The Applicability of the UNIDROIT Principles as the "Lex Mercatoria" in International Commercial Arbitration

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Ⅰ. Introduction

Although the UNIDROIT Principles (UNIDROIT Principles of International Commercial Contracts 1994) have not binding nature, they may be used as very useful instruments in international commercial contract by setting forth general rules, mutual agreement for governing, lex mercatoria, or supplementing international uniform law instruments.

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The impact of the parties' reference to this Principles is likely to vary depending on whether the case is referred to a domestic court or on arbitral tribunal. The principle of autonomy in choosing the law governing their contract is traditionally limited in a court. Domestic courts will tend to consider such reference as a mere agreement to incorporate the Principles into the contract and to determine the law governing their contract on the basis of their own conflict-of-law rules. As a result they will apply the Principles only to the extent that the Principles do not affect the provisions of the proper law from which the parties may not derogate.

By contrast, the situation may be different if the parties agree to submit their disputes to arbitration. Arbitrators are not necessarily bound by any particular domestic law. Moreover this is self-evident if the arbitrators are authorized by the parties to act as amiable compositeur or ex aequo et bono. But even in the absence of such an authorisation there is a growing tendency to permit the parties to choose "rules of law" other than national laws on which the arbitrators are to base their decisions. Therefore arbitrators may apply the UNIDROIT Principles not merely as terms incorporated in the contract but as "rules of law" governing the contract, irrespective of whether or not they are consistent with the particular domestic law otherwise applicable.

To examine the applicability of the Principles in international commercial arbitration, this paper will deal with the following four different situations:

First, the parties have expressly chosen the Principles as lex contractus in their contract. This is the most straightforward case.

Second, the parties may be considered by the arbitrators to have chosen the Principles as lex contractus tacitly or implicitly. Although less straightforward than the previous case, this situation is still fairly simple.

Third, in the absence of a choice of law by the parties, be it explicit or tacit, can the Principles be applied as lex contractus?

Fourth, in the presence in the contract of a clause designating a municipal law, is here any room for the UNIDROIT Principles to substitute

for the municipal law chosen by both parties?

In the above four difference situations, it will analyze the applicability of the Principles on the basis of the reported cases and international rules of law. It will particularly focus on the function of the "lex mercatoria" among the six texts prescribed in the preamble of the Principles.[1] Prior to the specific examination on the applicability of the Principles, it will start with exploring the arbitrator's autonomy in international arbitration according to the international rules of law.

Ⅱ. Recognition of Arbitrator's Autonomy in International Rules of Law

Undoubtedly the arbitrators are subject to the parties' agreement on the choice of law. However, in the absence of any law chosen in their contract, arbitrator's freedom can be applied. An international arbitrator has considerable freedom when deciding on the rules of law applicable to the merits of a case. In using the freedom, the arbitrator seeks to find a legitimate cause in international rules of law. Arbitrators are not necessarily bound to base their decision on a particular domestic law. Such a possibility is not only admitted under a number of domestic law but also most recent international instruments dealing with international commercial contract and international commercial arbitration. There are systems in which arbitrators enjoy substantially the same power of amiables compositeurs, even in the absence of an express authorization by the parties to this effect. They are as follows.

1) "Parties to international commercial contracts who cannot agree on the choice of a particular domestic law as the law applicable to their contract sometimes provide that it shall be governed by the "general principles of law", by the "usages and customs of international trade", by the lex mercatoria, etc.", UNIDROIT, Text of the UNIDROIT Principle of International Commercial Contracts, Black Letter Rules & Comments, The Complete Version of UNIDROIT Principles, Published by UNIDROIT, May 1994, p. 5.

The New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Award implicitly confirms the arbitrator's freedom in this field. In the list of grounds upon which the enforcement of awards may be refused (Art. V), no reference is made to the question of the law applicable to the merits of the case.

