Lex Mercatoria

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Since the nineteen sixties legal scholars have been systematically discussing the nature and function of a purported autonomous body of transnational commercial rules called lex mercatoria.[1] *Discussions have been ardent and the subject has become controversial. Whereas some authors have endlessly noted the advantages of the lex mercatoria others have denied its existence. In spite of the numerous academic contributions, the notion of the lex mercatoria still remains unknown to the majority of the business and legal communities. This fact alone could be a good reason for reconsidering the question of the lex mercatoria. Furthermore, recent developments such as the process of economical globalization, the irruption of Internet trade, the adoption of two bodies of codified principles of contract law (the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law) and the increasingly harmonization of contract law in the EU, call for a fresh examination of the traditional regulation of international contracts.*

1. Historical background of Lex mercatoria

The notion of the lex mercatoria is not new. Goldman noted that it has its precursor in the Roman *ius gentium*, the body of law that regulated the economic relations between foreigners and Roman citizens.[2] Other authors go further back in time and trace the origins of the lex mercatoria in the Ancient Egypt or in the Greek and Phoenician sea trade of the Old Ages.[3] In any case, it is in the *law merchant* of the Middle Ages where the historical roots of the lex mercatoria can truly be found. The flourishing of international economic relations in Western Europe at the beginning of the eleventh century caused the formation of the law merchant, a cosmopolitan mercantile law based upon customs and applied to cross-border disputes by the market tribunals of the various European trade centers. This law resulted from the effort of the medieval trade community to overcome the fragmentary and obsolete rules of feudal and Roman law which could not respond to the needs of the new interlocal and international commerce. Merchants created a superior law, which constituted a solid legal basis for the great expansion of commerce in the Middle Ages. For almost eight hundred years uniform rules of law, those of the law merchant were applied throughout Western Europe among traders.

With the raise of nationalisms and the codification period of the 19th century the law merchant was incorporated into the municipal laws of

[1] Discussions began under the auspices of the London Conference on the Sources of International Trade (1962) see Mustill, *Liber Amicorum for Lord Wilberforce*, Oxford, 1987, p. 150.
[2] Goldman, B., Forum Internationale, vol. 3, 1983, p. 3.
[3] Schmitthoff, C., Chia-jui Cheng (ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law*, Martinus Nijhoff, 1988, pp. 20-37, at 23.

each country. It became blended with the peculiarities of national law and thus is lost its uniform character. As states took control over international trade, the new national mercantile laws regulated economic relations and cross-border disputes were solved by referring to private international law.

The development of international trade after the Second World War showed some of the flaws of the traditional regulation of international contracts. The complexity of private international law rules and the obsolete character of domestic laws did not satisfy the simplicity and certainty required by the business community. States soon became aware of the impact of a legal divided world upon international trade and they reacted by means of international conventions and model laws, which harmonize private international law or substantive law aspects of international transactions. Numerous conventions and model laws have been adopted in the fields of arbitration, factoring, leasing, letters of credit or sales until present time. The process of negotiation and adoption of these conventions is nevertheless difficult and time-consuming. The different economical, social and legal background of the participating states enlarges the negotiating process into various decades (e.g. the drafting of the 1980 Viena Convention on International Sale Contracts, CISG, took over 20 years). Usually, reservations are allowed in order to adopt a final text. This leads to partial harmonization, different interpretations of the same convention, and to the risk of having a petrified regulation, which cannot be revised to adapt it to the further developments of international trade.

