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Interpreting Maritime Conventions and Shipping Contracts with EU Soft Law Instruments

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For some years now, European institutions have launched several working groups focused on the development of a harmonized European contract law. This resulted in several works, especially the Principles of European Contract Law – PECL[2], and the Draft Common Frame of Reference – DCFR[3], both aimed to constitute the basis for a future European Civil code.

The Principles of European Contract Law are a set of model rules drawn up by leading contract law academics in Europe[4]. They attempt to elucidate basic rules of contract law and more generally the law of obligations which most legal systems of the Member States of the European Union hold in common. The PECL are based on the concept of a uniform European contract law system. The DCFR adopts a wider approach which is not confined to contract law. It provides first general « Principles » considered as universally applicable to European legal systems, and further « model rules » to be used as models for drafting contracts or even law making, like for instance UNCITRAL Model laws. These rules can also govern contracts if voluntarily incorporated by the contracting parties.
Currently, such texts do not constitute hard law, as they have not been incorporated into normative Acts. One of the legal proposal issued from these works, the recent Commission Proposal for a 'Regulation on a Common European Sales Law (CESL)'[5], is still pending. However, these works, even if remaining at the stage of soft law, may be useful to solve some issues raised by international contracts. Indeed, as announced by Chapter one itself of the PECL entitled 'General Provisions' : 'These Principles are intended to be applied as general rules of contract law in the European Communities'. The relevance of these works lies in the fact that they propose rules, acceptable and compatible with both Civil and Common Law systems, and beyond, with all domestic contract law of the 28 European Member States. Such Principles could constitute a 29th regime for international contracts, as the Commission's proposal for a Regulation on a Common European Sales Law.

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[2] Original version (Part I) in1995 (revised in 1998) ; Part II in 1999; Parts I and II revised in 2002 ; Part III issued in 2002.
[3] Ch. Von Bar, Eric Clive and H. Schulte-Nolke, *Principles, Definitions, Model Rules of European Private Law - Draft Common Frame of reference (DCFR)* (Sellier. European Law publ. 2009).
[4] Works were carried out by the Commission on European Contract Law (an independent organization) and started in 1982 under the chairmanship of Ole Lando, a Danish professor.
[5] Brussels, 11.10.2011 COM (2011) 635 final - 2011/0284 (COD).

But in the field of shipping law, the question arising is the following: are they of any use for operators dealing with shipping law? If the answer is yes, or why not, it raises many issues to be dealt with.
This paper focuses on one aspect that is interpretation. A general definition of this term can be found in the Cambridge dictionary as an explanation or opinion of what something means. A more legal definition could be the following: 'The art or process of discovering and expounding the intended signification of the language used in a statute, will, contract, or any other written document, that is, the meaning which the author designed it to convey to others[6]'. Applied to interpreting a law, a statute or a contract, it consists in explaining the meaning and scope of an obscure or ambiguous text.

Two main types of sources are concerned with legal interpretation: legal sources (Domestic laws, Statutes, European Regulations, International Conventions) and contracts[7]. However, rules governing interpretation of international instruments are different from those governing interpretation of contracts. The first falls within the competence of international public law, while contract law governs the second. The idea of interpreting those sources with European soft law instruments is relevant as both PECL and DCFR contain specific provisions on interpretation of contracts[8]. Thus, PECL provisions or general guidelines of DCFR seem to be likely to provide satisfactory solutions to current interpretation issues related to international contacts. But are they relevant for shipping law?

To try to answer these questions, we will take a two-phase approach. First, considering the possible interpretation of shipping legal instruments, and especially international conventions (I) and secondly, considering international shipping contracts (II).

I. Interpreting Shipping International Conventions with EU Soft Law Instruments

Interpretation issues are critical in international relations, and especially as far as uniformization of international law is concerned. Among the great variety of international sources governing transports in general, the place of international conventions is prominent. But one of the limits of the harmonization process is the lack of supra-national Court empowered to rule on such cases[9].
The question may be slightly different for monist and dualist systems.

