ASSESSING THE ROLE OF THE UNIDROIT PRINCIPLES IN THE HARMONIZATION OF ARBITRATION LAW

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I. INTRODUCTION: THE APPLICATION OF THE UNIDROIT PRINCIPLES BY ARBITRATORS

A. The Preamble of the UNIDROIT Principles

Some years ago, I was involved in an arbitration between a South Korean contractor who had hired an Italian engineer to make drawings and plans for the erection of school buildings in the Tripoli area in Libya. The Korean plaintiff accused the Italian defendant of breach of contract by having delayed his performance and done bad work. The defendant alleged that the plaintiff had not given him timely and proper instructions. Most of the problems in the case were of an evidentiary nature, but some were also legal, and the question came up which law rules should govern the merits of the dispute. The contract between the parties was silent on this point. The case was tried in Paris. The counsels for the parties were a French *avocat* and an Italian *avvocato*. The arbitrators were a French lawyer, an English barrister, and a Danish law professor. None of the parties wanted Lybian law to govern the dispute. The plaintiff was not happy to have Italian law apply; the defendant was equally unhappy about the law of South Korea. After a while, the parties agreed not to argue any further about which national law should govern the case. They agreed instead that it should be subject to the general principles of law governing international contracts (i.e. *lex mercatoria*). In doing so, they also avoided potential debates on the contents of the legal system which the arbitrators would have decided to be the applicable national law. In their further pleadings, the counsels for the parties found no great difficulty in not relying on the rules of a particular legal system. Each of them believed that everybody would agree upon what were the requirements of due performance of an engineering contract, and what constituted breach of such a contract.

However, in the deliberations, it took the arbitrators some time to agree upon which rules of law to follow as *lex mercatoria*. It would have been a great help for them if at that time they had had the UNIDROIT Principles for International Commercial Contracts (Principles)[1] or the Principles of European Contract Law (PECL)[2] to guide them.[3]

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1. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994) [hereinafter UNIDROIT PRINCIPLES].

2. PRINCIPLES OF EUROPEAN CONTRACT LAW (Lando & Beale eds., 1994) [hereinafter PECL].

The Preamble of the Principles lays down what is the purpose of the Principles. Two of these purposes have special importance for arbitration. First, the Principles shall be applied when the parties have agreed that their contract be governed by them.[4] Second, the Principles may also be applied when the parties have agreed that their contract is to be governed by "'general principles of law,' 'lex mercatoria' or the like."[5] The PECL has similar provisions.[6]

The Principle's Comment to the first purpose points out that parties who wish to adopt the Principles as the rules applicable to their contract will be well advised to combine the reference to these Principles with an arbitration clause.[7] If the contract is brought before a state court, the Principles would only be applied to the extent permitted by the applicable national law. If, however, the parties connect the choice of the Principles with an arbitration clause, the arbitrator will apply the Principles to the exclusion of any particular national law and be subject only to rules of domestic law which are mandatory irrespective of which law governs the contract (directly applicable rules).[8]

In the Comment to the second purpose, the application of the Principles as part of *lex mercatoria*, no mention is made of arbitration.[9] It is, however, submitted that the parties would be well advised to combine a clause of that type with an arbitration clause as well. In fact, there are even stronger reasons to do so in this case. To my knowledge, many state courts would refuse to pay any heed to *lex mercatoria*, even if the parties have agreed upon its application.

The agreement to apply the Principles and the agreement to apply *lex mercatoria* have in common the parties' wish to replace the rules of a

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3. On the UNIDROIT PRINCIPLES, see M.J. Bonell, *Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts*, 40 AM. J. COMP. L. 617 (1992). On the Principles of European Contract Law, see Ole Lando, *Principles of European Contract Law: An Alternative to or a Precursor of European Legislation?*, *id.* at 573; and PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 2.

4. UNIDROIT, *supra* note 1, art. 1.2(1).

5. *Id.* art. 1.2(2)(a).

6. *See* PECL, *supra* note 2, arts. 1.101(2), 1.101(3)(a).

7. *See* UNIDROIT PRINCIPLES, *supra* note 1, art. 1.2(1) cmt. 1.

