

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

Friedrich Blase

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

2 **Friedrich Blase#**

3 **1. Introduction**

4 The post war period has seen a vigorous debate on the existence and the value of a *lex mercatoria*. Its protagonists<sup>1</sup> lit the fire by developing theories of a transnational commercial law or modern<sup>2</sup> *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.<sup>3</sup> The *raison d'être* of a *lex mercatoria* is that its application to cross-border transactions and their dispute settlement procedures is economically sound.<sup>4</sup> Thus, their application would produce superior results compared to the application of a national law.

5 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*).<sup>5</sup> These principles which intend to set forth 'general rules for international commercial con-

<sup>1</sup>Fragistas, *Arbitrage étranger et arbitrage international en droit privé*, *Rev.cit.dr.int.priv.* 1960, at 1 et seq., Goldstajjn, *The New Law Merchant*, *J.Bus.L.* 1961, at 12 et seq., Schmitthoff, *International Business Law: A new Law Merchant, Current Law and Social Problems*, 1961, at 129 et seq.; Goldman, *Frontières du droit et lex mercatoria*, *Archives de philosophie du droit* 1964, at 177 et seq.

<sup>2</sup>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.

<sup>3</sup>Berger, *Creeping Codification of the Lex Mercatoria*, at 1 et seq.

<sup>4</sup>*Ibid.*

<sup>5</sup>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.

tracts<sup>6</sup> were developed by an intensive<sup>7</sup> 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.<sup>8</sup> Since their introduction in 1994 the *UPICC* have received wide recognition both in academic research<sup>9</sup> and teaching<sup>10</sup> as well as in the practice<sup>11</sup> of international contract drafting and commercial dispute resolution.<sup>12</sup>

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 and eastern Europe apparently poses as one of the principal challenges for the EU in the forthcoming years.<sup>13</sup> However, a voice has been raised that the EU must tackle another - somewhat less

<sup>6</sup>UNIDROIT (ed.), *Principles of International Commercial Contracts*, 1994; for an overview see Berger, *Die UNIDROIT-Prinzipien für Internationale Handelsverträge*, *Zeitschrift für Vergleichende Rechtswissenschaft* 1995, at 217 et seq.; for a detailed study of the UNIDROIT-Principles see Bonell, *An International Restatement of Contract Law*, 1997, at 1 et seq.

<sup>7</sup>Cf. Preamble of the UNIDROIT Principles of International Commercial Contracts.

<sup>8</sup>Work started in 1971 when the Governing Council of UNIDROIT decided to include the elaboration of 'Principles of International Commercial Contracts' in the Work Programme of the Institute, cf. Introduction, UNIDROIT (ed.), *Principles of International Commercial Contracts*, 1994, at vii.

<sup>9</sup>Cf. Introduction, UNIDROIT (ed.), *Principles of International Commercial Contracts*, 1994, at vii et seq.

<sup>10</sup>See the exhaustive bibliography in Bonell, *An International Restatement of Contract Law*, 2nd ed., 1997, at 527 - 561.

<sup>11</sup>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.

<sup>12</sup>See Bonell, *The UNIDROIT Principles in Practice: The Experience of the First Two Years*, *Uniform Law Review* 1997 at 34 et seq.; Mayer, *Die UNIDROIT-Prinzipien für internationale Handelsverträge*, *AJP* 1998 at 499 et seq.

<sup>13</sup>See also *infra* at *The Success Story of the UPICC*.

apparent - problem. It is in need of greater harmonisation of its various national legal systems.<sup>14</sup> Particularly the contract law has been harmonised only in a fragmentary fashion with much emphasis laid on the protection of consumers.<sup>15</sup> 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,<sup>16</sup> 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.

7 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.<sup>17</sup> He founded the Commission on European Contract Law<sup>18</sup> with the goal to work out common principles of contract

<sup>14</sup>On 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.

<sup>15</sup>See the discussions in Capeletti (ed.), *New Perspectives for a Common Law of Europe*, 1978; for a more recent analysis see Hartkamp/Hesselink et al. (eds.), *Towards a European Civil Code - Second Revised and Expanded Edition*, 1998.