1. *Variety of legal Instruments*

In States where a monist system is in force, international law can be directly applied and adjudicated by domestic courts. International treaties thus constitute a source of domestic law when they have been ratified. The incorporation into domestic law occurs on ratification, by virtue of constitutional provisions[10], or through self-executing treaties. On the contrary, in dualist

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[6] *The Law Dictionary Featuring Black's Law Dictionary*, Free Online Legal Dictionary 2nd Ed.
7 This list correponds to the list of legal sources generally found in In States with a monist system, as France or The Nederlands for instance.
[8] PECL - Chapter 5 : Interpretation ; DCFR - Book II - Chapter 8 : Interpretation.
[9] The CMR Convention however contains a provisions giving jurisdiction to the International Court of Justice to settle dispute between Contracting Parties relating to the interpretation or application of this Convention (art. 47). But this provision has never been used so far.
[10] Example : article 55 of the French Constitution.

systems, international law is not directly applicable domestically, but must first be translated into national legislation before domestic courts can apply it[11]. As a consequence, the nature of the legal instrument interpreted is different: monist countries interpret an international instrument (a treaty), while dualist countries interpret a national Act of international origin. However, even in dualist systems, the international origin of the incorporated convention should be taken into account when interpreted by domestic courts.

2. *Interpretation by Domestic Courts*

The very problem of interpreting international conventions is that such interpretation is implemented by national Courts. Thus, facing questions of interpretation, they are often likely adopting interpretations based upon domestic concepts, forgetting the international character of the interpreted text or contract[12]. Many works have been carried on the different ways to improve uniform interpretation of international uniform law. The concern here is to discuss whether European Common Core developed in the past decades in the EU could settle the issue of interpretation discrepancies of legal instruments.

3. *Interpretation of legal instruments.*

As for interpretation of Law, it must be noted that both PECL and DCFR provisions on interpretation do not address Law interpretation but only interpretation of contracts. This raises the following question: Would it be possible to use these instruments to interpret Law and in particular shipping Law, that is international conventions, domestic law, or even European regulations? Such a proposal is sensible as, like Unidroit-Principles[13], PECL and DCFR contain provisions related to their own interpretation, which could possibly be used to interpret legal instruments[14]. It might however seem odd to consider using EU soft law instruments while there is an international instrument precisely dedicated to these issues: The Vienna Convention on Treaties, whose Article 31 deals with interpretation[15].

4. *Vienna Convention on the Law of Treaties*

The Vienna Convention on the Law of Treaties adopted 1969 contains interpretative guidelines. This convention is not universally into force[16]. However, several rules have been considered having a customary legal value at the very least. The International Court of Justice itself applying the Vienna Convention to litigations involving non-contracting parties has confirmed this customary status. Several ICJ decisions and advisory opinions also clearly stated that the Vienna

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[11] For instance, UK Carriage of Goods by Sea Act of 197 (COGSA) implemented The Hague-Visby rules in Great Britain.

[12] R. J. C. Munday, 'The Uniform Interpretation of International Conventions', *The International and Comparative Law Quarterly*, 1978, Vol. 27, No. 2, 450- 459: About the *Buchanan case,* HL 9 Nov. 1977: [1978] 1 Lloyd's Rep. 119 – 135.

[13] Chapter I : General provisions : art. 1.6.

[14] See under page 6.

[15] Vienna Convention on the Law of Treaties, 1969.

[16] For Instance, in France. See *D. Carreau, Droit international*, (éd ? Paris 1988), 101 ; W. Czapski, Application et interprétation de la convention CMR à la lumière du droit international, RDU 2006, 525. Civ. 1re, 11 juillet 2006, N° 02-20389, Bull. 2006 I N° 378 p. 325.

was mandatory, even for States, which, like France, had not ratified it[17]. Thus, this convention, as it contains uniform rules of interpretation of treaties accepted by the international community, should be considered as a privileged instrument for interpreting international shipping conventions. However, domestic courts when interpreting such instruments do not systematically use the Vienna convention. In France, only eight cases of the Cour de cassation mention this convention in a period between 1970 and now. And among these cases, only three are related to shipping conventions[18] and three to interpretation. There is only a single case concerning the interpretation of a maritime convention, the Marpol convention[19].