The supremacy of national law in international economic relations began to be questioned by scholars in the early nineteen sixties. At the same time, they noted the renaissance of the law merchant phenomenon. Just as medieval merchants overcame feudal law, present time traders were adopting alternative solutions to avoid the application of national law to their transactions. By means of standard clauses, self-regulatory contracts, trade usages and, especially, by recourse to international commercial arbitration, traders were creating their own regulatory framework independently from national law, the so-called *new lex mercatoria.*[4]

2. Concept and sources of the lex mercatoria

The lex mercatoria may be generally defined as the body of rules, different in origin and content, created by the trade community to serve the needs of international trade. A settled definition of the lex mercatoria upon which the majority of the doctrine agrees cannot be found. There are as many possible concepts of the lex mercatoria as there are authors having dealt with the subject. Usually, most definitions are based on the relation between the lex mercatoria and national law or on the substantive quality of the lex mercatoria.

As regards the relation of the lex mercatoria *vis à vis* national law, a distinction may be made between an *autonomist* and a *positivist* concept. The autonomist concept regards the lex mercatoria as having autonomous character, independent from any national system of law. Hence, it is "a set of

[4] E.g. Schmitthoff, C.M., "Das neue Recht des Welthandels", *RabelsZ* 28, 1964, pp. 47-77; Goldman, B., "Frontières du droit et lex mercatoria", *Arch.phil.dr.* 9, 1964, p. 89 *et seq.*; Goldstajn, A., "The New Law Merchant", *J. Bus.L.*, 1961, p. 11; Kahn, Ph., *La vente commerciale internationale*, 1961; Fouchard, Ph., *L'arbitrage commercial international*, 1965; Stoufflet, J., *Le credit documentaire*, Paris, 1959.

general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law."[5] From a positivist approach the lex mercatoria is defined as a body of rules, transnational in their origin, but which only exists by virtue of state laws, which give them effect. For the supporters of this concept the lex mercatoria is "ultimately founded on national law."[6]

Concerning its substantive quality, there are three main concepts of lex mercatoria.[7] The first one conceives the lex mercatoria as an autonomous legal order. The second one characterizes it as a body of rules capable of operating as an alternative to an otherwise applicable national law. Finally, a third concept describes the lex mercatoria as a conglomerate of usages and expectations in international trade, which may complement the otherwise applicable law.

The concept of the lex mercatoria is usually blended with other concepts, which may be similar or alternative. Some authors, for instance, refer to *transnational law* as a synonym of the lex mercatoria. Transnational law, however, is a broad concept, which encompasses all law regulating transboundaries actions or events, including public and private international law and other rules not fitting into those categories.[8] The lex mercatoria is a much narrower concept *"*used to indicate that part of transnational commercial law which is unwritten.*"*[9]

The question of the sources of the lex mercatoria is unsettled as well. It depends on each definition of the lex mercatoria at hand. From a positivist viewpoint Schmitthoff included mercantile customs formulated by international bodies such as the International Chamber of Commerce (e.g. INCOTERMS, rules for documentary credits) and international legislation.[10] From an autonomist position, Goldman embodied the usages of international trade and general principles of law as the genuine sources of the lex mercatoria.[11] Under this view, codified usages are part of the lex mercatoria only if businessmen refer to them with such a degree of frequency that it may be concluded that the reference is implicit.[12] Lando proposed an enlarged list of sources, which comprises public international law, uniform laws, the general principles of law, the rules of international organizations, standard form contracts and reported arbitral awards.[13] Goode has noted that some of these sources would not fall under a *strictu sensu* concept of lex mercatoria. Accordingly, the lex mercatoria is by nature customary and spontaneous and, therefore, it solely consists of customary commercial law, customary rules of evidence and procedure and general principles of com-

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[5] Goldman, B., *Contemporary Problems in International Commercial Arbitration*, Julian D.M. Lew (ed.), 1986, pp. 113-125, at 116.
[6] Schmitthoff, C.M., *op.cit.*, p. 223.
[7] Berger, K.P., *The creeping codification of the lex mercatoria*, Kluwer Law International 1999, p. 40 *et seq.*; Craig, WL., Park, WW., Paulsson, J., *International Chamber of Commerce Arbitration*, 2nd. edition, 1994, Oceana Publications, p. 603 *et seq.*
[8] The term was first used by Philip C. Jessup in his work *Transnational law*; Goode, R., *New Developments in International and Consumer Law, Ziegel, J.S. (ed.)*, Hart Publishing, Oxford, 1998, pp. 3-35, at 4.
[9] Goode, R., *ibidem*.
[10] Schmitthoff, C.M., *op.cit*., p. 34.
[11] Goldman, B., *op.cit.*, p. 114.
[12] I*bidem.*
[13] Lando, O., *34 I.C.L.Q.*, 1984, pp. 747 et seq., p. 748.