<sup>16</sup>Lando, *Unfair Contract Clauses and a European Uniform Commercial Code*, in: Capeletti (ed.), *New Perspectives for a Common Law of Europe*, 1978, at 267 (282).

<sup>17</sup>For a detailed study cf. Reithmann/Martiny, *Internationales Vertragsrecht*, 5th edition 1996, at 1 et seq.

<sup>18</sup>Lando, *Unfair Contract Clauses and a European Uniform Commercial Code*, in: Capeletti (ed.), *New Perspectives for a Common Law of Europe*, 1978, at 267 (282 et seq.); Lando, *Principles of European Contract Law*, *RebelsZ* 1992, at 261 et seq.

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<sup>19</sup> - 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.<sup>20</sup> In November 1999, a new book covering Part I and II of the *PECL* was released.<sup>21</sup> 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,<sup>22</sup> 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*.<sup>23</sup> Their origins and the work of the drafting groups were largely the same. The *PECL* are also formulated as black-letter rules, 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.<sup>24</sup> Their mutual inspiration was facilitated by

<sup>19</sup>Also known as the Lando-Commission in honour of its founder and chairman.

<sup>20</sup>Lando/Beale (eds.), *Principles of European Contract Law - Part I: Performance, Non-performance and Remedies*, 1995.

<sup>21</sup>Cf. de Lamberterie/Rouhette/Tallon (eds.), *Les principes du droit européen du contrat - L'exécution, l'inexécution et ses suites*, 1997.

<sup>22</sup>Lando / Beale (eds.), *Principles of European Contract Law - Parts I and II*, prepared by The Commission on European Contract Law, Kluwer Law International: The Hague, London, Boston, 1999.

<sup>23</sup>See <<http://www.jus.uio.no/lm/eu.contract.principles.1998/index.html>>.

<sup>24</sup>Cf. Bonell, *An International Restatement of Contract Law*, 1997, at 85.

the fact that a number of experts served in both drafting groups.<sup>25</sup> In particular both chairmen, Lando and Michael Joachim Bonell, were also members of the other group.

10 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<sup>26</sup> 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 *UPICC* and 19 years for the *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<sup>27</sup> one cannot deny the impression that until today the *PECL* have remained in the shadow of the *UPICC*. The *UPICC* are at the center of attention in academic and practical debate. So far, the *PECL* play little more than a minor role.

11 Interestingly enough, the delay of the publication of the 1999 version has brought the *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 Giuseppe Gandolfi is scheduled to publish its findings in early 2000. In contrast to the *UPICC* the collaboration of the

<sup>25</sup>For a detailed comparison of their content see Bonell, Restatement at 88 et seq.

<sup>26</sup>Bonell, An International Restatement of Contract Law, 1997, at 87, fn. 7.

<sup>27</sup>Berger, Creeping Codification of the Lex Mercatoria, at 67.

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.<sup>28</sup> 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.<sup>29</sup>

Bearing in mind on the one hand the recent publication of the 1999 version of the *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 *PECL*. If the *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.<sup>30</sup>

### 3. The Success Story of the *UPICC*

The means to achieve much of the needed attention for the *PECL* can be derived from the success story of the *UPICC*. Undoubtedly, the spread of and the enthusiasm for the *UPICC* is largely facilitated 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 in-

<sup>28</sup>Cf. also infra at The Success Story of the *UPICC*

<sup>29</sup>Cf. presentation of the project by Giuseppe Gandolfi at the Centrum für Europäisches Privatrecht at the Westfälische Wilhelms-Universität zu Münster on 12 December 1998.

<sup>30</sup>For an overview of the project cf. Academy of European Private Lawyers (ed.), Code Européen des Contrats - Avant-Projet, at 1 et seq.

ternational uniform instruments<sup>31</sup> 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.

15 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<sup>32</sup> as well as in several works dealing at least in part with the *UPICC*.<sup>33</sup> Moreover, the text of the black-letter rules alone had been translated into Arabic, Bulgarian, Croatian, Farsi, German, Hungarian, Japanese, Portuguese and Serbian.<sup>34</sup> Finally, the Uniform Law Review published by UNIDROIT provides an excellent platform for essays and case reports on the progress of the principles.<sup>35</sup> In numerous conferences

<sup>31</sup>Cf. infra at Necessary Steps for the Future.