Some more recent texts expressly recognize the arbitrator's freedom. Art. VII(1) of the European Convention on International Commercial Arbitration of 21 April 1961 is worded as follows:

"The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both case the arbitrators shall take account of the terms of the contract and trade usages"

The Model Law on International Commercial Arbitration adopted by the UNCITRAL on 21 June 1985, which is the basis of many national laws, provides in Art. 28 as follows:

"(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

The extent of the arbitrator's freedom is obviously limited by the parties themselves and by the law form which the arbitrator's powers derive (lex arbitri). When the parties have agreed on the lex contractus, the arbitrator must apply this law. It may be a national law, or it may be transnational rules described as rules of law in national or international legislation referring to them. When the parties have not agreed upon the lex

contractus, the extent of the arbitrator's freedom depends on the lex arbitri, which may authorize an arbitrator to apply rules of law and not just a national law.[2] However, the parties' choice of arbitration rules also plays a significant role, as shown by a comparison between the arbitration rules of ICC and UNCITRAL.

Art. 17 of the 1998 ICC Rules of Arbitration provides as follows:

"(1) The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate."

And Art. 33(1) of the UNCITRAL Arbitration Rules(1976) reads as follows:

"The arbitral Tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws which it considers applicable."

The difference between the arbitration rules of ICC and UNCITRAL, is in that, in an ICC arbitration the arbitral tribunal is free to apply the "rules of law" which it determines to be appropriate, whereas in an arbitration under the UNCITRAL Rules the arbitral tribunal must apply a "law" and not "rules of law."

A number of recent arbitration laws, when sanctioning the parties' right to choose the law applicable to the substance of the dispute, employ the term "rules of law" instead of "law", in order to make it clear that the parties' freedom of choice is not restricted to national laws, but also include rules of law of an a-national or supranational character. This is illustrated, for instance, by Art. 1496 of the French Code of Civil Procedure as amended in 1981, Art. 1054(2) of the Dutch Code of Civil Procedure as

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2) Yres Derains, "The Role of the UNIDROIT Principles in International Commercial Arbitration(1) : A European Perspective", International Court of Arbitration, UNIDROIT Principles of International Commercial Contract, Special Supplement, ICC International Court of Arbitration Bulletin, 2002, p. 11.

amended in 1986, Art. 182 of the 1987 Swiss Law on Private International Law, Art. 28(1) of the 1993 Russian Law on International Commercial Arbitration, Art. 834(1), first part, of the Italian Code of Civil Procedure as introduced in 1994 and Sec. 1051(1) of the German Code of Procedure as recently revised. And even in England, a country once famous for its rigidly legalistic arbitration regime, section 46(1) of the new Arbitration Act of 1996 tends very much in the same direction.[3]

But contrary to this trend, Art. 29 of Korean Arbitration Law[4] does not still allow arbitrators the discretion of choosing "rules of law".[5]

Ⅲ. UNIDROIT Principles as Law of Contract

1. Express choice

When the parties have expressly adopted the Principles as the rules of law governing their contract, the arbitrators are bound to apply them, so long as the issue to be decided falls expressly or impliedly within their scope and the Principles do not conflict with mandatory law from which the parties may not deviate. Otherwise, the resulting arbitral award may be challenged and set aside on the ground that the arbitrator went beyond the terms of the authority conferred on them under the arbitration agreement.[6] Even in situations where the issues to be decided fall under the scope of the Principles but are not expressly settled by them, the arbitrator is

3) M. J. Bonell, An International Restatement of Contract Law, the UNIDROIT Principles of International Commercial Contracts, 2nd Enlarged ed, Transnational Publications Inc., Ardsley, N.Y. 1997. pp. 196~198.

4) Amended by Act No. 6083 as of Dec. 31, 1999.

5) Art. 29(2) Failing the designation referred to in paragraph (1), the arbitral tribunal shall apply the law of the State with which the subject-matter of the dispute is most closely connected.

6) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards(1958), Art. V(1)(e).

encouraged to apply the Principles and their "underlying general principles" as the proper law of the contract.

There is yet no ICC award illustrating express choice of the UNIDROIT Principles by the parties in their contract. Although there may by contracts that parties have made subject to the UNIDROIT Principles, given the fact that the Principles were only published quite recently, these contracts have not yet given rise to disputes or, if they have, the disputes have not reached the stage at which an award is made and subsequently published.[7]

However the 1999 award in case 9419[8] contains an obiter dictum that suggests that their role is likely to be limited as follows:

"The UNIDROIT Principles could certainly be used for reference by parties involved for the voluntary regulation of their contractual relationship, in addition to helping the arbitrator in confirming the existence of particular trade usages, but they cannot constitute a normative body in themselves that can be considered as an applicable supranational law to replace a national law, at least as long as the arbitrator is required to identity the applicable law by choosing the rule of conflict that he considers most appropriate, in accordance with the provisions laid down by the international conventions and as provided for in the rules of arbitration within the scope of which he operates."

