INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS
Working Group for the Preparation of Model Clauses
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Report on the Meeting

1. Opening the meeting, Mr José Angelo Estrella Faria, Secretary-General of UNIDROIT, welcomed the participants and thanked them for their participation.[1] A number of members had been unable to attend, but had sent comments for consideration by the Group. He suggested that in consideration of the fact that he had been the promoter of the project, it was fitting that the Working Group should be chaired by Mr Don Wallace. No objections having been raised, Mr Wallace took the Chair.

2. Mr Wallace thanked Mr Faria. No comments having been made on the Draft Agenda, it was adopted as proposed. Mr Wallace thereafter gave the floor to Mr Bonell, who had acted as *Rapporteur*, asking him to introduce the document he had prepared.[2]

3. Mr Bonell stated that in preparing the list of draft Model Clauses annexed to Doc. 1, he had based himself first of all on current contract practice as regards the UNIDROIT Principles, but also on how judges and arbitrators in practice quite often applied the Principles even in the absence of any reference to them by the parties. He had divided the draft Model Clauses into four main categories: (1) Model Clauses referring to the UNIDROIT Principles as the rules of law governing the contract; (2) Model Clauses referring to the UNIDROIT Principles as terms to be incorporated in the contract; (3) Model Clauses referring to the UNIDROIT Principles as a means of interpreting and supplementing international uniform law instruments: and (4) Model Clauses referring to the UNIDROIT Principles as a means of interpreting and supplementing domestic laws.

4. Whenever appropriate, he had envisaged two variants for each Model Clause: one for inclusion in the main contract and one for use after a dispute had arisen. He had avoided

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1 A full list of participants is to be found in Annex I to this Report.

2 Study L – MC Doc. 1.

being overambitious and had tried not do go beyond the limits that most, if not all, domestic laws nowadays put to the parties' freedom of choice as to the applicable law. This explained whyonly some of the suggested Model Clauses were presented with no restrictions, i.e. as admissible in both court proceedings and arbitral proceedings, whereas others were expressly restricted to arbitral proceedings.

GENERAL DISCUSSION

5. The general discussion dealt with the need for Model Clauses, the addressees of the Model Clauses and the reference to the Principles in the contracts (ex ante) as against the use of the Principles when the dispute had started absent a prior choice of law by the parties (ex post)

(a) Need for Model Clauses

6. There was general agreement on the usefulness of the Model Clauses and on the expectation that they might considerably increase the use of the Principles in contract and litigation practice.

7. It was however recalled that one of the absent members of the Working Group had urged the Group to keep the number of Clauses to a minimum and to simplify the language, pointing out that much of the success so far of the Principles was due to their informal nature and to flexibility in their use.

(b) The Addressees of the Model Clauses

8. The addressees of the Model Clauses were essentially practising lawyers and in-house counsel, but also judges and arbitrators. It was observed that whereas the latter wanted to understand the mechanism of how the Model Clauses worked, practising lawyers needed instructions telling them when to use the Model Clauses and how.

(c) The reference to the Principles in the Contracts (*ex ante*) and the use of the Principles when the dispute had started and absent a prior choice of law by the parties (*ex post*)

9. As indicated by the *Rapporteur*, it was possible for the parties to choose to apply the Principles both before the dispute had arisen (ex ante) and after it had arisen when no choice of law had been made at the time of conclusion of the contract (ex post). Consequently, the Clauses were mostly provided in pairs: the first being the Clause to include in the contract at the time of the conclusion of the contract, the second being a Clause that would permit the parties to choose the Principles when the dispute had already started.

10. The need to distinguish clearly between these situations was stressed in the discussions of the Group.

11. The Group discussed whether it was better to group together all the Clauses that had been proposed for inclusion in the contract and all those that related to the situation where the dispute had already arisen, or to keep the present division. No decision was taken in this matter.

DISCUSSION ON THE PROPOSED MODEL CLAUSES (Study L – MC Doc. 1)

(a) Suggested Model Clause 1

12. A general question raised at the beginning of the discussion on this Clause was what the purpose of the bracketed words “except as” was. It was explained that their purpose was to tell potential users, who might not like all provisions of the Principles, that they could use the Principles even if they excluded the offending provision. It was suggested that this point might be raised in the comments, thereby making the text of the Clauses easier to understand for the user. The importance of indicating that with very few exceptions the application of single Principles could be excluded was also stressed by some members of the Group, even if others pointed out that those familiar with the Principles knew that this was possible. The need for the Clauses to be simple and pragmatic was stressed repeatedly.