mercial law, including international public policy.[14] Under this position, the various sources named by Lando would, collectively, make up transnational commercial law.[15]

3. The theory of the lex mercatoria

The theory of the lex mercatoria is controversial. Some authors have even denied its existence.[16] The opponents of the lex mercatoria affirm that it lacks generality and predictability and that it is vague and incomplete.[17] Furthermore, it is underlined that the lex mercatoria does not have any binding force, since it has not been enacted by a Parliament or endorsed in an international convention.[18] Nevertheless, the objection on the lex mercatoria's lack of binding force is overcome the theory of legal pluralism. Social groups, such as the community of merchants, are also capable of producing legal rules.[19] Moreover, in the past years, arbitrators have applied the lex mercatoria and it has been recognized by national laws and in case law (see *infra*).

It is stressed that the lex mercatoria lacks generality due to the existing diversity of standard contracts and trade usages. Hence, each standard contract and trade usage reflects the sense of justice of the different trades or professions, being too diverse to constitute a homogeneous legal source.[20] Likewise, the solutions reached by arbitrators in the application and, possibly, in the creation of the lex mercatoria only concern the dispute in question, not being extrapolable to the generality of international trade.[21] Few awards are published, making the outcome of future disputes difficult to predict. Accordingly, "the development of a consistent body of legal principles [...] requires disclosure of the facts and reasons underlying arbitral decision making. Without such disclosure, businessmen and arbitrators are unable to look to precedent for guidance, and arbitrators cannot be expected to apply commercial customary law principles consistently."[22]

The lex mercatoria is furthermore accused of being vague and incomplete. It has been claimed that there are very few general principles of trade law that can be universally recognized; those very few are so basic and fundamental as to be useless.[23] Even the proponents of the lex mercatoria have admitted that it is incomplete. Indeed, the lex mercatoria does not provide an answer for legal issues such as validity, capacity or contract form.[24]

In any case, the major obstacle to the theory of the lex mercatoria is its lack of binding force. The lex mercatoria falls from the traditional definition of law. It does not result from the command of a sovereign as it has not been enacted by a Parliament or endorsed in an international convention. From the point of view of legal pluralism, however, it is argued

[14] Goode, R., *op.cit.* , p. 4.
[15] *Ibid*, p. 6.
[16] E.g. Mann, F.A., *33 I.C.L.Q.*, 1984, pp. 193-198
[17] E.g. Kropholler, J., *IPR*, § 11 I.3
[18] E.g. Schlosser, *RIW*, 1982, p. 867.
[19] Goldman, B., *op.cit.,* pp. 20-23.
[20] Mustill, *op.cit*., p. 157.
[21] On the legal value of arbitral case law see e.g. Brækhus, S., *Sjørett, voldgift og lovvalg: artikler 1979-1988*, Oslo: Universitetsforlaget, 1998, p. 198 *et seq.*
[22] Cremades, B. and Plehn, S., *Boston University International Law Journal*, vol. 2, 1984, pp. 317-348, p. 336.
[23] Mustill, *op.cit.*, p.156.
[24] Goldman, B., *Journal de Droit International* (*Clunet*), 1979, pp. 475-505, p. 479.

vention. From the point of view of legal pluralism, however, it is argued that the lex mercatoria certainly belongs to the domain of "law". The concept of "law" largely departs from the notion of sanction and social organizations are capable of producing its own rules.[25]

