL also serve as a "... *basis for any future European Code of Contracts*", consistent with the above-mentioned EU resolutions, which may eventually replace separate national laws.

These law principles, the [Lex mercatoria](#), on which a court can then make its decision to settle the disputes of the parties, are composed of the "laws of several systems, the work of the legal writers and the published arbitral awards," and thus the entirety of the international legal practices in a special field of law. *Thus, the PECL are, like the Unidroit Principles or the CISG, also part of the Lex Mercatoria.*

The PECL were created, as was the case with the CISG and the Unidroit Principles, *with the intention to be an example for existing and future national legal systems.*

Regulations under these soft laws were integrated in the new laws of various Central European and East European states. For example, *parts of regulations of*

*the PECL became part of the German Civil Code (BGB) in the course of the reform of the law of obligations in 2002.*²⁴

DCFR

Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR) Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) Based in part on a revised version of the Principles of European Contract Law.

The DCFR contains '*principles, definitions and model rules*'²⁵

Meaning of 'principles'. The European Commission's communications concerning the CFR *do not elaborate on the concept of 'principles'*. The word is susceptible to different interpretations. It is sometimes used, in the present context, as a *synonym for rules which do not have the force of law*. This is how it appears to be used, for example, in the 'Principles' of European Contract Law (PECL). The word appears to be used in a similar sense in the Unidroit Principles of International Commercial Contracts. In this sense the DCFR can be said to consist of principles and definitions. It is essentially of the same nature as those other instruments in relation to which the word 'principles' has become familiar. Alternatively, *the word 'principles' might be reserved for those rules which are of a more general nature*, such as those on *freedom of contract or good faith*. In this sense the DCFR's model rules could be said to include principles.

The greatest part of the DCFR consists of 'model rules'. The adjective 'model' indicates that the rules are not put forward as having any normative force but are *soft law rules* of the kind contained in the Principles of European Contract Law and similar publications. Whether particular rules might be used as a model for legislation, for example, for the improvement of the internal coherence of the *acquis communautaire* is for others to decide.

Chapter 6. Radical view of Anna di Robilant

According to the opinion of Anna Di Robilant²⁶, the soft law is the „professional project of the new generation of arbitrators which emerged in the 1980s. Soft law is the professional jargon of the “Young Technocrats” whose expert knowledge and technical competence replaced the aura and the charisma of the “Grand Old Men.”²⁷ Similarly, the notion that soft forms of legality function as an efficient facilitative language permeates the professional and political project of the Lando Commission. One of the main purposes underlying the Principles of European

²⁴ https://en.wikipedia.org/wiki/Principles_of_European_Contract_Law

²⁵ https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf

²⁶ Anna di Robilant: Genealogies of Soft Law, Scandinavian Studies In Law © 1999-2015

²⁷ Yves Dezalay & Bryant G. Garth, *Dealing in Virtue: International commercial arbitration and the construction of a transnational legal order* (1996)

Contract Law (PECL) is to provide a common European language for academics and practitioners. The PECL are meant to create a purportedly neutral, accessible and efficient discursive framework for the debate on contract law. [...] Soft law is seen as a *global lingua franca* organically springing from the consciousness and the needs of the various global guilds, villages and corporations. The proliferation of soft legal regimes opens up new space for a highly personalized and *privatized law*. The global “mercatoracy” shapes the basic norms governing property, contract and dispute resolution to fit its *need for autonomy, informality, flexibility and efficiency*. Similarly, in the hands of marginalized groups seeking social change, soft law becomes a tool for empowerment and emancipation, reflecting their peculiar lived experience and special needs. [...] On the one hand, the expansion of soft law signifies a *drift towards global unification*. *Soft legal tools* harmonize, unify and globalize law. For instance, soft commercial law is the product of the efforts of the unification movement advanced by social forces committed to the facilitation of transnational capital expansion. On the other hand, the multiplication of soft legal regimes mirrors the complexity of global legal pluralism where multiple regional legal orders coexist with specialized legal regimes.”²⁸

Part 3. Emphasis on UNIDROIT Principles

Chapter 1. Uniform and predictable frame

The international forums were always preoccupied to create an uniform or predictable frame for the commercial contracts, as a key point in the development of the trade and economy. In this respect we may distinguish *two approaches*:

One relates to the need of an „**uniform law**” for the international sale of goods, that began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT²⁹) in Rome and now is in force as “The United Nations Convention on Contracts for the International Sale of Goods”, prepared by the United Nations Commission on International Trade Law (**UNCITRAL**³⁰) and adopted by a diplomatic conference on 11 April 1980 (known as CISG, Vienna, 1980), ratified by 89 states addressed in the convention as Contracting States.