<sup>32</sup>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.

<sup>33</sup>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.

<sup>34</sup>Bonell, An International Restatement of Contract Law, 1997, Annex; Berger, Formalisierte oder schleichende Kodifizierung des transnationalen Wirtschaftsrechts, 1996, Anhang; Berger, Creeping Codification of the Lex Mercatoria, Annex.

<sup>35</sup>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.

and colloquia,<sup>36</sup> 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.<sup>37</sup>

After less than 6 years in public, the *UPICC* have been subject of an uncountable number of research essays.<sup>38</sup> Law journals have dedicated substantial space or entire issues to the presentation of the *UPICC*<sup>39</sup> and the Internet's most prominent web site for research material on the CISG now includes contributions on the *UPICC*.<sup>40</sup> The focus of many of the essays and articles has

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<sup>36</sup>See contributions by Boele-Woelki (1996 at 652 et seq.), Boggiano (1996 at 219 et seq.), Bonell (1996 at 26 et seq., at 229 et seq., 1997 at 34 et seq., 1998 at 275 et seq.), Drobnič (1998 at 385 et seq.), Farnsworth (1998 at 397 et seq.), Ferrari (1997 at 451 et seq.), Fontaine (1998 at 405 et seq.), Furmston (1998 at 419 et seq.), Goode (1997 at 231 et seq.), Kahn (1998 at 519 et seq.), Komarov (1996 at 247 et seq.), Ramberg (1998 at 651 et seq.), and Rosett (1997 at 441 et seq.).

<sup>37</sup>The UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?, Institute of International Business Law and Practice at the International Chamber of Commerce in Paris, 1994; Colloquium on the UNIDROIT Principles at the Universidad Autónoma de México and the Universidad Panamericana in Mexico City, 1996; A new approach to international commercial relations: the UNIDROIT Principles of International Commercial Contracts, Inter-American Congress in Valencia, 1996; cf. also the papers presented at the Biannual 25th Conference of the International Bar Association in Melbourne, 1994; the papers presented at the Symposium 'Setting Forth the Law of Contract' at Miami School of Law, 1991, papers presented at the Symposia 'Alternativen zur legislatorischen Rechtsvereinheitlichung' (1991) and 'Europäische Vertragsrechtsvereinheitlichung und Deutsches Recht' (1999) held at the Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg.

<sup>38</sup>Bonell, An International Restatement of Contract Law, 2nd ed., 1997; see also the remarks by Bonell in the preface to this second edition.

<sup>39</sup>See the detailed bibliography in Bonell, An International Restatement of Contract Law, 1997, at 515 et seq. and the select bibliography on the internet site of UNIDROIT at <<http://www.unidroit.org/english/principles/pr-bib.htm>>.

<sup>40</sup>Cf. American Journal of Comparative Law, Volume 40 (1992); Tulane Journal

not only been for academic purposes, but also with a distinct ambition to underline the practical value of the *UPICC*.<sup>41</sup> 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,<sup>42</sup> the most prominent case being the Channel Tunnel Construction Case.<sup>43</sup> The *UPICC* have been a role-model and template for the rewriting of the civil law of eastern European states.<sup>44</sup> 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.<sup>45</sup> 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 partici-

of International and Comparative Law, Volume 3 (1994); Tulane Law Review, Volume 69 (1995).

<sup>41</sup>The CISG Web Site maintained by the Institute for International Commercial Law at Pace University - School of Law, New York at

<<http://www.cisg.law.pace.edu>>.

<sup>42</sup>Cf. Institute of International Business Law and Practice (ed.), UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?, ICC Publication n° 490/1, 1995; cf. also Berger, Arbitral Practice and the UNIDROIT Principles for International Commercial Contracts, AmJCompL 1998 at 129 et seq.; Hill, A Businessman's View of the UNIDROIT Principles, Journal of International Arbitration 1996 at 163 et seq.