8. *See* UNCITRAL Model Law on International Commercial Arbitration, U.N. GAOR, 40th Sess., Supp. No. 17, art. 28(1), Annex I, U.N. Doc. A/40/17, art. 28(1) (1985) [hereinafter UNCITRAL]; Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747, 764-68 (1985).

9. *See* UNIDROIT Principles, *supra* note 1, art. 1.2(2)(a) cmt. 1.

national legal system by international rules. In other respects, there are differences between them.

B. Agreement to Apply the Principles and its Implication

If the parties only agree to apply the Principles or the PECL, the arbitrator would apply these Principles to issues covered by them; and in case they do not directly settle the issue, he will apply the general principles on which they are based.[10] Issues which are outside the scope of the Principles would in most cases have to be governed by a national law. This is the solution provided in Article 1.104(2) of the PECL.[11]

The Principles and the PECL are principles of contract law which do not address all problems. Some issues will have to be governed by a national law. The arbitrator will then have to apply choice-of-law rules which will take him to the applicable national law. What choice-of-law rule should he apply? Is he bound to apply the choice-of-law rules of a certain country? One school maintains that he must apply the choice-of-law rules of the country in which he is acting as arbitrator. This is the English solution.[12] Another school says that he may apply the choice-of-law rules which he deems appropriate. This is provided in Article VII of the European Convention on International Commercial Arbitration of 1961[13] to which several European countries are Members. A similar provision is found in Article 28(2) of the UNCITRAL Model Act of 1985 (UNCITRAL Model Act)[14] and in a number of arbitration rules such as those of the International Chamber of Commerce (ICC).[15] This provision gives the arbitrator considerable discretion in his choice of the applicable law. He will, however, choose a national legal system.

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10. *Id.* art. 1.6; PECL, *supra* note 2, art. 1.104.

11. *See* PECL, *supra* note 2, art. 1.104(2).

12. A.V. DICEY & J.H.C. MORRIS, 1 DICEY & MORRIS ON THE CONFLICT OF LAWS 585 (Lawrence Collins ed., 1993).

13. *See* European Convention on International Commercial Arbitration, April 21, 1961, art. VII, 484 U.N.T.S. 350, 374. Among the Members of the European Convention on International Commercial Arbitration are Austria, Belgium, Bulgaria, Czech Republic, Slovakian Republic, Cuba, Denmark, France, Italy, Russia, White Russia, Ukranian Republic, Poland, Romania, Spain, and Hungary.

14. UNCITRAL, *supra* note 8, art. 28(2).

15. INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, ICC RULES OF CONCILIATION AND ARBITRATION § 13.03 (W. Laurence Craig et al. eds., 1990).

In the construction case mentioned above the Principles or the PECL could have solved most, but not all, of the problems; a national law would have had to be chosen.

C. Parties' Agreement to Apply Lex Mercatoria

The parties' agreement to apply *lex mercatoria* of "general principles of law" will entail a different solution. As we shall see, it will not bind the arbitrator to follow any national legal system; nor will he be obliged to apply the Principles or the PECL. There are very good reasons for applying the Principles as part of *lex mercatoria*. In the case mentioned above, they would have been a considerable help.

II. LEX MERCATORIA

A. What is It?

Lex mercatoria is resorted to when the parties or the arbitrator do not wish to have the dispute governed by a national legal system and submit it to an international set of rules. The arbitrator will, besides taking account of the terms of the contract, consider the customs and usages of international trade. When the contract does not give him any guidance and customs and usages cannot be ascertained, the arbitrator will follow those rules which he deems most appropriate for the problem. He will by himself be guided by those rules of law which are common to all or most of the states engaged in international trade, or to those states which have a connection with the contract. He may also consider the rules and recommendations of public and private international organizations such as the United Nations Convention for the International Sale of Goods (Vienna Sales Convention)[16] and the Incoterms published by the ICC.[17] He may take into account the terms of commonly used international standard form contracts such as those of the Economic Commission for Europe for the Supply of Plants and Machinery for Export[18] and the FIDIC International Standard Form of Civil Engineering

16. *See United Nations Conference For the International Sale of Goods*, U.N. Doc. A/CONF.97/19, Annex I (1980) [hereinafter Vienna Sales Convention]. The Vienna Sales Convention is now in force in about forty countries, including Canada, China, Italy, France, Germany, Russia, and the United States.