Kassis has objected such position and claimed that legal rules have an obligatory character. The rules enacted by the legislator have an intrinsic binding force, whereas customary rules require the so-called *opinio iuris*, the feeling to be bound. This does not occur in the case of the purported rules of the lex mercatoria. Trade usages are a product of party autonomy; they are contractual practices generally observed and used as a proof of the will of the parties. The latter may therefore exclude their application by an express stipulation in the contract.[26] The proponents of the lex mercatoria have counter-attacked such statement by noting that the *societas mercatorum* has mechanisms of coercion to obtain compliance with its rules such as black lists, damage to commercial reputation or withdrawal from trade associations' members' rights.[27] As a result, merchants actually feel bound to observe the rules of the lex mercatoria.

Finally, it has been underlined that even if some of its elements may be described as legal rules, the lex mercatoria does not have the quality of a legal system. The *societas mercatorum* cannot present its convictions and notions in a systematic order, as there is not a single international community of merchants but a plurality instead.[28] At the most, there are only *principia mercatoria.*[29]

4. Lex mercatoria as the applicable law to international contracts

The applicable law to a contract is the legal framework that gives expression and content to the will of the parties under the contract.[30] Traditionally, only national law may function as the applicable law to international contracts. The Permanent Court of International Justice in the Serbian and Brazilian Loans Case already held that "any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country".[31] Normally, private international law rules to which national courts are bound lead to the application of national law, for instance, Art. 3 1980 Rome Convention on the Law Applicable to Contractual Obligations.[32] A choice of law clause for the lex mercatoria is inter-

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[25] Goldman**,** B., *Archives de philosophie du droit,* v. 9, 1964, pp. 177-192, p. 192.

[26] Kassis, A., *Théorie Générale des Usages du Commerce*, Librairie Générale de Droit et de Jurisprudence, Paris, 1984, p. 165 *et seq*.

[27] Berger, K.P., *op.cit.*, p. 29.

[28] Lagarde, P., *Études Goldman,* LITEC, Paris, 1983, pp. 125-150, p. 139: "il semble que ce soient seulement des îlots d'organisation qui apparaissent dans le commerce international, non une organisation unique."

[29] Highet, K., *Lex Mercatoria and Arbitration*, Thomas Carbonneau, (ed.), Rev. ed., 1998, Juris Publishing, Kluwer Law International, p. 134: "The concept of principia mercatoria more correctly reflects the nature, application, and content of the law merchant than any suggestion that it amounts to an inchoate or undiscovered legal system that exists outside national jurisdictions."

[30] Von Hoffmann, B., *Contract Conflicts*, Ed. P. North, 1982, p. 222.

[31] Publications of the Permanent Court of International Justice, series A (Nos. 20-1) (Judgments Nos. 14 and 15), at p. 41, quoted by Schmitthoff, C.M., *op.cit.*, p. 474.

[32] OJ L 266, 9 Oct. 1980; Lagarde, P., *Rev. crit. dr. internat. privé*, 80 (2), 1991, pp. 287-340, p. 300.

preted as a mere incorporation of the usages of international trade into the contract, subject to the mandatory rules of the *otherwise applicable law*.[33]

Such hegemony of national law and private international law in the regulation of international contracts has been proven to be against the certainty and simplicity required by international trade for different reasons. Firstly, the localization of international contracts within a particular national system is arbitrary. Most international transactions present connections of equal importance with several legal orders. Moreover, some of these transactions take place in the major trade centers and are more closely connected to the transnational scene than to a single state, e.g. Euro-bonds. In the case of electronic commerce, it may be complicated to locate the transaction within the physical territory of a state because the Internet, which plays a central role in this type of trade, is an immaterial marketplace. Secondly, private international law rules are complex and their outcome often uncertain. In the event of a dispute the final result will depend on where proceedings are brought. National courts practice in many cases a homeward trend, which leads to the application of the lex fori. Furthermore, national law is not suitable for contracts between public bodies and private undertakers. The applications of the public body's own national law is not desirable. The State in question may change the law to the detriment of the private party. Likewise, a State is rarely willing to be submitted to a foreign law. Finally, national law is primarily enacted to regulate domestic transactions and does not take into account the needs of international trade. Sometimes, the applicable law is foreign to the judge and/or the parties and requiring information on its contents is cumbersome.