The general interpretation of this convention rule is settled in article 31. In a schematic view, according to the roman adage "in *Claris non fit interpretation*", interpretation is only needed when the rule is not clear. These principles have been clearly ruled in several ICJ cases[20]. When interpretation is necessary, article 31 paragraph 1 establishes that priority must be given to a literal interpretation of the ordinary meaning of the words. Besides, the interpretation should be consistent with the context of the treaty, thus giving preference to systematic interpretation, considering the text of the convention itself but also the preamble, the Amending Protocols…. And finally, the teleological interpretation method is also mentioned, taking into account the light of the purpose, values, legal, social and economical goals these provisions aim to achieve. Article 32 'Supplementary means of interpretation' precises that 'travaux préparatoires' or explanatory reports drafted at the time of conclusion of the treaty, can be also used, which corresponds to the French approach of the teological method[21].

Despite the existence of this relevant international source, the success of the Vienna convention is mitigated. Hence the importance of EU instruments as they contain general provisions, which might be applicable ton shipping conventions.

5. *General Interpretation Provisions*

Both EU instruments contain general and specific provisions related to interpretation of the instrument itself. In the PECL, the general provisions can be found in the first Chapter (General Provisions - Section 1: Scope of the Principles and Section 2: General Obligations: Article 1:201 ff.). In the DCFR, Book I contains comparable General Provisions in Article I-1:102. Several references to good faith and fair dealing, uniformity of application, legal certainty can be found. Such general principles are frequently used when dealing with interpretation.

These general provision focuses on overall consistency of the interpretation, taking into account the purpose of the instrument and the 'underlying principles'[22]. The first paragraph of both texts

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[17] Avena and Other Mexican Nationals case (Mexico v. United States of America), ICJ 31.03.2004 ; Rep. (2004), 38. D. Carreau, Droit international, Paris 1988, 101 .

[18] Cass. Civ. 1, 11 July 2006, N° 02-20389, Bull 2006 I N° 378 p. 325; Cass. Crim., 25 September 2012, N° 10-82938, Bull. crim. 2012, n° 198; Cass. Com., 16 October 2012, N° 11-13658, Bull. 2012, IV, n° 188.

[19] Cass. Crim., 25 September 2012, *ibid*.

[20] Advisory opinion of 28.05.1949 concerning the Conditions of Admission of a State to Membership in the United Nations, Rep. (1947-1948), 63 ; Advisory opinion of 03.03.1950 concerning the Assembly jurisdiction to rule on the admission of a new State in the United Nations, Rep. (1950), 8.

[21] John L. Murray, *Methods of Interpretation – Comparative Law Method*, *in* L'influence du droit national et de la jurisprudence des juridictions des États membres sur l'interprétation du droit communautaire, Colloquium proceedings for the 50th anniversary of the Rome Treaties, ECJ, 2007, p. 39

[22] DCFR 'Underlying principles' (Introduction, §15) are freedom, security, justice and efficiency.

refers to the interpretation of the instrument itself. These provisions intend to provide guidance on an appropriate interpretative approach for legislative drafters, judges, arbitrators, or even searchers. The second paragraph of *Article 1:106 of PECL* contemplates the issues not expressly settled by the Principles. In such case, the interpreter is encouraged to follow nevertheless the 'underlying principles', or, to apply the relevant legal determined by conflict of law rules.
The reference to uniformity of application through autonomous interpretation is significant at it is precisely one of the major goals of these instruments. The reference to good faith and fair dealing also constitute a fundamental guideline of these provisions. Such guidelines however may give Courts too much power, which justifies them to be balanced by legal certainty. These interpretation principles are common to several legal systems. Indeed, these works are supposed to reflect a common legal European approach on several questions. In a certain way, they can certainly be considered as "general principles of European law", and thus applied to European shipping contracts.
The delicate issue with regards interpretation is interpretation of Law in the narrow sense of the word, ie legal instruments. If we stick to the words employed in these texts, PECL and DCFR seem irrelevant to interpret shipping Law. Indeed, these provisions concern the interpretation of the instrument itself. For obvious reasons, domestic laws, and EU Regulations should not be interpreted with soft law instruments drafted for contracts.
The conclusion could be different as for interpretation of international conventions[23]. Indeed, current methods of interpretation of international conventions are not so different than those designed for contracts as international convention are also agreements between parties. The analysis of Article 31 of the Vienna Convention on Treaties[24] shows various provisions very similar to those drafted for contracts. For instance, paragraph one gives priority to literal interpretation of the ordinary meaning of the words. The interpretation is also supposed to be consistent with the context of the treaty, considering the text of the convention itself but also the preamble, the Amending Protocols…. The teleological interpretation method is also mentioned, taking into account the light of the purpose, values, legal, social and economical goals these provisions aim to achieve. In this sense, using PECL and DCFR general interpretation provisions could be considered when interpreting conventional instruments, subject to a problem of hierarchy of norms.