²⁸ Anna di Robilant: Genealogies of Soft Law, Scandinavian Studies In Law © 1999-2015, pg 243 si urm.

²⁹ UNIDROIT (international Institute for the Unification of Private law is an independent organisation, established in 1926 as auxiliary organism of Societes des Nations. The institute was re-established in 1940 based on an interstate agreement which represent its statute. Romania is member of UNIDROIT since 1927.

³⁰ By the resolution 2205/1966 the United Nations (ONU) established the United Nations Commission on International Trade Law to draft international conventions, model laws, uniform rules, guides in drafting international contract etc.

The other is emphasise as „**uniform principles**” – UNIDROIT PRINCIPLES of International Commercial Contracts adopted by International Institute for the Unification of Private Law, 2016 being the forth eddition. As opposed to the uniform law, wich is applicable to the international contracts for sale of goods with the force of the national law, the UNIDROIT Principles applies, as we may see in the Preamble (purpose of the Principles), „*when the parties have agreed that their contract be governed by them, [...] when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like, [...] when the parties have not chosen any law to govern their contract.*” Also „they may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators.” As a first conclusion, the UNIDROIT PRINCIPLES are seen as applicable law only when the parties provides so or when they choose general principles of law or lex mercatoria.

The UNIDROIT Principles of International Commercial Contracts have been praised as 'an authentional expression of what is usually called "lex mercatoria"' and as 'a kind of ratio scripta of an emerging supranational legal order -a modern lex mercatoria'.

Creating a system of transnational commercial law as a modern law of international trade was stongly promoted by international contract drafting and international commercial arbitration, since both areas are governed by *the principle of party autonomy which leaves the necessary room for the development of transnational legal structures.*

The Convention on International Sell of Goods (CISG) was the result of complicated international negotiation between **fifty** states coming from all legal traditions and, in order to reach a form acceptable to all of them, the ompromise was a *heavy reliance on legal standards rather than specific rules wich also generated vague rules.* Therefore, it is interesting to note that many parties to international sales specifically exclude application of the CISG from the possible sources of law for their contracts.

The *CISG is a hard law* in disputes between parties from contracting States as well as in disputes where only one of the parties is from a contracting State when conflict-of-law rules direct the court to the CISG signatory state. However, unless restricted by the arbitration agreement or procedural rules, arbitral panels are free to use the *CISG as soft law.* The use of the CISG as soft law has been seen more recently in a number of cases, particularly in China where arbitral panels have increasingly seen the CISG as a reasonable source for commercial contract rules. Like the lex mercatoria, the CISG's value is as a persuasive authority and not as a binding law³¹.

³¹ Larry A. DiMatteo, Soft law and the principle of fair and equitable decision making in international contract arbitration, pg. 24, link <http://cisgw3.law.pace.edu/cisg/biblio/dimatteo7.pdf>

Chapter 2. Closer approach on UNIDROIT Principles

The concept of 'commercial' contracts should be understood as broadly as possible since the Principles are flexible enough to be applied to international service, leasing and licensing agreements as well as finance, banking, insurance and other transactions.

As with the CISG, the Principles only apply to international, as opposed to, domestic agreements. Furthermore, the Principles are, generally speaking, the same as or similar to the relevant CISG provisions. This similarity is due to the fact that the CISG was one of a number of instruments examined by UNIDROIT in drafting the Principles. Because of its broad similarity to the CISG, the Principles may be used to interpret not only the CISG but also to supplement the deficiencies or gaps that appear in the CISG.

The UNIDROIT Principles may be incorporated into contracts as if they were the governing law or indeed the terms of the contract subject to any exclusion or modification agreed to by the parties. Furthermore, the Principles may be applied by judges and arbitrators so as to provide a solution to an issue when it proves impossible to establish the relevant rule of the applicable law. In this regard, it has been suggested that they 'probably represent the most accurate description to date of the emerging international consensus about the rules that are most suitable to international trade law'.