17. INTERNATIONAL CHAMBER OF COMMERCE, INCOTERMS (1990).

18. *See* Economic Commission for Europe for the Supply of Plants and Machinery for Export (ECE 188).

and Building Contract.[19] He may consider the published arbitral awards and, of course, the doctrine. This enumeration is not exhaustive.

Except for certain mandatory rules of national law, to be dealt with herein, the arbitrator is not bound by any national rule of law. His task is to apply the rules which he deems appropriate for issues of the kind before him. He may apply the rule which he would apply if he, as legislator, were to provide rules for international trade. In so doing, he must consider the legal tradition, but he is not bound by tradition. Just as the judge may make new law, the arbitrator may also develop the law and pay heed to needs for reform.

Lex mercatoria is a controversial concept. It has been and is still being debated whether there is such a thing as *lex mercatoria*.

B. The Legal Status of Lex Mercatoria: Does It Deserve to be Called Lex, a Law?

Compared with most national legal systems of the industrialized world *lex mercatoria* has shortcomings. Its rules are not laid down by any state authority. There is no government to tell you which source of law you must apply to the case, and, therefore, no established hierarchy of sources.

There are not many texts which are considered as a genuine core of *lex mercatoria* and which every arbitrator will apply. On the other hand the arbitrator may draw from several sources of inspiration; they may sometimes contain texts which are in conflict with each other. The arbitrator will then make a choice and apply the rules of law which he considers most appropriate; and it may be a rule of law which he creates for the situation.

Many distinguished scholars oppose the application of *lex mercatoria*.[20] Several of them assert that it cannot be law since it does

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19. *See* FIDIC International Standard Form of Civil Engineering and Building Contracts.

20. *See generally* LEX MERCATORIA AND ARBITRATION (Thomas E. Carbonneau ed., 1990) (including essays by both proponents and opponents of *lex mercatoria*); F.A. Mann, *Lex Facit Arbitrum*, *in* INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 157 (Peter Sanders ed., 1967); Paul Lagarde, *Approche Critique de la Lex Mercatoria* [*Critical Approach to Lex Mercatoria*], *in* LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES: ÉTUDES OFFERTES À BERTHOLD GOLDMAN [THE LAW OF INTERNATIONAL ECONOMIC RELATIONS: STUDIES OFFERED AT BERTHOLD GOLDMAN] 125 (1982); Werner Lorenz, *Die Lex Mercatoria: Eine internationale Rechtsquelle?* [*The Lex Mercatoria: An International Source of Law?*], *in*

not derive its binding force from any state authority. The arbitrator has to apply rules of law, and cannot apply rules which are not established by a government.[21] To this, the answer is that the binding force of *lex mercatoria* does not depend upon the fact that it is made and promulgated by state authorities but that it is recognized as an autonomous norm system by the business community and state authorities.[22]

C. Choice of Lex Mercatoria by the Parties

The UNCITRAL Model Law provides that the parties may agree which rules of law "shall be applied to the substance of their dispute."[23] These rules of law comprise both a set of nonnational rules of law like the Principles and the PECL, and other elements of *lex mercatoria*. The UNCITRAL Model Law has been adopted by a number of countries such as Canada, Australia, and Scotland. It is believed that the Portuguese Law on Arbitration of 1986 also permits the parties to select *lex mercatoria*.[24]

D. Choice of Lex Mercatoria by the Arbitrator

The French Code of Civil Procedure and systems following it go even further. They allow the arbitrator to apply the rules of law which he deems appropriate also when the parties themselves have not made a choice of the applicable rules of law.[25] This was provided in the conviction that parties are better served by an award governed by a neutral system of rules dictated by the needs of international trade than by one which is based on often inadequate national law of one of the parties.[26] The rule of the French Code of Civil Procedure permits the arbitrator to

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FESTSCHRIFT FÜR KARL H. NEUMAYER [PUBLICATION IN HONOR OF KARL H. NEUMAYER] 407 (1985).

21. *See id.*

22. Lando, *supra* note 8, at 752.

23. *See* UNCITRAL, *supra* note 8, art. 28(1).