6. *Hierarchy of Norms*

Finally, we must admit that such a proposal is quite artificial. First, it is incompatible with public international law principles, especially hierarchy of norms. The Vienna convention binds on States when applying a treaty. Thus, on what grounds could soft law instruments apply in the same way to legal international instruments? Besides, the European origin of these works clearly prevents them from being used to interpret non-EU instruments. As a consequence, we must come to the conclusion that PECL and DCFR scope of application should limit to interpretation of shipping contracts, thus excluding interpretation of international conventions. Such instruments prove to be inappropriate to solve interpretation discrepancies of shipping conventions.

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[23] Franck Latty, et Sébastien Touzé (dir.), *Les techniques interprétatives de la norme internationale* (Revue générale de droit international public 2011/2).
[24] Vienna Convention on the Law of Treaties, 1969.

II. Interpreting Shipping International Contracts with EU Soft Law Instruments

The relevancy of these European instruments includes first to consider the scope of application of these texts (I). Indeed, it seems necessary to check whether shipping issues are covered or not by these instruments. Then, the content of these interpretation provisions will be analysed (II). Both questions will be dealt with regarding relevance towards shipping law.

1. Scope of application of PECL & DCFR

Both PECL and DCFR define their scope of application. As regards shipping, it seems necessary to analyse whether these scopes cover or not such domain. The material scope of these instruments (1.), their geographical scope (2.) and finally their recipients (3.) will be successively analysed.

1.1. Material scope

Both PECL and DCFR specifically address contract law, thus DCFR scope of application is wider[25]. As they constitute a common body of law governing contracts, these texts have been designed to apply to all types of contracts. As a consequence, they should be relevant for shipping contracts, and therefore interpretation of such contracts[26]. As regards general contract Law applied to shipping contracts, both PECL and DCFR aim to constitute a common core for international contracts. PECL provisions are very general and contain basic rules governing contracts, what is called in France 'le droit commun des contrats'. DCFR are more developed as they deal first with general contract rules, and later Book IV addresses specific contracts. But shipping contracts are not mentioned amongst these. It infers that the drafters of these principles did not consider such contracts needed to be addressed specifically and could satisfy with general contract law provisions. These contracts are even excluded from the section dedicated to service contracts[27]. We must come to the conclusion that shipping contracts are only governed by general contract rules under these instruments.

1.2. Geographical scope

PECL and DCFR are European texts applicable to contracts. Should they apply only to European contracts or could they apply more broadly?

European contracts. PECL and DCFR have been drafted at the initiative of European institutions, by European scholars. The aim of these works is to provide European institutions and operators with a set of common rules forming the basis of a harmonized European contract law. In the introduction of DCFR and especially in the paragraph entitled 'Purposes of DCFR', several

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[25] PECL : Article 1:101 (1) : 'Application of the Principles'. The scope of application of DCFR is wider : Book I – article I. – 1:101: 'Intended field of application' : '(1) These rules are intended to be used primarily in relation to contracts and other juridical acts, contractual and non-contractual rights and obligations and related property matters'.

[26] Negotiable instruments are however excluded from the scope of application of DCFR Article 1:101 (2 d). Such exclusions only have a warning function, aiming at noting that the rules have not been drafted taking these excluded specific matters in mind. But they do not forbid the use of these rules for such matters, provided that the users make adaptation.