(b) Suggested Model Clause 2

13. A first question raised with reference to Clause 2 was why reference was made only to arbitral tribunals. It was observed that the reason was that in practice national courts accepted only the choice of a domestic law, whereas arbitral tribunals accepted also other rules of law such as the Principles. It was suggested that the text of the Clause could be silent on this point, which could be explained in the comments.

14. Another point concerned the language “decide … in accordance with” and why this language was adopted instead of “governed by”. It was suggested that using “governed by” might give rise to misunderstandings, might indeed give the impression that the Principles would be used without the parties having chosen them. An alternative proposed was “shall be interpreted according to the Principles”.

15. It was also pointed out that Clause 1 and following needed to have notes on the limitation of the effectiveness of the clauses.

(c) Suggested Model Clauses 3 and 4

16. The *Rapporteur* explained that what was new in Clauses 3 and 4 was that the parties were reminded that the Principles were not an exhaustive codification, so they might wish to select an applicable domestic law to fill in possible gaps.

17. It was suggested that “supplemented” was unclear if arbitral proceedings were imagined, it would be better to say that only if no answer can be given in the Principles, then the law of jurisdiction X should be resorted to. Another option was “supplemented by otherwise applicable law”.

18. It was observed that two issues were addressed by Clause 3: firstly the fact that by their nature the Principles were incomplete, and to the extent that the Principles did not cover the problems it told users where to go; secondly, the fact that courts do not accept the Principles as sovereign law: the Principles could be incorporated by reference to the extent that the legal systems allowed that. “Supplemented” was not a suitable word for the second situation, it was for the first.

19. It was pointed out that the Model Clauses dealt with a number of different situations and the options proposed were already dealt with. Thus, Clauses 7 and 8 dealt with the incorporation of the Principles in the contract and subjected them to the mandatory rules of applicable law (Clause 7) or to the law of a selected jurisdiction (Clause 8). On the other hand, Clause 14 stated that the contract was governed by the law of a particular jurisdiction interpreted and supplemented by the Principles, whereas Clause 15 stated that the Court or Arbitral Tribunal shall decide the dispute in accordance with the law of a selected jurisdiction interpreted and supplemented by the Principles.

20. A question was raised as to the meaning of the words “supplemented by”. In Clause 3 the Principles were supplemented by national law: what was the role of that law? As a set of rules that could not prevail over the Principles? Reference was made to Article 1.4 of the Principles, under which it was clear that mandatory national laws would always apply. It was pointed out that in arbitration this was true only with respect to so-called overriding mandatory laws. The importance of the amendments made to the Comments to Article 1.4 in the 2010 edition of the Principles was stressed.

(d) Suggested Model Clauses 5 and 6

21. The Group discussed the utility or otherwise of keeping Clause 5, which was difficult to understand. There was uncertainty as to whether there was a difference in legal effect of Clause 5 from Clause 1, whether it added anything to Clause 1. If they were intended to have the same legal effect, they should not be separated by ten pages, Clause 5 should be placed closer to Clause 1. Alternatively, it was suggested to place Clause 1 in the text and Clause 5 in the notes, although others stressed the importance of Clause 5, suggesting certain drafting changes. The words “as stated in” gave rise to objections: they seemed to mean that the arbitrators would have to decide what the rule was.

22. The Clause referred to the *lex mercatoria*. It was suggested that there was a misunderstanding as to what the *lex mercatoria* was, if it was an alternative scenario to place the Principles in. In essence the *lex mercatoria* was an empty box that had to be filled. Having said this, support was given to the *lex mercatoria* solution, without touching the question of whether or not the Principles were *lex mercatoria.*

23. The question was whether the option chosen should be Clause 1, indicating the Principles as the applicable law, or Clause 5. Clause 5 excluded national law and remained in the realm of transnational usages, these could be governed by general principles of international law, including the Principles. It was suggested that wording along these lines either be added to the text, or dealt with in the comments. The words “…and in any case shall take into consideration trade usages” was by way of a standard formula in all arbitration rules. It was suggested that what had been done with the *lex mercatoria* (emptying it and filling the empty box) could be done with the notion of “usages”. The goal of the Model Clauses should be that of helping international trade law, so they should close their eyes if it was done to help create what transnational law otherwise could not develop.

24. The Group was however warned that in some legal systems trade usage was used for contract interpretation and ranked low. The risk of associating the Principles with trade usages was that the status of the Principles would be lowered as well. However, it was observed that for instance in Russia and in China international commercial arbitration referred to the Principles as reflecting trade usages, because what was important was the fact that they were of international origin. It was suggested that this should be explained in the comments and should not be part of Clause 5. It was also suggested that Comment 3 to Article 1.9 of the Principles be referred to in the comments.