24. Collaço, *in* DROIT INTERNATIONAL ET DROIT COMMUNAUTAIRE: ACTES DU COLLOQUE [INTERNATIONAL AND COMMUNITY LAW: PROCEEDINGS OF THE COLLOQUIUM] (Paris, Apr. 5-6, 1990) 55, 63 (1991).

25. *See* Code de Procédure Civile [C. PR. CIV.] art. 1496 (Fr.).

26. *See* Phillipe Fouchard, *L'arbitrage international en France après le décret du 12 Mai 1981* [*International Arbitration in France After the Decree of May 12, 1981*], 109 JOURNAL DU DROIT INTERNATIONAL 374, 397-420 (1982).

apply the Principles and the PECL, with or without the other elements of *lex mercatoria*.[27]

May the arbitrator always apply *lex mercatoria*? Probably not. If both parties have let him know that they wish a particular national law to apply or a national law determined by the arbitrator, the latter must do so and the arbitrator cannot apply *lex mercatoria*. If he disregards the parties' wish and applies *lex mercatoria*, a court may set aside or refuse enforcement of the award on the ground that the arbitrator went beyond the terms of the submission to arbitration.[28]

In other cases, there is probably no ground for setting aside or refusing enforcement of an award based on *lex mercatoria*. As mentioned above, French courts will enforce it.[29] Outside of France, courts in Austria and England[30] have recognized awards based on *lex mercatoria*, even though the parties in the arbitration proceedings had not expressly or impliedly agreed upon its application. It is difficult to find support in the New York Convention for refusing enforcement of such an award.

In the famous *Norsolor* case the parties had not pleaded the application of *lex mercatoria*.[31] The plaintiff who had been the agent in Turkey of the French principal claimed good will compensation when the principal ended the contract. It seems that, in this case, neither French nor Turkish law would have given the agent any compensation. However, the arbitrators invoked the good faith principle to support the plaintiff's claim, a principle which was found both in French and Turkish law. The arbitrators applied the good faith principle of *lex mercatoria* to reach a result which the good faith principles of neither French nor Turkish law could have reached. The arbitrators were precursors. About twelve years

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27. *See* C. PR. CIV., art. 1496. The PECL similarly provides for such a situation. *See* PECL, *supra* note 2, art. 1.104(2)(b).

28. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(c), 21 U.S.T. 2517, 2520, 330 U.N.T.S. 38, 42 (codified at 9 U.S.C. §§ 201-208 (1988)).

29. *See* C. PR. CIV. art. 1496.

30. *See* Deutsche Schachtbau-und Tiefborhgesellschaft m.b.H. v. R'AS al-Khaimah National Oil Co., 3 W.L.R. 1023, 1029-30 (Eng. C.A. 1987). However, several distinguished English writers are opposed to *lex mercatoria*. *See, e.g.*, SIR MICHAEL J. MUSTILL & STEWART C. BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 80-82 (2d ed. 1989); The Rt. Hon. Lord Justice Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, *in* LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE 149 (Maarteen Bos & Ian Brownlie eds., 1987); DICEY & MORRIS, *supra* note 12, at 583-85.

31. Norsolar, Judgment of Oct. 9, 1984, Cass. civ. 1re (Fr.), *reprinted in* 24 I.L.M. 360 (1985) (English translation).

later, the laws of the European Union have mandatory rules providing for good will compensation.[32]

III. LEGAL CERTAINTY AND PREDICTABILITY: DOES NATIONAL LAW PROVIDE CERTAINTY?

In our view, the real issue is not whether the arbitrator may apply *lex mercatoria*. It is whether parties and arbitrators should apply *lex mercatoria* in spite of its uncertainty, its looseness, and its permissiveness. This depends upon whether the application of a national legal system offers the parties so much more certainty and predictability that it must be preferred. In this evaluation, one should also consider the advantages of applying *lex mercatoria* in international arbitration.