[27] IV. C. – 1:102 : 'Exclusions' : This Part does not apply to contracts in so far as they are for transport, insurance, the provision of a security or the supply of a financial product or a financial service.

references are made to EU Law, though in the article dedicated to the scope of application of these model rules, no geographical reference appears[28]. By contrast, according to Article 1:101, paragraph 1 of PECL, these principles apply in the European Communities. So far, they are certainly likely to rule European contracts, provided that such contracts could be defined.
Besides, the 2nd paragraph of Article 1:101 precises that PECL only apply on a voluntary basis, through incorporation into a contract. But paragraph 3 goes further as PECL are declared to be applicable when parties have 'agreed that their contract is to be governed by "general principles of law", the "lex mercatoria"' (a), or, 'not chosen any system or rules of law to govern their contract' (b)[29], meaning they may be declared applicable by Courts, or more likely by arbitrators even if not chosen by the contracting parties. As a result, even if these principles have a European origin, they may be applicable to any international contract if chosen by the parties according to paragraph 1. But, when not designated by the parties, my opinion is that only arbitrators could apply such Principles on the grounds of paragraph 3. As for European Member States' Courts, as PECL is soft law, judges cannot apply them under Rome I Regulation[30], in the absence of specific reference in the contract itself. Although the PECL preamble declares them to be part of *Lex mercatoria*, it is doubtful that such principles could be considered as equivalent to "general principles of law" for several reasons all related to their origin. First, their European origin limits their universality. Besides, their academic origin stands in contradiction with such assimilation. *Lex mercatoria* is precisely a set of rules founding its sources in professional practice and it would be rather paradoxical to consider an academic work as equivalent. Of course, it is undeniable that such principles intend partly to codify trade practices[31], but the very nature of these rules are fundamentally opposed. At least such principles could eventually become part of *Lex mercatoria* if used by courts or arbitrators[32]. Obviously however, arbitrators of 'European' contracts could possibly apply these rules. But what is a European shipping contract? Is it a contract concluded between parties established in the EU? A contract performed in the UE? A contract governed by a European domestic Law, even subsidiarily? In the absence of an official definition, arbitrators using such principles should justify the application of these sources from a geographical point of view.

Non-European contracts. Could the examined provisions be applied to contracts outside the EU, on a domestic or international scale? This interrogation is particularly relevant as regards to shipping law which extent is rather global than regional. If chosen by the parties to govern a shipping contract, the answer is certainly yes. Nothing prohibits it. But on the grounds of paragraph 3 of *Article 1:101* of PECL, it is unlikely that court or arbitrators would consider such rules as part of *Lex mercatoria*, or apply them when no choice of law has been made as regards contracts outside the scope of EU. Indeed, such principles may be regarded as reflecting European Common Law but it is questionable whether their application could be extended

[28] Book I – General Provisions - Article I-1:101 : INTEND FIELD OF APPLICATION.

[29] See Unidroit-Principles, PREAMBLE (PURPOSE OF THE PRINCIPLES) § 3 stating in the same way '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.'

[30] Recital 13 of the preamble of REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I) authorizes parties to incorporate by into their contract a non-State body of law or an international convention, but under French interpretation, designation of a soft maw set of rules cannot be considered as a choice of Law under article 3.

[31] Indeed, The PECL were inspired by the United Nations Convention on Contracts for the International Sale of Goods (CISG) from 1980, which is considered somehow as a codification of lex mercatoria regarding international sales' Law.

[32] E. Loquin, 'Les rapports entre le droit modelisé et la lex mercatoria', [2003] Petites affiches 63.

outside Europe. However, it must be noted that they are on many points very similar to Unidroit Principles, and could be thus in practice taken as general principles of contract law by arbitrators.

1.3. Recipients

Finally, must be considered the recipients of such soft Law. According to these texts, the potential users are contracting parties, courts and arbitrators, and finally legislators. As regards to interpretation, the first recipient of these rules should be the contracting parties or their legal advisers confronted to a different interpretation from the parties to an agreement. But more likely, interpretation issues arise when there is a dispute. Thus, recipients of these instruments are judges in a broad sense. Courts (ECJ, Domestic courts) as well as arbitrators are bound by these rules, provided that the apply on a voluntary basis, through incorporation into a contract, But, if the parties have made no specific reference, only arbitrators could apply such rules if the contract is considered as European.
One of the other possible uses of DCFR is to serve as model-law for European legislators, both EU institutions and Member States. Thus, interpretations provisions, like all provisions of this common core, could be used by legislators when drafting legal texts on international contracts, like for instance a possible regulation on multimodal transport[33].