25. It was pointed out that the focus of the Model Clauses was the answers, but they were not explicit as to the questions that the Model Clauses were an answer to. It was suggested that the questions should be put, and then an explanation given as to which Clause was the most suitable.

(e) Suggested Model Clauses 7 and 8

26. The choice of the word “incorporate” was questioned, the alternative “governed by” being suggested. It was however observed that “governed by” conveyed the idea that it was not the choice of the parties. Furthermore, in all continental Europe “incorporate” was a term of art which caused no problems.

27. It was observed that it should not be assumed that the parties wanted the Principles as part of their contract. They should not be worried if the Principles read like legislation rather than as a contract. It was suggested that if the Principles were incorporated in a contract, mandatory provisions could be a problem: "subject to mandatory rules" meant "not subject to non-mandatory rules".

28. A question was raised as to how Clauses 1 and 3 were to be distinguished from this. The question was what one did if one did not find a solution in the Principles, and the reply was Clause 7. It was stressed that it was necessary to be transparent in the comments and to state that if the Principles were incorporated in the contract, they were supplemented by national law. Furthermore, it was necessary to explain that in some cases courts were not involved at all. It was suggested that that might be solved by giving the Clause a title along the lines "Model Clause for Incorporating the Principles by Reference". It was also suggested that Clause 1 should be taken as lead for the arbitration scenario and Clause 7 for the court scenario.

(e) Suggested Model Clause 9

29. The draft Clause dealt with the situation when the contract was governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG) interpreted and supplement by the Principles. The comments submitted by UNCITRAL explained that the CISG did itself have a provision dealing with gaps and interpretation, namely Article 7. UNCITRAL suggested that the Principles should step in only after it had not been possible to find the required answers in the principles underlying the Convention. As currently drafted, the Model Clauses instead stepped in immediately.

30. It was recalled that the deletion of the whole of Section III of Doc. 1 had been proposed. This proposal was favourably received by some members of the Group, who considered the Section to introduce an element of complication and that the comments could give all due to the CISG.

31. A discussion ensued on the different ways of applying the CISG: in the case of a Contracting State, the Convention was part of domestic law and would be applied if that domestic law were chosen. There might also be cases in which the Convention would not be applicable because the States had not ratified it or adhered to it, but in which the parties wanted it to apply and therefore chose it as the applicable law. There were also cases in which the contract was governed by domestic law and CISG was part of domestic law and therefore applicable, and other legislation of the domestic law dealt with areas not covered by the CISG. However, the parties might not be satisfied with the domestic law and might want the Principles to apply, but as the domestic law did have legislation, they would not come into play. This was not considered necessarily to be the case, as many national laws were incomplete.

32. It was suggested that sales was such a special case that it might be better to have an extra chapter to deal only with sales. This gave rise to the question how the other instruments would be treated if there was a special Clause on sales. It was felt that the others would come under Clause 14.

33. It was also pointed out that there was a certain problem with the result, as the same result was reached with Clause 14ff as with Clauses 9 and 10. It was suggested that Articles 9 and 10 made sense only if the CISG did not apply as domestic law.

34. Clauses 9 and 10 dealt with the CISG in two aspects: as freely chosen by the parties or by operation of law. Attention could be drawn to this in the comments to Clauses 9 and 10. Doubts were expressed on the utility of distinguishing between the two situations. It was observed that "supplement" did not mean replace the CISG in its entirety. The situation when the parties wanted to replace the CISG in its entirety should not be addressed in Section III, it was a situation that was covered by Clause 1.

(f) Suggested Model Clauses 14, 15, 16 and 17

35. With reference to the Model Clauses which referred to the Principles as a means of interpreting and supplementing domestic laws, a question was raised on the differences between these Model Clauses and Model Clauses 1, 3 and 5. It was pointed out that the difference was that the preference of the parties was for their contract to be ruled by national law, but in the light of international law.

36. It was suggested that two separate clauses might be used, one of which allowing supplementation. It was also observed that Clause 14 would be widely used, but it was difficult to understand that if international instruments were applicable, they should be interpreted in the light of the Principles and it would be helpful if this were explained.

37. The need to have a clause providing for the hierarchy of the instruments that applied to the contract was stressed. A clear priority was needed. Clauses 16 and 17 were not needed.

(g) Mediation

38. The possibility of applying the Principles in mediation was also considered. It was pointed out that there were two types of mediation: one in which the mediator imposed his will, the other, facilitative mediation, in which the mediator tried to facilitate the solution of the controversy. It was stressed that the mediator was not interested in law, but tried to find a solution together with the parties. It was therefore difficult to see what a reference to the Principles could add. Furthermore, it would give the impression that the Principles were not real law. The temptation to make the Principles all to everyone should be resisted.