A. National Law in the Courts

Some lawyers have the following image of the national legal system: it is perfect and exhaustive. If occasionally the statutes or the case law do not provide an answer to the problem, the spirit of the law, its general principles, will do so. This makes the judicial process into a syllogism. The facts of any case may be subsumed under a rule of law. The lawyer or the judge who knows his law well can always make this subsumption. His task is to apply the right rule of law, not to invent it.[33]

This is an image. The reality is different. The national legal system will often give a clear answer to a problem. The judge then applies the law automatically, as a knee-jerk reaction, without questioning the usefulness of doing so. In the mind of many judges, there is a strong reverence for the law, and they make a great effort to study the statutes, precedents, and literature, before they make their judgments. The laws of most of the industrialized countries are so coherent and so rich in sources that, in many cases, there is a considerable certainty as to what the outcome will be.

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32. *See id.*; *see also* Council Directive 86/653, art. 17, 1986 O.J. (L382) 17, 20 (providing for the agent's claim for indemnity or compensation in case of termination of the agency contract. This is now in force in all Member States of the European Union). In the 1980s and 1990s, the *good faith* principle has gained ground in the Netherlands under the new Civil Code and in France through case law. *See* NIEUW BURGERLIJK WETBOEK [NBW] art. 6:2 (Neth.) (Peter Haanappel et al. trans., 1990) and BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT 142 (1992).

33. This seems to be the basis of F.A. Mann's reasoning. *See* Mann, *supra* note 20.

However, no law is perfect in the sense that it covers all contingencies. Furthermore, it is in constant development under changing economic and political conditions and under changing views of those judges or academics who are the opinion carriers, the guiding spirits. The changing conditions may lead to a change of the legislation; but, in all the countries, they are also reflected in the decided cases. Furthermore, there are also many judges who do not always wait to form an opinion of a case until they have studied the books. Having heard the case, the judge gets an intuitive concept of how it should be decided. He then goes to look for rules of law which he can use in presenting his reasons. His judgment is a product of legal, ethical, socio-economic, and pragmatic consideration. What he has learned in law school and read later is a very important part of the conscious and subconscious factors which form his judgment. However, the older and more experienced he is, the less important becomes the black letter law and the precedent. It is my impression that, in a number of situations, the judges pay more lip service than true service to legal rules. It is what he feels is the necessity of the situation that guides the judge. Writers, especially in this country,[34] have been prone to point out that the courts often hide the real reasons behind their judgments, often because they have not followed the law. This infidelity to the law is due to its imperfection and insufficiency. No legal systems can provide solutions which in all the cases are acceptable according to the yardsticks of what judges hold to be reasonable and equitable. It must be admitted that some judges, especially in the lower courts, resign themselves and follow the black letter or precedents even when they do not wish to do so, while the highest courts will often show great audacity. The authors of the Dutch Civil Code of 1992 saw this. They provided in Article 2(2) of book six on Obligations in General: a rule binding upon the parties by virtue of law usage or judicial act does not apply to the extent that, under the circumstances, this would be unacceptable to the criteria of reasonableness and equity.[35]

So, if an experienced judge, who professes the view that the existing law rules are exhaustive and perfect, and that they always give the right answer to the problems, were to be put on a couch and

34. *See, e.g.*, Karl Llewellyn, Book Reviews, 52 HARV. L. REV. 700, 702 (1939) (explaining American courts' use of "interpretation" to avoid unfair contract clauses when the law did not permit them to set aside such clauses).

35. *See* NBW art. 6:2, 2.

hypnotized to speak the truth of his experience, he would not sustain this view.

B. Arbitrators and the National Law

In most international cases, the arbitrators are to apply the rules of a national legal system. However, like the Supreme Court judges, they are often tempted by their wide powers of discretion. An arbitrator will not be held liable if he does not follow the law slavishly. His award cannot be appealed to a higher arbitral tribunal or to a court. A court will only set aside his award or refuse to enforce it, if there are cogent reasons of a strong public policy to do so. An arbitrator feels more than a judge of the Supreme Court, who rarely sees the parties and is not responsible for their fate. It is the ethics of the arbitrator which may keep him to follow the rule of law not a legal constraint. If the law would direct him to make an award which is unacceptable according to his standards of reasonableness and equity he will often follow his conscience knowing that he stands to gain much and lose very little in doing so.

We cannot offer you any absolute proof, but it is our opinion that arbitrators take up an even more relaxed attitude towards the rule of law than do the judges whose decisions may be appealed, are often published, and frequently criticized by the writers, for some of whom they have respect.