In the field of international commercial arbitration disputes are usually solved by the application of non-national rules, alone or in combination with municipal law. International commercial arbitrators are not usually bound to any particular national private international law rules, as their jurisdiction is based on the will of the parties and not upon the sovereignty of a state. They are in many cases allowed to apply non-national law if the parties so choose or in the absence of choice of the applicable law, e.g. Art. 17 ICC Arbitration Rules, Art. 33 of the UNCITRAL Rules on International Commercial Arbitration, Art. 28 of the UNCITRAL Model Law on Arbitration, or Art.VII of the 1961 European Arbitration Rules. Other recent rules on arbitration allow the arbitrator to directly find the substantive law applicable to the dispute without previous recourse to private international law e.g. Art.1496 of the French New Code of Civil Procedure or Art.1054 of the Dutch Arbitration Act. When awards based on the lex mercatoria have been subject to recognition or enforcement before national courts, the choice of substantive law by the arbitrators has not been questioned. It could neither be shown that the awards were *ultra vires* nor that the awards violated the forum's public policy which otherwise would have jeopardized their recognition under Art.V of the 1958 New York Convention.[34] In this regard, the

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[33] *Ibid*, p. 301; On the distiction between *kollisionsrechtliche Verweisung* and *materiellrechtliche Verweisung* (*ægte* og *uægte partshenvisning*) see Lando, O., *189 Collected Courses*, Vol.VI, 1984, pp. 255-256; Dicey & Morris, 13th ed., v.II, pp. 1226-1227; Kropholler, J., *Internationales Privatrecht*, 3rd. edition, Tübingen, 1997, § 40 I, pp. 268-269; Arnt Nielsen, P., *International privat- og procesret*, Jurist- og Økonomforbundets Forlag, 1997, pp. 483-484.

[34] E.g. the Norsolor Case, ICC award No. 3131, *XII Yearbook of Commercial Arbitration*, 1983, pp. 109-111; the Rakoil Case (deutsche Schachtbau- und Tiefbohrge-

1992 ILA Resolution recommends the validity and enforceability of awards based on transnational rules where the parties have so chosen or when they have remained silent as to the applicable law.[35]

It may be therefore concluded that the existence of the lex mercatoria is supported by the practice of international commercial arbitration in isolation from any doctrinal debate. Three are the foundations for this existence; the principle of party autonomy, the principle of good faith and the use of arbitration.[36]

5. New sources for the lex mercatoria?

During the last few years important changes have taken place in the field of contract law. Two sets of codified general contract principles have entered the international arena, the UNIDROIT Principles of International Commercial Contracts (1994) and the European Principles of Contract Law, Parts I and II (1999). They fulfill two ambitious programmes carried out by, respectively, the UNIDROIT and the Commission on European Contract Law, also known as the "Lando Commission" in honor of its founder and chairman, the Danish professor Ole Lando. The UNIDROIT Principles (UP) only apply to international commercial contracts, whereas the European Principles (PECL) may be also applied to national contracts and non-commercial agreements, such as consumer contracts.[37]

Both sets of principles contain rules that cover most aspects of contract law. The rules are endorsed with a very well defined content and a precise and clear language. The Principles do not have a precise role, in the sense that they are capable of serving different purposes. Hence, they may function as means of interpreting the applicable domestic or international uniform law, as a model for national and international legislators and as the governing law to the contract.[38] Neither the UP nor the PECL are binding. They are the work of eminent specialists in the area of contract law, but they are not endorsed in an international convention or the like.