The position of above case is very questionable. Even if the UNIDROIT Principles do not constitute a legal system, they form a set of legal rules and there is no theoretical reason why arbitrators should not apply them.

It seems to be because the arbitrators and both parties do not show a strong enthusiasm for non-national rules; either the parties choose a national legal system(which they do in around 80% of contracts) or they say nothing. A total of only 0.8% of the arbitration requests filed with the

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7) Pierre Mayer, "The Role of the UNIDROIT Principles in ICC Arbitration Practice", International Court of Arbitration, UNIDROIT Principles of International Commercial Contracts, Special Supplement, ICC International Court of Arbitration Bulletin, 2002, p. 108.

8) (1999) 10:2 ICC ICArb. Bull. 104 at 106.

ICC International Court of Arbitration in 2000 related to contracts subject to general principles of law(0.2%), lex mercatoria(0.2%) or the general practice of international trade(0.4%).[9)]

The UNIDROIT Principles are, by their nature as a private restatement of the law, an "ongoing and continuous excercise". In other words, they cannot be seen as fixed or static but evolving, which sets them apart form national codes. So a choice of law clause referring to the UNIDROIT Principles must be interpreted as referring to a living law, including its future changes. Thus there is no reason why, in exercising their autonomy, parties to an international contract could not select the Principles as lex contractus or the proper law of the contract, notwithstanding their evolving character.[10)]

2. Reference to Transnational Principles

In ICC case 7110, an unnamed state and a British company had entered into nine contracts relating to the sale, maintenance and operation of equipment. Most of these contracts contained the following clause:

"Disputes to be finally settled according to natural justice (alternatively according to the laws, or the rules, of natural justice) by ICC arbitration in Paris."

To this case the words of the arbitral tribunal are as follows:[11)]

"Reference to "natural justice" and "laws" or "rules" of "natural justice" found in the majority of the contracts should be consistently and uniformly interpreted as referring not only to procedural justice but to the special type of substantive justice the parties had in mind, based on the neutrality of the applicable law to the merits and of the means of dispute resolution mechanism selected by the parties to effectuate substantive neutrality ......"

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9) Pierre Mayer, op. cit., p. 108.
10) M. J. Bonell, op. cit., p. 255.
11) (1999) 10:2 ICC ICArb. Bull. 39 at 48.

In these words, the reasonable intention of the parties regarding the substantive law applicable to the Contracts was to have all of them governed by general rules and principles in matter of international contractual obligations. The tribunal found that general legal rules and principles enjoying wide international consensus, applicable to international contractual obligations ...... are primarily reflected by the Principles of International Commercial Contracts, adopted by UNIDROIT ...... in 1994.[12)]

The step from substantive justice to general legal rules and principles, and also from the general legal rules and principles to the UNIDROIT Principles may be considered too abrupt. However, it should be said that when the parties' intention was clearly to exclude any national law - whether by referring to rules of natural justice, lex mercatoria, general principles of law - resorting to the UNIDROIT Principles cannot be other than worthwhile, as the award in case 7110 points out:

"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 ......"

This possibility is expressly foreseen in the Preamble to the UNIDROIT Principles which states that "they may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria, or the like".[13)]

In present situation, the application of the Principles has the potential of minimizing uncertainty with respect to the many contract rules on which there is insufficient consensus.

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12) ibid at 49.

13) 15. VI. 1994 - No SCH-4318 and 15. VI. 1994 - No SCH-4366 of International Court of Arbitration of the Austrian Chamber of Commerce(Vienna).

3. No mention of Applicable Law

This is the most interesting situation as far as the status of the UNIDROIT Principles is concerned. It calls for reflection on the following two questions. First, Should one seek a national system of law by applying conflict-of-laws rules, or forgo this approach and apply transnational rules or principles? Second, If the second alternative is a preference, to what extent do the UNIDROIT Principles reflect transnational law?

