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MODEL CLAUSES FOR THE USE OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

INTRODUCTION

1. The UNIDROIT Principles of International Commercial Contracts (hereinafter "the UNIDROIT Principles"), first published in 1994, with a second edition in 2004 and now in their third (2010) edition (hereinafter "UNIDROIT Principles 2010"), represent a non-binding codification or "restatement" of the general part of international contract law. Welcomed from their first appearance as "a significant step towards the globalisation of legal thinking" (J.M. Perillo), over the years they have been well received not only by academics but also in practice, as demonstrated by the numerous court decisions and arbitral awards rendered world-wide that refer in one way or another to the UNIDROIT Principles.(*)

2. There is, however, a clear perception that the potentialities of the UNIDROIT Principles in transnational contract and dispute resolution practice have not yet been fully realised. This is due to a large extent to the fact that the UNIDROIT Principles are still not sufficiently well-known among the international business and legal communities so that much remains to be done to bring them to the attention of all their potential users worldwide. While this is true of all international uniform law instruments, with respect to the UNIDROIT Principles there is an additional factor to be taken into consideration. Unlike binding instruments, such as, *e.g.*, the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter "the CISG"), which are applicable whenever the contract at hand falls within their scope and the parties have not excluded their application, the UNIDROIT Principles, being a "soft law" instrument, offer a greater range of possibilities of which parties are not always fully aware. Hence the idea of preparing Model Clauses that parties may wish to adopt in order to indicate more precisely in what way they wish the UNIDROIT Principles to be used during the performance of the contract or when a dispute arises.

3. The Model Clauses suggested below are primarily based on the use of the UNIDROIT Principles in transnational contract and dispute resolution practice, *i.e.* they reflect the different ways in which the UNIDROIT Principles are actually being referred to by parties or applied by judges and arbitrators. The Model Clauses are divided into four categories according to whether their purpose is (i) to choose the UNIDROIT Principles as the rules of law governing the contract, (ii) to incorporate the UNIDROIT Principles as terms of the contract, (iii) to refer to the UNIDROIT Principles to interpret and supplement the CISG when the latter is chosen by the parties, or (iv) to refer to

(*) For an up to date collection of court decisions and arbitral awards (at least in the form of abstracts) referring in one way or another to the UNIDROIT Principles see the database UNILEX (http://www.unilex.info).

the UNIDROIT Principles to interpret and supplement the applicable domestic law, including any international uniform law instrument incorporated into that law.

4. Where appropriate, for each Model Clause two versions are proposed, one for inclusion in the contract ("pre-dispute use") and one for use after a dispute has arisen ("post-dispute use").

5. The Model Clauses are deliberately drafted in a concise manner, leaving it to the Comments to indicate possible modifications or additions parties may wish to make.

6. The Model Clauses refer to the UNIDROIT Principles 2010, but parties are free to choose the previous editions of 1994 and 2004 (which, however, cover fewer topics). If the parties refer to the UNIDROIT Principles without specifying the edition, it should be presumed that the reference is to the current edition.

7. Parties should be aware that, since the purpose of the Model Clauses is merely to allow the parties to indicate more precisely the way they wish the UNIDROIT Principles to be used during the performance of the contract or when a dispute arises, even if they decide not to use these Model Clauses, judges and arbitrators may still apply the UNIDROIT Principles according to the circumstances of the case as they have been doing so far.