Some scholars have begun to speak of the Principles as new sources for the lex mercatoria. For instance, regarding the UP, it has been affirmed that "in view of the fact that the Principles represent a system of rules intended to enunciate principles which are common to the existing national legal systems and best adapted to the special requirements of international commercial contracts, they could be considered as a sort of modern 'ius commune'or what is commonly called 'lex mercatoria'."[39] Being so, the lex mercatoria could be now served by rules that are predictable, consistent and complete, thereby tackling the traditional critiques against its vagueness, incompleteness and lack of foreseeability. As an author has put it, "the great importance of the UP is that the volume exists. It can be taken to court,

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sellschaft mbH at al. v. The Government of the State of R'as Al Khaimah and The R'as Al Khaimah Oil Company), *[1987] 2 All ER*, pp. 769-784.

[35] Resolution on Transnational Rules adopted at the 65th International Law Association Conference in Cairo on April 26, 1992.

[36] Dasser, F., *Internationale Schiedsgerichte und lex mercatoria*, Schulthess Polygraphischer Verlag AG, Zürich 1989, p.46; Goldstajn, A., *Festschrift für Clive M. Schmitthoff*, Athenäum Verlag, Frankfurt (M), 1973, p. 171.

[37] Bonell, M.J., *Uniform Law Review,* vol. 2, 1996.

[38] See: the Preamble of the UNIDROIT Principles of International Commercial Contracts, Rome, 1994 and art. 1:101 of the European Principles.

[39] Bonell, M.J., *40 Am.J.Comp.L*, 1992, p. 629.

it can be referred to page and article number, and persons who are referred to its provisions can locate and review them without difficulty. This alone is a great contribution towards making lex mercatoria definite and provable."[40]

There are a considerable number of examples where the legal community has acknowledged the UP. Accordingly, the UP have been applied by arbitrators on several occasions and recognized by national courts.[41] Likewise, the 1994 Mexico Convention endorses on its arts. 9 and 10 that the principles of international commercial law recognized by international organizations shall be considered to ascertaining the applicable law to the contract. These references include the UP, for so was expressly noted during the sessions of the Conference that approved the Convention.[42]

In any case, being the product of academic research, the characterization of the UP and PECL as a whole as lex mercatoria depends on their recognition by those involved in international trade. Only "when the actors on the international trade stage, the parties to contracts, the arbitrators and possibly judges start to use the Principles, the latter may, in due course, grow into a part of the lex mercatoria."[43] This has been made clear in some arbitral awards, in which the arbitrators found that some of the UP provisions did not yet reflect a current practice of international trade.[44]

6. The lex mercatoria: a European insight

From its very beginning the strategy of the Community has been to promote economic integration through legal harmonization. The original version of the Treaty of Rome already provided for harmonization in various provisions e.g. Art.27, regarding customs, Art. 54.3. g) on certain companies and general provisions like Art.3. h), Art. 100 or Art. 235. Ever since the Single Market Programme of 1985 the Community has actively intervened in the field of private law by the enactment of many harmonizing acts, including

[40] Selden, B.S., *2 Golden Gate University School of Law*.

[41] The UP have been applied in at least 30 cases, including national courts decisions e.g. United States District Court, S.D. California, 7 Dec. 1998, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems Inc.*, which held that the application of the UP in a previous arbitral award as a source of "general principles of international law and trade usages" without an express authorization by the parties thereof constituted no violation of Article V(1)(c) of the 1958 New York Convention; www.UNIDROIT.org/principles.

[42] See, Parra Aranguren, G., *69 Tulane Law Review*, 1995, pp. 1239-1252.

[43] Boele-Woelki, K., *Uniform Law Review*, 1996, v. 4, p. 652 *et seq.*, p. 659; also, Goldman, B, *op.cit.*, p. 114, on the quality as lex mercatoria of standard contracts and general clauses established under the auspices of an international organisation.