As regards the first question, the aforementioned award in case 7110 answers very clearly as follows:

"In respect of transactions like the contracts, in which (i) there is no express choice-of-law stipulation designating the law of any of the parties or of a third country and where neutrality regarding the applicable laws was a paramount concern denoted by the parties' rejection of each other's law and the absence of any explicit or implicit reference to the laws of a third country; and (ii) the parties have buttressed neutrality as to the applicable law by agreeing to submit heir contractual disputes to international commercial arbitration, albeit without empowering the Tribunal to act ex aequo et bono or as amiable compositeur, it can only be concluded that no national law was judged adequate or adapted to govern such transactions without the risk of disturbing the balance of neutrality between parties. In consequence, when the parties negotiated and finally entered into the contract, they only left room for the application of general legal rules and principles adequate enough to govern the Contracts but not originated in a specific municipal legal system."

In June 1996 a similar stance was taken by the arbitral tribunal in ICC case 7375. A United States company had sold goods to a government agency in a Middle Eastern country. There was no choice-of-law clause in the contract. The seller, against whom a claim was brought by the buyer,

contended that the claim was time-barred, pursuant to the law of Maryland which it deemed applicable. The buyer relied on its own domestic law, under which the action would not be time-barred.

The arbitral tribunal found that, in the circumstances of the case, the absence of a choice-of-law clause revealed that neither party was prepared to accept the other party's domestic law. There was therefore an implied negative choice, which left the tribunal with three alternatives. It rejected two of them - including the choice of a neutral national law - and, referring expressly to award 7110, decided to apply truly, international standards as reflected in, and forming part of, the so-called "general principles of law". Arbitral tribunal decided that the contract should be governed by general legal rules and the rules of law applicable to international contractual obligations, which had gained broad recognition and international consensus in the international business community, including concepts regarded as belonging to the lex mercatoria, and to take into account the UNIDROIT Principles as far as they could be considered to reflect generally accepted principles and rules. So Arbitral tribunal declared itself not ready at this point in time to make a final award and invited the parties to submit their memorials on substance having regard to applicable general principles of law rather than to their sole domestic laws.[14]

Even if arbitral tribunal apply the Principles, however it would be prudently considered the maintaining the equilibrium between the parties and meet the reasonable expectations of both of them.

Case 8261 involved a contract between an Italian company and a government agency in a Middle Eastern country. There was no choice-of-law clause in the contract. In its preliminary award of september 1996, the arbitral tribunal declared that it wold base its decision on the terms of the contract, supplemented by general principles of trade as

14) Award on Preliminary Issues of 5 June 1996, 11 Measley's International Arbitration Report (1996).; And also a similar case of UNIDROIT Principles as a means of interpreting the applicable domestic law at 4. IX. 1996, International Court of Arbitration of the International Chamber of Commerce.

embodied in lex mercatoria. When dealing with the merits of the dispute, it referred with no further explanation, to individual provisions of the UNIDROIT Principles, thereby implicitly considering the latter a source of the lex mercatoria.[15)]

Indeed, the lack of an agreement between the parties to choose the law of one or other of them, or the law of a third state, does not in fact amount to an agreement to exclude any municipal law. It there had been such an agreement, why had it not been mentioned? And if it is believed that when no positive agreement has been expressed, this amounts to the agreed exclusion of any national law, why is there no similar inference that when general principles of law are not mentioned this is because the parties wished to exclude them too?

The reality is that when the parties do not agree on the applicable law, they simply leave the task of determining it to the arbitrator.

The argument based on the absence of an objective reason for preferring the law of one of the parties to that of the other, in order to decide on the appropriateness of applying rules that do not belong to any municipal legal system, is more acceptable. In ICC case 9875, for instance, the arbitral tribunal considered that 'the difficulties to find decisive factors qualifying either Japanese or French law as applicable to the contract reveal the inadequacy of the choice of a domestic legal system to govern the case like this. It concluded that 'the most appropriate "rules of law" to be applied to the merits of this case are those of the lex mercatoria'.[16)]

Yet other awards - such as that in ICC case 9479 - simply infer automatically from the lack of choice of a municipal law the need to supplement the provisions of the contract, if required, by resorting to "usage to international trade".

