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Model Clauses for Use of the UNIDROIT Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice

(Comments by Professor Lauro Gama Jr.)

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Inviato: martedì 5 febbraio 2013 19.50
A: Bonell, M. Joachim

Dear Joachim,

Please find below some of my comments on your excellent Study L – MC Doc. 1 Rev. Once again, I would like you to know that I am very honoured to participate in this initiative to promote the UNIDROIT Principles.

1. In my opinion, your Study should not forget to mention at para. 33 the 2005 Hague Convention on Choice of Court as an example of the possible use of the UNIDROIT Principles in conjunction with Suggested Model Clause No. 13.

It comes to my mind, for example, that the UNIDROIT Principles may be useful to interpret the notions of « civil or commercial matters » and « internationality », contained in Art. 1 of the Convention. They may also serve to clarify the notions of « writing » and « means of communication which renders information accessible », contained in Art. 3 c) of the Convention. They may be particularly useful to clarify the notion of « damages », contained in Art. 11 of the Convention, vis-à-vis the principle of full compensation.

2. My second comment actually consists of three examples withdrawn from the Brazilian arbitration practice, which may be included in your Study or other future paper related to the Model Clauses:

a) The first two examples relate to the reference to the UPICC as an expression of « general principles of law » (para. 14-17 of your Study).

- A very interesting dispute between a Chilean and a Brazilian company, brought before an arbitral tribunal (CIESP Chamber) in São Paulo, currently involves precisely this issue.It deals with the alleged *breach* of a *distribution and partnership agreement* according to which the Chilean company would provide the Brazilian distributor with *nitrates* to be used as *fertilizers.*The *nitrates* would be sold to the Brazilian distributor at competitive prices with flexible payment arrangements. In exchange the Chilean provider would participate in the profits made by the distributor if and when the prices obtained in Brazil achieved a certain level. The dispute b/w the parties arose because *nitrate* prices rose significantly in Brazil during the contractual period but the Brazilian distributor never remitted the share of profits due to the Chilean provider. Following a technical expertise that is still in course, the arbitrators will have to determine what is the law applicable to the merits of the case, since the parties choice-of-law clause actually conveys a *negative choice.* It reads: "**The arbitrators shall decide the issues submitted to them in accordance with the *international commercial practice* and the *general principles of law.*"** The Claimant (Chilean party) argues that the UPICC reflect the parties reference to *international commercial practice* and *general principles of law* contained in the choice-of-law clause. To support this argument, Claimant refers to the UPICC's preamble, where it says 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."* Additionally, Claimant invokes the official comment to this rule and the UPICC's usefulness in the case at hand, in order to avoid or at least reduce the vagueness of such concepts. Finally, it brings to the arbitrators' attention two ICC awards where the tribunal recognized the UPICC's relevance to the dispute as an expression of general principles of law, saying in one case that: *"several ICC cases have considered that the UPICC are the best approach to apprehend the general principles of law"* and in another case that: *"the terms international*

law used by the parties refer to lex mercatoria and general principles of law applicable to international contractual obligations such as the ones arising out of the Contract. Such general principles are reflected in the UPICC which will be applied for the determination of the parties' respective claims in this arbitration." As concerns the merits of the case, the Chilean Claimant invokes several UPICC provisions in support of his arguments: art. 1.1 (freedom of contract); art. 1.3 (binding character of contract); art. 1.7 (good faith and fair dealing) ; art. 3.2 (validity of mere agreement) and art. 1.2 (no form required); art. 4.8 (supplying an omitted contractual term).

- The other example is an ICC case (no. 11317, of 2002), which involved a money claim brought by a Spanish company against a Brazilian party, arising from a railroad maintenance services agreement. The Brazilian party submitted a counterclaim in which it alleged the wrongful termination of the contract by the other party. The UPICC have been argued in the final submission as a guide for the interpretation of the commercial relationship between the parties, and on the basis that the Terms of Reference had generally referred to "general principles of international commercial contracts" as the law applicable to the dispute. The award has referred to the UPICC in dealing with matters related to the good faith of the parties in performing the contract.

b) The third example relates to the reference to the UPICC as a means of interpreting and supplementing domestic laws (para. 35 ff. of your Study).

- This domestic arbitration procedure was initiated in 2007 before the CBMA (Centro Brasileiro de Mediação e Arbitragem). The dispute dealt with the allegation of anticipatory breach of a contract for real estate development. The UPICC were extensively referred to by a leading scholar engaged by one of the parties who, in her legal opinion, argued for the legality of the application of the concept (of anticipatory non performance) to the case at hand despite the fact that the Brazilian Civil Code was silent on this matter.

3. My third comment is more general in character, and deals with the reference to the UPICC as an expression of « trade usages », « usages of international trade », « internationally recognised usages » or the like (para. 19, of your Study – Suggested Model Clauses no. 5 and no. 6, as well as para. 41 and Suggested Model Clause no. 17).

Although a number of arbitral awards applied the UPICC as an expression of « trade usages », I am not 100% convinced that from a theoretical point of view we should emphasize this application of the UPICC. My concern relates specifically to the fact that the UPICC essentially treat the trade usages as a means to supplement their rules or the intention of the parties (e.g., Art. 1.9, Art. 4.3(f)), rather than treating themselves as an expression of « trade usages », which could be applied independently of the rules of law applicable. How can we possibly conciliate these two approaches to the UPICC without taking the risk of lacking coherence in defining the role of our Principles ?

Warm regards,

Lauro

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