

Kluwer Arbitration Blog

Creeping Codification of the New Lex Mercatoria: The TransLex Principles at www.trans-lex.org

Klaus Peter Berger (University of Cologne, Center for Transnational Law (CENTRAL)) · Wednesday, January 20th, 2010

One of the major problems related to the doctrine of the New Lex Mercatoria (NLM) is to determine its contents. The UNIDROIT Principles of International Commercial Contracts, of which a third edition will perhaps be finalized this year, have used the Restatement technique of the American Law Institute as a means to “codify” transnational contract law. International arbitral tribunals have used the Principles over the past fifteen years to fill gaps in international uniform law instruments like the CISG, to interpret domestic law in a transnational context, to make their awards more persuasive from a comparative perspective or because the parties had agreed to have “general principles of law, the lex mercatoria or the like” (see the Preamble of the Principles) applied to their contract. Some tribunals, like the one in ICC case 9797, have emphasised the quality of the Principles as the “ratio scripta” of transnational contract law:

‘The UNIDROIT Principles of International Commercial Contracts are a reliable source of international commercial law in international arbitration for they contain in essence a restatement of those “principes directeurs” that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice’ (ICC Award No. 9797, excerpt reproduced in Marrella, *La Nuova Lex Mercatoria*, 2003, at 424).

Another tribunal applied the Principles because of their code-like character:

“...rather than vague principles or general guidelines, the UNIDROIT Principles are mostly constituted by clearly enunciated and specific rules coherently organized in a systematic way ...” (ICC Award No. 7110, excerpt reprinted in Gopalan, *J.L.&Com.* 2004, at 117, 161)

An alternative approach to the codification of the NLM is the concept of the “Creeping Codification” through the TransLex Principles at www.trans-lex.org. This innovative project is operated by the Center for Transnational Law (CENTRAL) at Cologne University, Germany. It is intended to provide international legal practice with an easily, freely and globally accessible Web-based platform to allow for the application of the NLM in everyday arbitration and drafting

practice. If the ‘[t]he Internet is becoming the town square for the global village of tomorrow’ (Bill Gates 2003) then the World Wide Web must be regarded as the ideal forum for the codification of the NLM. By putting the principles and rules of the NLM in the form of black-letter rules with a synopsis of the relevant comparative law references, the TransLex Principles establish a presumption, i.e. prima facie evidence, that the principles and rules reproduced in the list do in fact form part of the NLM.

Kluwer Law International will soon publish the second edition of the “[Creeping Codification of the New Lex Mercatoria](#)” by Klaus Peter Berger. That book will explain the background of the TransLex Principles. At the same time, the book will contain a rare personal account by Philippe Kahn about the “discovery” of the NLM by the research team directed by Berthold Goldman at Dijon University during the late 1950s and early 1960s of the last century.

Klaus Peter Berger


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