Under the five awards discussed above in cases 7110, 7375, 8261, 9479 and 9875, these are initially inferred the exclusion of any municipal law and

15) M. J. Bonell, op. cit., p. 249.
16) (2001) 12:2 ICC ICArb. Bull. 95 at 97.

an implied or necessary choice of international trade usages, then went on to state that the UNIDROIT Principles should be applied.

Awards 8261 and 9875 did not go to the trouble of justifying inclusion of the UNIDROIT Principles in lex mercatoria, which they deemed to be applicable. However, this could not be taken for granted. The UNIDROIT Institute is not the acknowledged legislator of the societas mercatorum. It is not, and does not claim to be, a source of lex mercatoria. Thus, the Principles it has drawn up form part of lex mercatoria only if they coincide with the rules which emanate from a true source of lex mercatoria, namely general principles of law or usages.

The other three awards, as it happens, contain direct references to general principles of law(cases 7110 and 7375) and usages(cases 9479). Here, the problem was therefore to establish the link between the UNIDROIT Principles and these sources.

In case 7110, the arbitral tribunal set out some reasons why, in its view, the UNIDROIT Principles are "the central component of the general rules and principles regarding international contractual obligations". The first and main reason is as follows:

"The reason why this Tribunal considers the UNIDROIT Principles to be the central component of the general rules and principles regarding international contractual obligations and enjoying wide international consensus are manifold: (1) the UNIDROIT Principles applicable to international commercial contracts made by a distinguished group of international experts coming from all prevailing legal systems of the world, without the intervention of states or governments ......"

The award in ICC case 7375 is more reserved. Here, the tribunal decided to "take into account the UNIDROIT Principles, as far as they can be considered to reflect generally accepted principles and rules". It considered that there may be certain articles in the Principles that do not reflect an international consensus.

The award in case 9479 affirms for its part that "the UNIDROIT

Principles are an accurate representation, although incomplete, of the usage of international trade".[17]

On the other hand, in case 9029 application of the UNIDROIT Principles was refused on the ground that "these are only partly valid, and in many ways are innovative":

"In other words, although the UNIDROIT Principles constitute a set of rules theoretically appropriate to prefigure the future lex mercatoria if they are consistent with international commercial present there is no necessary connection between the individual Principles and the rules of lex mercatoria, so that recourse to the Principles is not purely and simply the some as recourse to an actually existing international commercial usage."[18]

It is sometimes difficult to decide whether or not a given rule in the Principles is in accordance with general principles of law or usage over which there is an international consensus. This is notably the case with regard to the rule on hardship provisions.[19] Although the Principles are declared to be generally applicable in case 7110, it is said in the second award rendered in this case, although without actually mentioning these articles, that "the theory of changed circumstances"(in Art. 6.2.2) does not form part of widely recognized and generally accepted legal principles.[20] This position is consistent with the majority tendency amongst arbitrators that emerged previously. In case 7365 and 9479, on the other hand, Art. 6.2.1 and following of the Principles are applied unhesitatingly.

Given these conceptual and practical difficulties, there is a reason to pause before encouraging arbitrators to declare the UNIDROIT Principles applicable on the sole ground that the parties have not included a choice-of-law clause in their contract.

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17) (2001) 12:2 ICC. ICArb. Bull. 67 at 69.

18) (1999) 10:2 ICC. ICArb. Bull. 88 at 90.

19) Sec. 2(hardship) Art. 6.2.1(contract to be observed), Art. 6.2.2(definition of hardship), Art. 6.2.3(effects of hardship).

20) M. J. Bonell, A New Approach to International Commercial Contracts : The UNIDROIT Principles of International Commercial Contracts, London Kluwer, 1999, p. 231.

In the U.S. perspective, Farnsworth in his paper[21] concluded that the arbitrators really regard the UNIDROIT Principles as a representative statement of general principles of international contract law or lex mercatoria.

4. Presence in the Contract of a Clause Designating a Municipal Law

The parties' choice is respected in arbitration agreement. Arbitral award has not tried fully to substitute the UNIDROIT Principles for the law chosen by the parties. However it may be considered whether the UNIDROIT Principles are to be added to or occasionally substituted for the national law chosen as lex contractus.