IV. IS THE DIFFERENCE BETWEEN NATIONAL LAW AND LEX MERCATORIA SO SIGNIFICANT?

If this view of how the legal system operates is true, the difference in method between an arbitrator who applies national law and one who applies *lex mercatoria* becomes less pronounced. *Lex mercatoria* is, as mentioned, more incoherent and less complete than national law. Still, it has more the character of law than the considerations which may motivate an arbitrator who may act as *amiable compositeur* and whose task it is to find the most expedient and equitable solution to the problem. The arbitrator who applies *lex mercatoria* has to consider the existing laws. He may create a rule for the situation, but not a rule which no law maker would ever consider. If, for instance, a Danish seller has sold machinery to a German buyer, the arbitrator must find for the seller when the two year period allowed of notice under Article 39 of the Vienna Sales

Convention has elapsed before the buyer gave notice of defects.[36] The arbitrator must do so even if it would be more equitable to find for the buyer. The cut-off period in the Vienna Sales Convention is one of the longest known, longer than that under both the Danish Sale of Goods Act[37] and the German Civil Code.[38]

V. THE ADVANTAGES OF LEX MERCATORIA AND THE PRINCIPLES

Parties who choose the Principles or the PECL to govern their contract with or without a concurrent choice of *lex mercatoria* will have at their disposal a European or a world restatement of the law of contracts which are the first texts having international arbitrators as their target group. The Principles will enrich *lex mercatoria* which is poor in such sources.

Furthermore, by choosing the Principles and *lex mercatoria*, the parties avoid both the technicalities of a national legal systems and rules which are unfit for international contracts; they escape the peculiar formalities, brief cut-off periods, and the difficulties created by domestic rules of law which are unknown abroad such as the common law rules on consideration and privity of contract. They also avoid legal constructions which are hard to penetrate such as the German rules on remedies for breach of contract.[39]

Finally, those involved in international proceedings—be it parties, counsel or arbitrators—plead and argue on an equal footing; none has the advantage of having the case pleaded or decided by his own law and nobody has the handicap of seeing it governed by a foreign law. Those who have participated in an international arbitration governed by foreign law have experienced the frustration of being told the law by a participant who is a "native" of that legal system. If the native is not the sole arbitrator or the president of the tribunal, but one who is or may be suspected of being interested in the outcome of the dispute, you may have reason to fear that you are not always told the whole truth about the law. Nevertheless, you remain the foreigner who speaks without authority, you

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36. *See* Vienna Sales Convention, *supra* note 16, art. 39.

37. This Act requires the complaining party to give notice within one year. Danish Sales of Goods Act [SGA] ¶ 54 (1980).

38. The German Civil Code provides that court action be brought within six months. BÜRGERLICHES GESETZBUCH [BGB] § 477 (Ger.).

39. *See* KOMMISSION ZUR ÜBERARBEITUNG DES SCHULDRECHTS, ABSCHLUßBERICHT DER KOMMISSION ZUR ÜBERARBEITUNG DES SCHULDRECHTS 16-20 and 118-21 (1992).

are the dilettante where the other is the expert. If he is your co-arbitrator, you have often very little to say.

In the construction case mentioned above the Italian *avvocato* who was the counsel for the Italian engineer argued first for applying Italian law to the dispute. He referred to Article 4(2) of the Rome Convention on the Law Applicable to Contractual Obligations[40] which establishes a presumption in favor of the law of the place of business of the engineer who was the party performing the characteristic obligation of the contract. However, the *avvocato* soon cottoned to the atmosphere of the room and proposed *lex mercatoria*.

VI. MANDATORY RULES AND INTERNATIONAL ARBITRATION

As was mentioned before, parties that have chosen the Principles or the PECL and who later bring their dispute before a state court, are considered to have made an agreement to incorporate the Principles in the contract, while the law governing the contract will be determined by the choice-of-law rules of the forum. The Principles will be applied only to the extent that they do not affect the rules of applicable law from which the party cannot derogate, the so-called mandatory rules.