1. MODEL CLAUSES CHOOSING THE UNIDROIT PRINCIPLES AS THE RULES OF LAW GOVERNING THE CONTRACT

General remarks

1. There are several reasons for which parties – be they powerful "global players" or small or medium businesses – may wish to choose the UNIDROIT Principles as the rules of law governing their contract or, in case of a dispute, as the rules of law applicable to the substance of the dispute. Except where one of the parties is in a position to persuade the other to accept its own domestic law, parties are usually reluctant to agree on the application of the domestic law of the other. The choice of a "neutral" law, *i.e.* the law of a third country, to avoid choosing the domestic law of either party presents obvious inconveniences, since such "neutral" law is foreign to both parties and to know its content may require time consuming and expensive consultation with lawyers of the country of the law chosen. The UNIDROIT Principles are a useful alternative to the choice of both the domestic law of one of the parties and the law of a third country. The UNIDROIT Principles provide a balanced set of rules covering virtually all the most important topics of general contract law, such as formation, interpretation, validity including illegality, performance, non-performance and remedies, assignment, set-off, plurality of obligors and of obligees, as well as the authority of agents and limitation periods. Moreover, and even more important, the UNIDROIT Principles, prepared by a group of experts representing all the major legal systems of the world and available in virtually all the major international languages, are designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied.

2. Parties wishing to choose the UNIDROIT Principles as the rules of law governing their contract or as the rules of law applicable to the substance of the dispute, may choose the UNIDROIT Principles without any reference to other legal sources (see Model Clauses No. 1.1 (a) and (b)), or choose the UNIDROIT Principles supplemented by a particular domestic law (see Model Clauses No. 1.2 (a) and (b)) or by "generally accepted principles of international commercial law" (see Model Clauses No. 1.3 (a) and (b)).

3. In all these cases the parties may refer to the UNIDROIT Principles either in their entirety or with the exception of individual provisions thereof which they do not consider appropriate for the kind of transaction/dispute involved.

4. Parties choosing the UNIDROIT Principles as the rules of law governing their contract or the rules of law applicable to the substance of the dispute are well advised to combine such a choice-of-law clause with an arbitration agreement. Domestic courts are bound by the rules of private international law of the forum, which traditionally and still predominantly limit the parties' freedom of choice to domestic laws, so that a purported choice of non-state rules such as the UNIDROIT Principles will be considered not as a choice of law but, rather, as an agreement to incorporate them into the contract. The consequence of this treatment of non-state rules is that they bind the parties only to the extent that they do not conflict with the rules of the applicable domestic law from which the parties may not vary by agreement (for some examples of such "ordinary" mandatory rules of the applicable domestic law see Model Clause No. 2, Comment § 5, *infra* p. 7). In the context of international commercial arbitration, however, parties are nowadays generally permitted to choose "soft law" instruments such as the UNIDROIT Principles as the "rules of law" on which the arbitrators are to base their decisions. Consequently, in arbitration, the UNIDROIT Principles apply within their scope to the exclusion of any particular national law, subject only to the application of those rules of domestic law which are mandatory irrespective of which law governs the contract; and since such "overriding" mandatory rules are for the most part of public law nature (e.g. prohibition of corruption; exchange control regulations; anti-trust rules; environmental protection rules; etc.), their application along with the UNIDROIT Principles normally will not give rise to any true conflict.

5. Parties may refer to the UNIDROIT Principles also where they agree that the arbitral tribunal shall decide *ex equo et bono* or as *amiable compositeur.* However, in such a case the arbitral tribunal will apply the UNIDROIT Principles as the rules of law governing the substance of the dispute only to the extent that their strict application does not lead to an inequitable result in the dispute at hand.

6. Parties may refer to the UNIDROIT Principles even in the context of conciliation. However, in such a case the conciliator will merely use the UNIDROIT Principles as guidance when formulating the terms of a possible settlement agreement for submission to the parties for approval.

1.1 MODEL CLAUSES CHOOSING ONLY THE UNIDROIT PRINCIPLES

(a) Model Clause for inclusion in the contract

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

Comment

1. This Model Clause may be used by parties wishing to choose the UNIDROIT Principles as the rules of law governing their contract without any reference to other legal sources (see UNIDROIT Principles 2010, Preamble § 2).

2. As to the different effects which such a choice may have on the application of the UNIDROIT Principles depending on as to whether it will be invoked in court proceedings or in arbitration proceedings, see Model Clauses No. 1, General Remarks, § 4, *supra* p. 3.