The reason that could lead to a positive answer is based on the rule, which is "in all cases the Arbitral Tribunal shall take account of ...... the relevant trade usages", found in certain national laws or the 1961 Geneva Convention in their arbitration provisions.[22]

On the basis of this rule, the award in case 9593 considered that the obligation to cooperate in good faith referred to in Art. 5.3 of the UNIDROIT Principles should be applied as a usage of international trade. As the arbitral tribunal noted, it so happened that an identical solution was to be found in the national law chosen by the parties. However one may wonder if this had not been so, whether the UNIDROIT Principles would have prevailed over the national law.

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21) E. A. Farnsworth, "The Role of the UNIDROIT Principles in International Commercial Arbitration(2) : A US Perspective on their Aims and Application", ICC UNIDROIT Principles of International Commercial Contracts, Special Supplement, ICC International Court of Arbitration Bulletin, 2002, p. 27.

22) Art. 7(1) of European Convention on International Commercial Arbitration and Art. 17(2) of ICC Rules of Arbitration.; Art. 28(4) of UNCITRAL Model Law on International Commercial Arbitration.; Art. 33(3) of UNCITRAL Arbitration Rules.; Sec 1051(4) of German Arbitral Proceeding Reform Act.; Art. 1496 of New Code of Civil Procedure in France.; Art. 29(4) of Arbitration Act of Republic of Korea. etc.

While noting that "the UNIDROIT Principles are not of mandatory but only of persuasive nature",[23] the arbitral tribunal in case 10022[24] likened them to the trade usages mentioned in Art. 17(2) of ICC Arbitration Rules, which this provision is to be applied "in all cases".

On the basis, not of the ICC Rules, but of the reference to trade usages found in Czech law applicable to the contract, the award in case 9753[25] also gave a broad meaning to the concept, under which it included the principle of binding character of contract and good faith and fair dealing laid down respectively in Art. 1.3 and 1.7 of the UNIDROIT Principles.

On the other hand, there are some different cases, at least the next two awards of ICC International Court of Arbitration. In these cases the concept of usage has interpreted more narrowly.

According to the award in case 9029, it was stated as follows;

"International commercial usages are of strictly interpretative and integrative value, to the extent that there are gaps in national regulation usages ...... all the more so when the parties have chosen national law applicable to their relationship, it being certainly not possible, in such a case, to substitute international commercial usages for the national law chosen by the parties with regard to institutions, actions, and effects, for which the latter makes special provision."[26]

In this case the request of application of UNIDROIT Principles as an "authoritative source of knowledge of international trade usages" was rejected.

For this reason, the award excludes the rules of the UNIDROIT Principles relating to gross disparity and hardship.

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23) (2001) 12:2 ICC ICArb. Bull. 100.

24) ICC International Court of Arbitration, Case No 10022(2000). In this case arbitral tribunal requested to take into account "relevant trade usages"(Art. 17 of ICC Rules of Arbitration) - reference includes but is not limited to the UNIDROIT Principles and the Principles of European contract law.

25) ICC International Court of Arbitration, Case No 9753(1999). In this case the contract governed by a particular domestic law - reference to UNIDROIT Principles in support of solution found in domestic law.

26) (1999) 10:2 ICC ICArb. Bull. 88 at 91.

The other award in case 8873, usages was limited as follows;

"For its part limits the complementary or divergent role of usages to true usages, that is to say usages widely known and regularly observed in the branch concerned". Here, the arbitral tribunal had to decide upon the application of Art. 6.2.1 relating to hardship and in so doing expressed the view that hardship "constitutes a quite exceptional principle that is accepted only in the context of contractual clauses".[27)]

This award therefore rules out the possibility of considering the provisions on hardship in the UNIDROIT Principles as trade usages.

Ⅳ. Conclusion

For three years between the start of 1996 and the end of 1998, about 20 among 720 awards in fact applied UNIDROIT Principles in one way or another in ICC International Court of Arbitration. With the similar ratio, of the 600 or so awards made during the period 1999~2000, about 16 awards were found to have applied the Principles in ICC International Court of Arbitration.[28)]

The provisions most frequently applied are those of chapter 7 on non-performance provisions which seem natural and chapter 1 on general provisions. They are for example Art. 1.7(good faith and fair dealing), Arts. 4.1~4.5(contract interpretation), Art. 5.3(cooperation between parties), Arts 6.2.1~6.2.3(hardship), Art. 7.1.3(withholding performance), Art. 7.4.3(certainty of harm), Art. 7.4.8(mitigation of harm), Art. 7.4.9(interest for failure to pay money). Especially the principle of good faith and fair

27) (1999) 10:2 ICC ICArb. Bull. 78 at 79~80.