<sup>43</sup>Bonell, The UNIDROIT Principles in Practice - The Experience of the First Two Years, ULR 1997 at 2 (8 et seq.), Bonell, Restatement at 120 et seq.; Bonell, Erste Entscheidungen zu den UNIDROIT Principles, Bull. ASA 1997 at 600 et seq.; Berger, Arbitral Practice and the UNIDROIT Principles for International Commercial Contracts, AmJCompL 1998, at 129 et seq.; Mayer, Die UNIDROIT-Prinzipien für internationale Handelsverträge, AJP at (499) 510; for a recently published award see ICC Award 8486, reprinted in: Clunet / Journal du Droit International 1998, at 1047 (1048).

<sup>44</sup>Schlechtriem, UNIDROIT Principles (Einheitliche Prinzipien für Verträge) und Werkvertragsrecht, in: FS von Craushaar, at 157 et seq.

<sup>45</sup>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. Bonell, International Restatement, 2nd ed., at 236 et seq.

pants 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?<sup>46</sup>

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 is immense. For example, more than half of Germany's exports are devoted to the other member states of the EU.<sup>47</sup> Another ten

<sup>46</sup>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*.

<sup>47</sup>Cf. Bonell, The UNIDROIT Principles of International Commercial Contracts

per cent of exports is devoted to Eastern Europe, whose countries are preparing for an admission into the EU.<sup>48</sup> Already today, the *PECL* can be used in these transactions and the dispute settlements thereof. While preparing a contract the parties may refer to the *PECL* as a check list or use it as a reference for the definition of terms.<sup>49</sup> They may decide that the contract shall be governed by the *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 *PECL* as governing law should be upheld by arbitral tribunals, if their *lex fori* has incorporated the UNCITRAL Model Law on International Commercial Arbitration.<sup>50</sup> It is thus argued that the *PECL* will establish themselves in European trade while the *UPICC* will be the dominant set of rules used in global trade surpassing the European borders.

21 However, three advantages of the *PECL* over the *UPICC* are evident which could prove to be the catalyst for success of the *PECL*.

22 First, the *PECL* in their complete version will deal with more issues than the *UPICC*. The drafters of the *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 *UPICC*,<sup>51</sup> the complete version of the *PECL* deal with

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and the Principles of European Contract Law: Similar Rules for the Same Purposes?, ULR 1996, at 229 et seq.; cf. also Bonell, International Restatement of Contract Law, 1997, at 99 et seq.

<sup>48</sup>Cf. Deutsche Bundesbank (ed.), Monatsbericht März 1999, at 64.

<sup>49</sup>Cf. Deutsche Bundesbank (ed.), Monatsbericht März 1999, at 64.

<sup>50</sup>For this mode of application with respect to the *UPICC* cf. Bonell, International Restatement, 2nd ed., at 238 et seq.

<sup>51</sup>Cf. Article 17 of the UNCITRAL Model Law. The UNCITRAL Model Law has been 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.

this issue extensively.<sup>52</sup> 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 *PECL*.<sup>53</sup> 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 *UPICC*. Since their combined launch in 1994/95 the Lando-Commission has been more vigorous in tackling these new legal questions.<sup>54</sup>

Second, the *PECL* set forth general rules for contract law<sup>55</sup> whereas the *UPICC* restrict their application to commercial contracts.<sup>56</sup> The term 'commercial' is intended to exclude consumer contracts.<sup>57</sup> The *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 con-

<sup>52</sup>Cf. Art. 3.1 *UPICC*.

<sup>53</sup>Cf. Art. 3.101 - Art. 3.304 *PECL*.

<sup>54</sup>Cf. Art. 4.101 *PECL*, which reads: 'This Chapter [concerning validity] does not deal with invalidity from illegality, immorality or lack of capacity.'

<sup>55</sup>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 *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>.

<sup>56</sup>Art. 1.101 *PECL*.