3. If parties choose only the UNIDROIT Principles as the rules of law governing their contract, the question arises as to how to deal with issues not covered by the UNIDROIT Principles. Indeed, comprehensive as the UNIDROIT Principles are, there are still issues which fall within their scope of but are not expressly settled by them (e.g. specific cases of negotiations in bad faith (see Comment 2 to Article 2.1.15 UNIDROIT Principles 2010); the extent of the duty of co-operation (see Comment to Article 5.1.4 UNIDROIT Principles 2010); specific duties to preserve the other party's rights pending fulfillment of a condition (see Article 5.3.4 UNIDROIT Principles 2010); etc.). Moreover other issues are outside the scope of the UNIDROIT Principles (e.g. lack of capacity (see Article 3.1.1 UNIDROIT Principles 2010); the internal relationship between principal and agent (see Article 2.2.1 (2) UNIDROIT Principles 2010); the authority of organs, officers or partners of a corporation (see Article 2.2.1 (3) UNIDROIT Principles 2010); etc.), as are issues relating to specific types of contracts (e.g. with respect to sales contracts, the buyer's duty to examine the goods and to give notice thereof to the seller; special remedies for defects of the goods; the passing of the risk; etc.). Issues within the scope of the UNIDROIT Principles but not expressly settled by them may be settled, as far as possible, in accordance with the basic ideas underlying the UNIDROIT Principles (see Article 1.6 UNIDROIT Principles 2010). By contrast, issues outside the scope of the UNIDROIT Principles and, therefore, not covered by them at all will of necessity be governed by other legal sources. Unless the contract provides a reference to the sources to be used (as in Model Clauses 1.2 and 1.3), they will be determined in accordance with relevant rules of private international law. Inasmuch as those rules vary somewhat from State to State and are not always predictable in their application, the absence of such a reference may result in some uncertainty as to the source of rules that will apply to matters outside the scope of the UNIDROIT Principles.

(b) Model Clause for use after a dispute has arisen

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

Comment

1. This Model Clause may be used by parties wishing to choose, after a dispute relating to their contract has arisen, the UNIDROIT Principles as the rules of law applicable to the substance of the dispute without any reference to other legal sources.

2. Depending on the applicable rules of procedure parties may do so by a separate agreement, before or after the commencement of the court or arbitration proceedings.

3. As to the different effects this Model Clause may have on the application of the UNIDROIT Principles, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, § 4, *supra* p. 3.

4. As to the question of how to deal with the case where the disputed issues are not covered by the UNIDROIT Principles, see Model Clause No. 1.1 (a), Comment, § 3, *supra* p. 4.

1.2. MODEL CLAUSES CHOOSING THE UNIDROIT PRINCIPLES SUPPLEMENTED BY A PARTICULAR DOMESTIC LAW

(a) Model Clause 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 such Principles, by the law of [State X]".

Comment

1. This Model Clause may be used when the parties, in view of the fact that the UNIDROIT Principles do not cover all issues that may arise in relation to their contract, wish to choose the UNIDROIT Principles as the rules of law governing their contract together with a particular domestic law to which to resort to fill possible gaps in the UNIDROIT Principles. In so doing, the parties will avoid the possibility present in Model Clause No. 1.1 (a) that a dispute will arise that is outside the scope of the UNIDROIT Principles and that the governing law will be determined by the adjudicating body in accordance with the relevant rules of private international law (see Model Clause No. 1.1 (a), Comment, § 3, *supra* p. 4).

2. When choosing the domestic law, parties should bear in mind that in the case of a multi-unit State (e.g. the United States of America; Canada; Australia; etc.) they should specify the particular jurisdiction to which they intend to refer (e.g. the law of the State of New York; the law of the Province of Quebec, etc.).

3. As to the different effects this Model Clause may have on the application of the UNIDROIT Principles, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, § 4, *supra* p. 3.

(b) Model Clause 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 [State X]".