From now on, we will consider that PECL or DCFR may govern shipping contracts. Thus, it is now time to analyse the specific provisions related to interpretation to ensure their relevancy for this type of contracts.

2. PECL & DCFR Interpretation Provisions

First will be analysed the content of the specific provisions on interpretation, and then their relevancy for shipping contracts.

2.1. Content of the provisions

Both texts contain provisions specifically dedicated to interpretation of contracts (PECL : Chap. 5: Interpretation - Articles 5:101 ff. – DCFR : Book II - Contracts and other judicial Acts ; Chap. 8 : Interpretation; Section 1: Interpretation of contracts ; Article II-8:101 ff.). These provisions are essentially identical, as DCFR is indeed inspired of PECL. As a consequence, only DCFR provisions, which are the more recent and the more substantial will be commented, except when PECL provides for significant differences.

Article II : 8:101 (1) *DCFR 'General Rules of Interpretation'*[34], provides for a subjective method of interpretation, based upon primacy of the common intention of the parties. Such method exists in both Common Law and Civil Law, even if EU domestic Courts may combine differently subjective and objective approach. When a common intention cannot be discerned, paragraph 2 recommends taking account of the knowledge of the other party's intention. Subsidiarily, paragraph 3, encourages to employ an objective method of interpretation, by taking an external

[33] See: « European Multimodal Sustainable Transport: Quo Vadis? », colloquium held in September 2014, Institute of International Economic Law, University of Helsinki.
Also See. : InterTran project: http://www.helsinki.fi/katti/english/InterTran-project.htm.
[34] Identical to article 5 :101 PECL.

view. Recourse to the understanding of a reasonable person does not explicitly exist under French Law, but using objective criteria like good faith for example, leads to the same result.
Article II : 8:102 'Relevant Circumstances' lays down a list of circumstances that should be taken into account. This list addresses interpreters using both subjective and objective method. This provision is quite identical to Article 5 :102 of PECL, but some differences exist. Paragraph 2 'Particular case of a third party' of Article II 8 :102 contains indeed a specific provision related to interpretation towards third parties (for instance an assignee). In such case the only acceptable method is the objective one. Indeed, preliminary negotiations or conduct of the parties cannot obviously been taken into account.
Article II : 8 :103 'Contra Proferentem Rule'[35] indicates that interpretation of a term should be made against the party who supplied it. This provision refers to a rule widely recognized in European law or case law, and even in international law. It rests on the idea that the party (or third party) who drafted the contract should bear the risk of interpretation. This rule is relevant as regards shipping contracts as many pre-drafted contracts exist in this field of activity. Standard contracts generally contain standard terms draw up unilaterally by carriers or professional associations of carriers. Thus, shipper and consignee need to be protected in case of ambiguity.
Article II :8:104 'Preference to Negotiated Terms'[36] ensures that terms specifically negotiated by contracting parties prevails over terms of standard contracts. Such a provision is also quite relevant for shipping contracts that often are standardized. For instance, if the parties have agreed a specific jurisdictional clause, it will set aside the standard clause mentioned on a bill of lading.
Article II : 8:105 'Reference to Contract as a Whole'[37] ensures the overall coherence and consistency of the contract.
Article II : 8:106 'Terms to Be Given (Full) Effect'[38] rejects an interpretation that renders the terms of the contract lawful, or effective.
Article II : 8:107 'Linguistic Discrepancies'[39]. When an international contract has been drafted in several languages, and the parties have not provided an authoritative version, this article gives preference for the interpretation according to the version in which the contract was originally drawn up.
From reading these articles, we can easily recognize familiar principles of interpretation of contracts for European lawyers. Thus, there should be no problem to apply them to shipping contracts.