<sup>57</sup>As already their name suggests, cf. also Preamble of the *UPICC*.

tracts 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.<sup>58</sup> On the other hand inclusion of arbitration agreements in consumer contracts is restricted.<sup>59</sup> 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 *PECL*. By considering the rather weak position of consumers in contract negotiation, academics and practitioners might find that the drafters of the *PECL* have balanced the interests of the parties more evenly and regulated certain legal questions in more detail than the *UPICC*.

25 Finally, the overwhelming advantage of the *PECL* is their future prospect of inclusion in a codification. No global treaty with respect to contract law is foreseeable.<sup>60</sup> Although the CISG is one of the most successful international legal harmonisation initiatives,<sup>61</sup> its scope is limited,<sup>62</sup> the options for reservations numerous<sup>63</sup> and a number of its articles bitterly disputed.<sup>64</sup> In Europe the chances

<sup>58</sup>Bonell, *An International Restatement of Contract Law*, 1997, at 51.

<sup>59</sup>Reithmann/Martiny, *Internationales Vertragsrecht*, at 633.

<sup>60</sup>Cf. §1031 para. 5 ZPO (German Code of Civil Procedure): If a consumer is involved, arbitration agreements must be signed as a separate document.

<sup>61</sup>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).

<sup>62</sup>For an updated list of the countries that have signed and adopted the Convention, turn to <<http://www.un.or.at/uncitral/status/status.pdf>>.

<sup>63</sup>See Art. 1 - 5 CISG. The 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 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.

<sup>64</sup>See Art. 92 et seq. CISG. Especially the reservation of the writing requirement for the conclusion, amendment or termination of the contract (Art.

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 *ius commune*.<sup>65</sup> 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<sup>66</sup> 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.<sup>67</sup> With the parliament gaining in strength and influence in the EU, this fostering relationship will be of some importance towards the inclusion of the *PECL* in the process of harmonisation.

## 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

96, 12 CISG) might pose problems with respect to the trade on the internet.

<sup>65</sup>See only the relationship between Art. 48 and 49 CISG.

<sup>66</sup>cf. in general Knütel, *Rechtseinheit in Europa und römisches Recht*, in *ZeUP* 1994, at 244 et seq.

<sup>67</sup>Gordley, *Common law und civil law: eine überholte Unterscheidung*, in *ZeUP* 1993, at 498 et seq.

taken to the 'market'. This requires a widely diversified marketing strategy aimed at research as much as at education and practice.

30 Research into the *PECL* should be encouraged by conferences such as the symposium held in early 1999 at the Max-Planck-Institut.<sup>68</sup> 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 *UP-ICC* and the *CISG*.<sup>69</sup> Spread of research books and essays could be increased by an Internet database similar to the one provided for the *CISG*.

31 The text of the *PECL* should be made available to students and practitioners at attractive prices.<sup>70</sup> 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*.<sup>71</sup> While the well established Jessup-Moot Court has its European counterpart,<sup>72</sup> the *Willem C. Vis International Commercial Arbitration Moot* has not. There is a gap to be filled.

32 Practitioners must be made familiar with the application of the *PECL* in drafting contracts as well as dispute settlement. One could also

<sup>68</sup>Resolution of 6 May 1994 (Dok. A3 - 0329/94), Official Journal of the European Communities C 205/518.

<sup>69</sup>'Europäische Vertragsrechtsvereinheitlichung und deutsches Recht'; papers to be published at the end of 1999 in a joint issue of the AcP and the *RabelsZ*.

<sup>70</sup>See for a first practice of this the contributions in the newly established *European Journal of Law Reform*, Vol.1 (1999) No. 3.; however, the contributions still focus largely on the *UPICC*.

<sup>71</sup>Cf. a planned publication including both the *UPICC* and the *PECL*: Centre for Transnational Law (CENTRAL) (ed.), *Applying Transnational Principles in Commercial Practice - A Reference Guide*, 1999.

<sup>72</sup>Cf. Flessner, *Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung*, *RabelsZ* 56 (1992), at 243 et seq.

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.

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1. Scholarship-holder of the Graduiertenkolleg 'Europäisches Privat- und Wirtschaftsrecht' at the Humboldt-Universität zu Berlin. Friedrich Blase is also the current Chancellor of the MAA (FBLASE@MAA.NET).

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