28) UNILEX statistics which is an intelligent database of international case law and bibliography on the United Nations Convention on Contracts for the International Sale of Goods (CISG) and on the UNIDROIT Principles of International Commercial Contract those are two of the most important international instruments for regulation of international commerce. Reference to the website. http://www.unilex.info

dealing(Art. 1.7) is sometimes used to fill gaps in the Principles.

The actual applicability of the UNIDROIT Principles in ICC Arbitration Practice can be relied upon four circumstances as follows.

First, even if the parties stipulate the Principles expressly in their contract, their role of a nominative legal body is likely to be limited(unless the arbitrators are specially authorized to act as amiable compositeur) so long as the arbitrators are required to identify the applicable law by choosing the rule of conflict.

Second, if there is a reference to transnational principles in the parties' contract, the reasonable intention of the parties regarding the substantive law applicable to the contract is regarded to be governed by general legal rules and principles in matter of international contractual obligations. The tribunal found in ICC case 7110 that the general legal rules and principles enjoying wide international consensus are reflected by the UNIDROIT Principles.

Third, in case there is no mention at all of the applicable law in the contract, whether the arbitrator seeks a national system of law by applying a conflict-of-laws rules or seeks to apply transnational rules or principles is dependent on the determination of the arbitrator. For example, as in the awards 8261 and 9875, the UNIDROIT Principles are not a source of lex mercatoria, namely general principles of law or usages, whereas the Principles may form a part of lex mercatoria only if they coincide with the rules which emanate from a true source of lex mercatoria. The other three awards(case 7110, 7375 and 9479) contain direct reference to general principles of law or usages. The link between the UNIDROIT Principles and these sources is confirmed by those awards.

Fourth, if there is a clause designing a municipal law, the basic principles such as cooperation between the parties(Art. 5.3), good faith and fair dealing(Art. 1.7) and binding character of contract(Art. 1.3) should be applied as a usage of international trade to the extent that there are gaps in national regulation usages.

Thus, in international commercial transaction, the UNIDROIT Principles are a very useful tool specially in arbitration, which can be used as a governing law, lex mercatoria, or general principles of law or usage, depending on express mention or implied reference. And its application would be expanded with the increase of the request of international uniform rules of law. It is hoped to examine the related cases more in the near future.

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ABSTRACT

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Nowadays even if environment of international commercial transaction is changing quickly municipal law could not meet with such change accordingly. So far, however, efforts towards unification have prevailingly taken the form of binding instruments, such as non-national or supranational legislation, international conventions or international model laws. Among them, the UNIDROIT Principles with parties' autonomous and yet non-binding character do not only meet the substantive requirements of a true law merchant. In addition they also counter some of the main points of criticism against the modern lex mercatoria. As such the Principles constitute a cornerstone in the lex mercatoria debate and may become the heart of the new lex mercatoria.

The purpose of this article is to ask whether there could be applied the Principles in international commerce. For the purpose it is to investigate when the Principles are applied in international commerce and how effectively the Principles are applied for the decision in international commercial disputes.

Even though the Principles are used for reference by parties involved for the voluntary regulation of their contract, it is sufficiently expected that the Principles are to be a stepstone of uniform contract law in international commerce.

Until now cases of appling the Principles are not satisfied with its expectation as a source of non-legislative means of unification or harmonization of law.

Given the party's autonomy in the contract, this is among other things because business parties are strongly tend to observe their national laws in their international commerce. And also, even though there are a number

of neutral and uniform regulations for international commercial contracts, parties do not often recognize their usefulness with being up to expectation.

In order to explore the applicability of the Principles a number of cases of ICC International Court of Arbitration and others are quoted.

Keyword ;

UNIDROIT Principles, Lex Mercatoria, Arbitration, Applicable Law