2.2. Application to shipping contracts

As regards shipping contracts, provisions related to interpretation appears to be applicable and even quite relevant on many points. Such a use of these principles could moreover contribute to improve a harmonized interpretation providing a common basis to domestic courts and arbitrators. Thus, shipping operators should be encouraged to designate such texts along with the choice of an international convention or a domestic law, as their are compatible with these latter sources. And in fact they contain rules currently applied by EU State Courts, even if, according to the legal culture of each Member State, one method may be preferred to another.
French cases related to interpretation of transport contracts show that in practice the search for common intention is the predominant method of interpretation. This tendency is reflected in the

[35] Identical to article 5 :103 PECL
[36] Identical to article 5 :104 PECL
[37] Identical to article 5 :105 PECL
[38] Identical to article 5 :106 PECL
[39] Identical to article 5:107 PECL

two following cases. The first case of 2010[40] dealt with air transport but the solution can be transposed to all means of transport. The issue related to the identification of the consignee. The Court interpreted the contract according to the common intention of the parties, noting that the *Société Régionale CAE* was mentioned in the consignee box on the air waybill, and came to the conclusion that this company was the actual consignee. The decision specifically refers to interpretation of the common intention of the parties. But it must be noted that in France, interpretation rules are considered as guidelines and are therefore not biding. Moreover, interpretation is a question of fact, which is not controlled by the Cour de Cassation, as evidenced by the frequent usage of the expression 'interprétation souveraine' by the Court of Appeal (sovereign interpretation). As a consequence, affairs dealing with interpretation are quite rare before the Cour de Cassation. The second case[41] concerned the signing of a bill of lading and the identification of the ship owner. A maritime company had signed the bill specifying 'signed on behalf captain and ship owner'. The Court considered that such a formulation could have two meanings: the first one was that this company was the ship owner, and the second possible interpretation was that the company had signed on behalf of the ship owner. Finally, the Court interpreted the contract according to the evidence submitted and concluded that the company who had signed was not the actual ship owner. These few examples show that even if the above methods of interpretation are not clearly mentioned by French Courts, these follow an interpretation process in accordance with European principles.
Besides, the provisions contained in these instruments are very close to those of Unidroit-Principles on International Commercial Contracts. Several provisions of Unidroit Principles refers to interpretation: In chapter I – 'General provisions' and in chapter IV – 'Interpretation'. A single non-significant difference may be noted. In chapter IV, Article 4.8 'Supplying an omitted term' has no equivalent in European instruments. But I believe Courts and arbitrators usually correct any defect or supply any omission with regards consistency of the contract, even when such a provision is lacking. Thus, discrepancy related to interpretation seems to be unlikely.

In the light of the foregoing considerations, it is now time to conclude to the original question.

3. Conclusion : May Common core, PECL and DCFR be useful to interpret Shipping law?

At this study's end, it is likely to conclude that PECL and DCFR may be useful to interpret shipping contracts and could even contribute to improve harmonization. But however some reservations still exist. First, these provisions provide for common contract rules that may not prove to be really relevant to solve specific difficulties arising from shipping contracts. A single example can evidence this doubt. A very frequent issue in shipping litigations is the applicability of the bill of lading's provisions to the consignee. And yet, PECL or DCFR provisions on interpretation do not contain any relevant solution to these problems. Another reservation concerns the scope of application of these texts. Such texts cannot be considered as codification of *Lex Mercatoria,* and even less of *Lex Maritima.* As a consequence, they cannot apply when not specifically addressed by contracting parties, except possibly by arbitrators. And yet we know

[40] Cass com 8 July 2014, N° 12-29383, unpublished.
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000029247019&fastReqId=860492351&fastPos=1
[41] Cass com 30 November 2010, N° 09-14892, unpublished.
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000023168560&fastReqId=897147087&fastPos=1

that the success of Unidroit Principles is not so effective, although they spread on a wider scale[42]. The success of appropriation of these works by European shipping operators somewhat appears to be jeopardized. Besides, from a geographical point of view, these works addresses mostly European relations. Their applicability on a global level could be acceptable, as their content on interpretation is finally quite similar to Unidroit-Principles that were specially designed for all international contracts. Talking about European legislation on transports however, the concern is always the same : Is the regional level an appropriate level to rule on Transports Law ? In certain areas, like road transport, or passengers' transport, EU may be the appropriate level. But it is much less likely when it comes to Maritime Law.

[42] E. Jolivet, 'Les Principes UNIDROIT dans l'arbitrage CCI', [2005] ICC ICA 01/10/2005, 71 ; 'La jurisprudence arbitrale de la CCI et la lex mercatoria', [2001] La Gazette du Palais, 36 ; Ch. Seraglini, 'Du bon usage des principes UNIDROIT dans l'arbitrage international', [2001] Rev. arb., 1101.