If, however, the parties have submitted their dispute to arbitration, the arbitrator may apply the Principles to the exclusion of any national law. He will only apply those rules of a national law which are mandatory, irrespective of which law governs the contract, the so-called directly applicable rules. The same is true when *lex mercatoria* is being applied. The arbitrator will give effect to the public policy of the law governing the arbitration, including its directly applicable rules. That law is generally the law of the country in which the arbitration is conducted. If, for instance, a clause in the contract violates the antitrust rules of law of the country governing the arbitration, the arbitrator will refuse to enforce that clause. Otherwise, he will risk that a party will challenge the award before the courts of the forum country, and have it set aside.

Should he also consider the directly applicable rules of other countries? The Rome Convention provides in Article 7(1) that when applying under the Convention, the law of a country effect may be given to the mandatory rules of law of another country with which the contract

40. Council Convention on the Law Applicable to Contractual Obligations, art. 4(2), 1980 O.J. 1, 2 [hereinafter Rome Convention].

has a close connection if, and in so far as, under the law of the latter country those rules must be applied whatever the law applicable to the contract.[41] In considering whether to give effect to these mandatory rules, regard should be given to their nature and purpose and to the consequences of their application or nonapplication. Paragraph 6(2)(c) of the American Restatement of Conflict of Laws[42] has a provision which would guide the American judge or arbitrator in the same direction.

Article 7(1) of the Rome Convention deals with mandatory provisions of a law other than the law of the forum and the proper law of the contract.[43] Under this rule, a French court could apply an American rule of public policy to a contract governed by English law, if the contract has a close connection with the United States.

Even if the law governing the arbitration has not adopted Article 7(1) or similar provisions, the arbitrator, it is submitted, should be guided by the same considerations. Contracts governed by *lex mercatoria* do not have a proper law in the sense envisaged by the Rome Convention. The arbitrator must, therefore, give the rule Article 7(1) an extended application. He should consider the directly applicable rules of any country having a close connection with the contract. First of all, the arbitrator should take into account the public policy provisions of the country in which the award would have to be enforced. But he should also consider mandatory rules of a country closely connected with the contract, even though the award would not be enforced in that country. Let us assume that a clause in a license agreement between a Japanese licensor and a Mexican licensee relating to goods which are to be sold in the United States violates the U.S. antitrust laws. An arbitrator sitting in a third country should refuse to give effect to the clause, even if it would be valid under Japanese and Mexican law and even if it could not be shown that a Mexican court would refuse to enforce the award.

VII. CONCLUSION: FUTURE APPLICATION OF THE PRINCIPLES AND THE PRINCIPLES OF EUROPEAN CONTRACT LAW

Whether arbitrators will consider the Principles and the PECL will depend upon whether the UNIDROIT, supported by its Member Governments, and the Commission on European Contract Law (CECL),

41. Rome Convention, *supra* note 50, art. 7(1).
42. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(c) (1971).
43. Rome Convention, *supra* note 50, art. 7(1).

supported by the Commission of the European Community, will be willing and able to spread knowledge of their existence in business circles and among international arbitrators. Both sets of rules are general principles of contract law. However, they have to be applied to specific contracts and there is, as we know, no such thing as a general contract.

Both the set of Principles and the PECL have been inspired by the Vienna Sales Convention. As in the national systems of law, the rules of the sales contract have been an important paradigm. The fact that about forty countries have now adopted the Vienna Sales Convention, and among them most of the important trade countries, would tend to make the rules familiar to the business community.

The Members of the CECL have made special studies of how its general rules on performance and nonperformance would operate upon a number of specific contracts. About twelve specific contracts were studied. It was found that, on the whole, the PECL was well fitted for these specific contracts. We have reason to believe that the same would apply to the Principles as far as their rules on performance and nonperformance of contracts.

Curious to learn how practitioners would react to the PECL the Commission had meetings with lawyers in Louvain la Neuve, Paris, London, Cologne, Madrid, and Lisbon. The reactions differed. It seems to have been the view of many lawyers who draft international contracts that common principles are needed. However, the prevailing concern in all the cities was that the Principles are too influenced by foreign law. In Paris, there were complaints about the strong influence of the common law while in London these complaints were about the too great civil law influence.

In view of the conservatism of most lawyers, it is surprising that the resistance was not greater. However, those who volunteer to come to such meetings are perhaps those who are the least hostile. However, the arbitrator who is in need of nonnational sources will have easily accessible and comprehensible guides. It is not unlikely that they will be used.