DISCUSSION ON THE DRAFT PROPOSED CLAUSES AS REVISED[3]

39. A new set of Clauses prepared in the light of the discussion was submitted to the Group for consideration. The revised draft Clauses did not distinguish between the recommended use by arbitrators or courts, as the impression from the discussion of Doc. 1 was that no formal distinction should be made, but that the comments should be used for this purpose. There might be jurisdictions where the relevant rules of private international law allowed the parties to choose the Principles as the law governing the contract.

40. It was suggested that this would be correct if the Clauses were read by lawyers, but not if they were read by businessmen, as the latter did not read introductions. It was pointed out that the intention was to have very concise comments following each Clause and this would help also businessmen. It was stressed, however, that it would not be possible to avoid illustrating the difference between applying the Principles as applicable law, or as incorporated into the contract.

41. It was observed that still simmering was the situation of the contract that incorporated the Principles and then ended up in court. It would be easier for practitioners if there were a hierarchy clause - in any event the Principles already contained a hierarchy, it was a matter of presentation.

42. In relation to the presentation of the document, the Group was reminded that there were many audiences, including judges, in fact, this document might be used to educate judges.

43. It was pointed out that the new Clause 4 was incomplete, as it did not have a Variant B. As regarded Clause 4, in the situation in which Clause 4 had been used by the parties and common law applied to the contract, which would apply? There were concepts that were similar in the two: frustration and hardship, for instance. It was observed that to the extent that the Principles did not infringe the applicable

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[3] See Annex 2.

law, they would apply. The consistency of the Principles with domestic law was not their problem: the Principles would apply as long as consistent: penalty clauses v. liquidated damages, frustration v. force majeure. In the latter case the Principles' doctrine of force majeure would prevail, but as to the consequences these would be determined by the domestic law.

44. It was suggested that it would be useful to have an illustration of what the effect of the Clauses would be, as there would be attempts to reconcile the different approaches. A new foreword might be necessary.

(a) Suggested Model Clause 5

45. Model Clause 5 dealt with the *United Nations Convention on Contracts for the International Sale of Goods (CISG)* interpreted and supplemented by the Principles.

46. Doubts were expressed as to what should go in Clause 5 and what in Clause 6: what about those situations where there was an express choice of the parties for CISG or when it was applied automatically as part of domestic law? Would those cases be illustrated in the comments to Clause 5 or Clause 6? How would the concerns of UNCITRAL be met?

47. It was recalled that for cases in which the CISG applied as domestic law, Clause 6 would apply, meaning that Article 7(2) CISG was replaced by the Principles. Clause 5 should address only situations in which the CISG did not apply automatically, but was chosen by the parties as the applicable law.

48. It was pointed out that the title did not reflect this, it was necessary to go to the notes to see that it was a matter of the Clauses voluntarily subjecting the contract to the CISG in conjunction with the Principles.

49. It was suggested that this was the same as a voluntary choice.

50. It was observed that it would be necessary to choose the wording carefully.

(b) Formal Presentation

51. The question was raised of what the position would be of the clauses already existing in the Principles. It was suggested that they should be replaced by the Model Clauses being elaborated.

52. The presentation of the material in the booklet to be was questioned: presumably there would be some introductory material, then the Clauses would be presented in such a way as to maximise their use. It would be useful if there were an on-line reporting of how the Clauses were used.

53. It was confirmed that what was planned was a booklet with a short introduction, the Clauses, each followed by short comments, no more than two pages each. The role of the UNILEX database in retrieving, collecting and presenting the case law applying the Principles was stressed. The booklet would be available on line. By way of formal presentation it was suggested that the text might be in bold and the comments in small print.

54. The putting in place of a consultation procedure before finalising the text of the Model Clauses was urged. At first a very broad consultation was proposed, but in the end a compromise was reach in that it was agreed that only arbitration institutes handling international arbitration would be consulted on the draft. It would then be feasible to find the e-mail addresses and to ask for comments. There were three months before the next meeting of the Governing Council at which the Model Clauses were expected to be adopted. After the Governing Council had approved the text, it would be sent out widely and the Council informed of the comments received. It was suggested that to the arbitration institutions be added the contacts of the members of the Working Group and world leading city bar leaders from a selected 20 to 25

key bars. It was pointed out that the academic community should not be forgotten, as the universities was where the next generation was being trained.

55. The representative of the ICC Court of Arbitration indicated that the Court was happy to be associated with this consultation process and would give feedback. The ICC itself was more complex but he could envisage a joint event with UNIDROIT to present the Model Clauses. Furthermore, the ICC Commission on Commercial Law and the ICC Institute of World Business Law might also contribute.