[44] ICC Award No.7375, Int'l Arb. Rep., 1996; see Berger, K.P., *Uniform Law Review* 2000-1, p. 169, ICC Award No. 8873, J*ournal du droit international 1998,* 1017; see http://www.unidroit.org/english/principles/caselaw/caselaw-main.htm.

contract law where several directives have been issued.[45] This has led to a "*communitarisation*" of contract law.[46]

The intervention of the Community in the field of private law has been fragmentary and it is not well coordinated. Furthermore, in those areas, which still remain unharmonized, recourse has to be made to private international law rules e.g. the Rome Convention. This leads to a paradox; whereas law has been one of the main tools for European integration, the latter is, at the same time, a great obstacle for the completion of the internal market. As contracts are the main legal tool used in the circulation of goods and services, the existence of fifteen different contract laws within the European Union may hamper the optimal functioning of the internal market. Increased transaction costs due to the necessary legal advice on foreign contract law and uncertainty as to the outcome of possible future disputes hold many traders away from the European market and keep them within their own national boundaries.[47] Ultimately, consumers end up paying the price of legal uncertainty.

The heterogeneous regulation of contracts in the national, communitary and international context has given rise to a discussion on the need of a common basis for contract law in Europe. For some time the debate on harmonization of contract law has been merely academic, with an almost non-existent political back up. Only two resolutions of the European Parliament in 1989 and 1994, respectively, called for work to be started on the possibility of drawing up a common European Code of Contract Law.[48] However, over the past three years the issue on harmonization of contract law has been impregnated of a political character. Indeed, in 1999 the conclusions of the European Council held in Tampere requested ”as regards substantive law an overall study on the need to approximate Member States legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings” (para. 39).[49] Moreover, in its resolution of 16 March 2000 the European Parliament again insisted on ”that greater harmonisation of civil law has become essential in the internal market” and requested the Commission to undertake a study in this area. Finally, the European Commission published in 11th July 2001 a Communication to the Council and the European Parliament on European Contract Law,[50] seeking information from all interested parties as to whether the co-existence of different national contract laws hinders the functioning of the internal market (para. 72) and if so which

[45] E.g. Council Directive 93/13/EEC on unfair terms in consumer contracts, OJ L 095, 21/04/1993, p. 0029-0034, Council Directive 86/653/EEC on self-employed commercial agents, OJ L 382, 31/12/1986 p. 0017-0021, Council Directive 85/577/EEC on Doorstep Sales, OJ L 372, 31/12/1985 p. 0031 – 0033, Council Directive 87/102/EEC on consumer credit, OJ L 042, 12/02/1987 p. 0048-0053, Council Directive 90/314/EEC on package tours, OJ L 158, 23/06/1990 p. 0059-0064, or Directive 94/47/EC on time share, OJ L 280 , 29/10/1994 p. 0083 – 0087.

[46] Benacchio, G., *Diritto Privato della Comunità Europea*, CEDAM, Padova, 1998, p. 9.

[47] Lando, O., *International Contracts and Conflicts of Laws*, Petar Sarcevic (ed.), Kluwer, 1990, pp. 1-13, p. 2.

[48] OJ C 158, 26.6.1989, p. 400 (Resolution A2-157/89); OJ C 205, 25.7.1994, p. 158 (Resolution A3-0329/94).

[49] Presidency conclusions, Tampere European Council 15 and 16 October 1999, SI (1999) 800.