The Principles basically reflect concepts of contract law to be found in nearly all legal systems of the world. As stated by Article 1.4 of the Principles: 'Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.' Hence, the proper law that strictly speaking governs an international commercial contract will be determined by the rules of private international law of a particular forum or in the case of sale of goods, the Hague Convention of the Law Applicable to Contracts for the International Sale of Goods (1985). Generally speaking, the rules of private international law of most countries enable application of the domestic law of a State expressly or inferentially chosen by the parties or the system of law with which the transaction has its closest and most real connection.³²

Whilst the courts of some forums have given limited recognition to general principles of international trade law, it will normally be the case that judges are obliged to apply the proper law as determined by rules of private international law or an applicable convention even if parties have expressly agreed that the Principles are to govern their contract. However, as suggested by the Preamble to the Principles, judges could use the Principles to assist in the interpretation of

³² Peter Gillies and Gabriël Moens, *International Trade and Business: Law, Policy and Ethics* Ed. Cavendish Publishing Pty Limited, 1998, reprinted 2000, pg.79-83

international uniform law instruments and also use the principles to provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law where, for example, the law of a given State is obscure, underdeveloped or simply difficult to ascertain.

The UNIDROIT Principles are a most impressive multinational promulgation of rules for international commercial contracts which have many uses. Because *the Principles are not legally binding*, they are easily capable of modification in the future to reflect changes in international trade practice. Article 1.5 allows parties to exclude or derogate from or vary the Principles except where they are mandatory. For example, *the duty of good faith and fair dealing* and some aspects of validity cannot be excluded or limited. *In their capacity as a model for national legislators, the Principles have already influenced the drafting of recent national codifications such as the Civil Code of Quebec, the Commercial Code of Mexico and the Dutch Civil Code.* Indeed, countries closer to Australian shores such as Indonesia and Vietnam may derive significant use from the Principles in drafting basic contract law particularly given the fact that the Principles are free from any political or particular jurisprudential persuasion. This can only benefit Australian ties with such Asian countries particularly given the growing economic need for trade with Asian countries.

Because the Principles have no mandatory force of law, *they will ordinarily not be recognised by court forums as the applicable law.* Therefore, parties who contractually incorporate the Principles as the governing law and/or the terms of their contract, should always include an arbitration clause so as to ensure that any dispute goes to arbitration. Arbitrators are generally not obliged to apply a particular domestic law or convention whereby the UNIDROIT Principles should be applied as the party's choice of law in Arbitration Tribunals. In the event of gaps in the Principles, it is submitted that *a choice of law clause resembling the suggested draft* in Comment 4 to Article 1.6 should be included *as a matter of prudence.*

CONCLUSIONS

The historical context as well as the present context is dominated by international contracts and international relations. But, since the national legislations are insufficient and the international provisions are hard to approve considering the various legal systems, the middle way is represented by *lex mercatoria* and soft law.

The procedural context for *lex mercatoria* or soft law to be applicable is the freedom of the parties to choose the rules of law and furthermore, the possibility of the arbitrators or of the national judges to choose the rules of law.

Also national legislations provide expressly that the trade usages are applicable. The arbitrators and the national judges may always look at the *transnational*

principles of private international law to aid them in their selection. The only overriding requirements that may limit the freedom of the arbitrators are those of genuinely international public policy.

The transnational law it is not only a well structured and detailed set of legal rules and principles but also a self-organized process of the creation of law. This inherent flexibility allows the lex mercatoria to react quickly to the changes of the patterns of international commercial transactions which are taking place today. The codification process is a long term work that brings more stability, predictability and easier evidence but on the other hand slows the reaction towards the market needs and tends to transform and absorb a free spirit law into common provisions of laws.

One question suitable to be addressed under the soft law is if transnational law is building a *new regime (or regimes) of substantive law* existing alongside state law or is it mainly a *procedural, coordinating law, linking state and other legal regimes to serve transnational networks*? Does it point towards a gradual transnational unification of regulation, or must it remain a vast array of intersecting, often conflicting regulatory regimes?

Soft law is an instrument usually considered as non-binding but nevertheless with much potential for morphing into "[hard law](#)" in the future by two different ways: one is when declarations, recommendations, etc. are the first step towards a treaty-making process, in which reference will be made to the principles already stated in the soft law instruments or by the direct influence on the practice of states including European Court of Justice, creating customary law. As i mentioned before, soft law is a convenient option for negotiations that might otherwise stall if legally binding commitments were sought, because the choice would not have been between a binding and a non-binding text, but between a non-binding text and no text at all.

There is also the appearance of legality of the soft law because, due to the spreading of the information, the citizens often assimilate the soft law instruments as if they were legal instruments and slowly do not react against but moreover refer to these instruments frequently that ease the process to become legal norms.

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