56. The possibility of the American Bar Association holding a session to publicise the end product was also envisaged.

57. The tight schedule for the proposed consultations was considered not to fit well with the Russian system. There was a problem of language, so it would be necessary to prepare a translation and other illustrative materials in Russian. There would not be many addressees, but it would be possible to get reactions.

CLOSING OF THE SESSION

58. Closing the session, the Secretary-General thanked participants for their contributions. He announced that a Drafting Committee made up of Messrs Bonell, Cohen and Wallace, assisted by Ms Peters, would meet to prepare a revised text in the light of the discussions, which would be circulated among the participants. After consultations with interested circles, the revised text of the Model Clauses together with comments would be submitted to the Governing Council for approval at its next session in May 2013.

59. The President of UNIDROIT, Mr Alberto Mazzoni, joined the Secretary-General in thanking the participants.

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LIST OF SUGGESTED MODEL CLAUSES AS REVISED

CLAUSE NO. 1 – CLAUSE FOR REFERENCE TO THE UNIDROIT PRINCIPLES AS THE SOLE RULES OF LAW GOVERNING THE CONTRACT

VARIANT A (For Inclusion in the Contract)

"This contract shall be governed by the UNIDROIT Principles of international Commercial Contracts (2010)".

COMMENT:

[...]

VARIANT B (FOR USE AFTER A DISPUTE HAS ARISEN)

"This dispute shall be decided in accordance with the UNIDROIT Principles of International Commercial Contracts (2010)".

COMMENT:

[...]

CLAUSE NO. 2 – CLAUSE FOR REFERENCE TO THE UNIDROIT PRINCIPLES AS THE RULES OF LAW GOVERNING THE CONTRACT IN CONJUNCTION WITH A A PARTICULAR DOMESTIC LAW

VARIANT A (FOR INCLUSION IN THE CONTRACT)

"This contract shall be governed by the UNIDROIT Principles of international Commercial Contracts (2010) and with respect to issues not covered by the Principles by the law of [jurisdiction X]".

COMMENT:

[...]

VARIANT B (FOR USE AFTER A DISPUTE HAS ARISEN)

"This dispute shall be decided in accordance with the UNIDROIT Principles of International Commercial Contracts (2010) and with respect to issues not covered by the Principles by the law of [jurisdiction X]".

COMMENT:

[...]

CLAUSE NO. 3 – CLAUSE FOR REFERENCE TO THE UNIDROIT PRINCIPLES AS THE RULES OF LAW GOVERNING THE CONTRACT IN CONJUNCTION WITH GENERALLY RECOGNISED PRINCIPLES OF INTERNATIONAL CONTRACT LAW

VARIANT A (FOR INCLUSION IN THE CONTRACT)

"This contract shall be governed by the UNIDROIT Principles of international Commercial Contracts (2010) and with respect to issues not covered by the Principles by generally accepted principles of international commercial law".

COMMENT:

[...]

VARIANT B (FOR USE AFTER A DISPUTE HAS ARISEN)

"This dispute shall be decided in accordance with generally accepted principles of international commercial law including the UNIDROIT Principles of International Commercial Contracts (2010)"

COMMENT:

[...]

CLAUSE NO. 4 – CLAUSE REFERRING TO INCORPORATING THE UNIDROIT PRINCIPLES AS TERMS TO BE INCORPORATED INTO THE CONTRACT

VARIANT A (FOR INCLUSION IN THE CONTRACT)

"This contract shall incorporate the UNIDROIT Principles of International Commercial Contracts (2010) [in their entirety] [Chapters X, Y, Z].

COMMENT:

[...]

CLAUSE NO. 5 – CLAUSE FOR REFERENCE TO THE UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

VARIANT A (FOR INCLUSION IN THE CONTRACT)

"This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG) interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010)."

COMMENT:

[...]

VARIANT B (FOR USE AFTER A DISPUTE HAS ARISEN)

"This dispute shall be decided in accordance with the United Nations Convention on Contracts for the International Sale of Goods (CISG) interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010)."

COMMENT:

[...]

CLAUSE NO. 6 – CLAUSE FOR REFERENCE TO THE UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING THE APPLICABLE DOMESTIC LAW

VARIANT A (FOR INCLUSION IN THE CONTRACT)

"This contract shall be governed by the law of [jurisdiction X] interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010)."

COMMENT:

[...]

VARIANT B (FOR USE AFTER A DISPUTE HAS ARISEN)

"This dispute shall be decided in accordance with the law of [jurisdiction X] interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010)."

COMMENT:

[...]