[50] COM (2001) 398 final, 11th July 2001.

option would be the most appropriate to solve such problem (para. 73). Four options were suggested by the Communication (para. 46):

I. To leave the solution of any identified problems to the market

II. To promote the development of non-binding common contract law principles, useful for contracting parties in drafting their contracts, national courts and arbitrators in their decisions and national legislators when drawing up legislative initiatives

III. To review and improve existing EC legislation in the area of contract law to make it more coherent or to adapt it to cover situations not foreseen at the time of adoption

IV. To adopt a new comprehensive legislation at EC level e.g. a European Contract Code

The idea of a European Contract Code (option IV) meets strong cultural, political and legal difficulties.[51] Consequently, other less interfering alternatives are to be preferred. Amongst them is the notion of *optional harmonization*. This has been described as the process of unification that takes place from below, in the sense that it is not imposed by legislative means.[52] In this way, it is up to the different actors involved in intra-community trade to contribute to a further unification.[53] Diverse "private" projects have already taken the initiative of setting up a common background for the unification of private law in Europe e.g. the Pavia Group on a European Contract Code, the European Civil Code Group, the Trento Project on the Common Core of European Private Law and the Commission on European Contract Law, drafter of the PECL.

It has been suggested that the PECL may function as a sort of European Restatement of contract law (option II)[54] or that they may be enacted as a Model Law like the UCC.[55] Both possibilities present certain flaws. National laws giving effect to model laws are often enacted in somewhat altered versions. The uniformity achieved is thus limited.[56] It follows that a European Uniform Contract Code adopted by means of a model law would demand the uniform interpretation of a Supreme Court. The ECJ could function as such, but its competence would require a legal basis, which currently is doubtful. As regards the Restatement method, the viability of a European construction of national contract law in the light of the PECL "requires a solid dogmatic groundwork in the respective European jurisdictions."[57] It is not clear whether courts within the EU will interpret national provisions *contra legem*.[58]

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[51] Such as Euroscepticism, feasibility of reaching an agreement covering all areas of private law, legal petrification or a doubtful legal basis for accomplishing unification.

[52] The latter is called mandatory unification.

[53] Lando, O., *European Review of Private Law*, vol. 1, 2000, pp. 59-69.

[54] Lando, O., *New Perspectives for a Common Law of Europe*, Cappelletti (ed.), 1978, p. 267 *et seq*.

[55] See e.g. Schmid, Ch.U., *Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU*, Feiden, S. and Schmid, Ch.U. (eds.), EUI Working Paper Law No. 99/7, pp. 103-124, p. 124.

[56] Reimann, M., 3 *Maastrich Journal of European and Comparative Law*, 1996, pp. 217-234, at p. 228.

[57] Berger, K.P., *European Review of Private Law*, vol. 1, 2001, pp. 21-34, p. 32.

[58] See Case 192/94, ECR I 1281, *Corte Inglés S.A. v Cristina Blázquez Rivero;* Lando, O., EUI Working Paper Law No. 99/7, pp. 11-29, at p. 25.

Another alternative could be to let the PECL contribute to the approximation of contract law in Europe through market forces and the lex mercatoria doctrine (option I). The PECL could function as the governing law of intra-community contracts if the parties so choose. This option would require an amendment to or an extensive interpretation of the Rome Convention Art. 3.[59] The American counterpart of the Rome Convention, the 1994 Mexico Convention, empowers the judge to apply non-national rules that are especially designed to cope with the needs of international trade.[60] By allowing the parties to choose the PECL as applicable law traders may obtain the flexibility, practicability and legal certainty international transactions require.[61] The latter could be further consolidated when the two Protocols that endorse the competence of the ECJ to interpret the Rome Convention enter into force or when the Rome Convention is transformed into a EC Regulation. Ultimately, the interplay between the PECL and national laws may bring national contract laws closer together.

As to option III, no one seems to deny the need to simplify and consolidate the legal conglomerate produced by the Community in the field of contract law. This is however, an entirely different pursuit from that of undertaking the harmonization of the whole area of contract law.

[59] Boele-Woelki, K., *op.cit.*, p. 676.
[60] Juenger, F.K., *45 Am.J.Com.L.,* 1997, pp. 195-208, p. 204.
[61] Berger, K.P., *op.cit.,* p. 154.