Comment

1. This Model Clause may be used by parties wishing to choose, after a dispute relating to their contract has arisen, the UNIDROIT Principles as the rules of law applicable to the substance of the dispute together with a particular domestic law to fill possible gaps in the UNIDROIT Principles. In so doing, the parties will avoid the possibility present in Model Clause No. 1.1 (b) that a dispute will arise that is outside the scope of the UNIDROIT Principles and that the governing law will be determined by the adjudicating body in accordance with the relevant rules of private international law (see Model Clause No. 1.1 (a), Comment, § 3, *supra* p. 4).

2. Depending on the applicable rules of procedure, parties may do so by a separate agreement either before or after the commencement of the court or arbitration proceedings.

3. As to the different effects this Model Clause may have on the application of the UNIDROIT Principles, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, § 4, *supra* p. 3.

1.3 MODEL CLAUSES CHOOSING THE UNIDROIT PRINCIPLES SUPPLEMENTED BY GENERALLY ACCEPTED PRINCIPLES OF INTERNATIONAL COMMERCIAL LAW

(a) Model Clause 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 such Principles, by generally accepted 'principles of international commercial law".

***Comment*:**

1. This Model Clause may be used when the parties, in view of the fact that the UNIDROIT Principles do not cover all issues that may arise in relation to their contract, wish to choose the UNIDROIT Principles as the rules of law governing their contract together with generally accepted principles of international commercial law to which to resort to fill possible gaps in the UNIDROIT Principles. In so doing, the parties will avoid the possibility present in Model Clause No. 1.1 (a) that a dispute will arise that is outside the scope of the UNIDROIT Principles and that the governing law will be determined by the adjudicating body in accordance with the relevant rules of private international law (see Model Clause No. 1.1 (a), Comment, § 3, *supra* p. 4).

2. Instead of referring to "generally accepted principles of international commercial law", parties may use other formulations such as "general principles of law", "generally accepted principles of international contract law", the *lex mercatoria*, international customs and usages, or the like: all such formulations have one and the same purpose, *i.e.*, to indicate the parties' determination to have possible gaps in the UNIDROIT Principles filled in accordance with transnational principles and rules and not by resort to a particular domestic law.

3. As to the different effects this Model Clause may have on the application of the UNIDROIT Principles, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, § 4, *supra* p. 3.

(b) Model Clause 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 such Principles, by generally accepted principles of international commercial law".

***Comment*:**

1. This Model Clause may be used by parties wishing to choose, after a dispute relating to their contract has arisen, the UNIDROIT Principles as the rules of law applicable to the substance of the dispute together with generally accepted principles of international commercial law to which to resort to fill possible gaps in the UNIDROIT Principles. In so doing, the parties will avoid the possibility present in Model Clause No. 1.1 (b) that a dispute will arise that is outside the scope of the UNIDROIT Principles and that the governing law will be determined by the adjudicating body in accordance with the relevant rules of private international law (see Model Clause No. 1.1 (a), Comment, § 3, *supra* p. 4).

2. Instead of referring to "generally accepted principles of international commercial law", parties may use other formulations such as "general principles of law", "generally accepted principles of international contract law", the *lex mercatoria*, international customs and usages, or

the like: all such formulations have one and the same purpose, i.e., to indicate the parties' determination to have possible gaps in the UNIDROIT Principles filled in accordance with transnational principles and rules and not by resorting to a particular domestic law.

3. Depending on the applicable rules of procedure parties may do so by a separate agreement, before or after the commencement of the court or arbitration proceedings.

4. As to the different effects this Model Clause may have on the application of the UNIDROIT Principles, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, § 4, *supra* p. 3.

2. MODEL CLAUSE INCORPORATING THE UNIDROIT PRINCIPLES AS TERMS OF THE CONTRACT

"The UNIDROIT Principles of International Commercial Contracts (2010) are incorporated in this contract to the extent that they are not inconsistent with the other terms of the contract".

Comment

1. This Model Clause may be used when the parties, instead of choosing the UNIDROIT Principles as the rules of law governing their contract, wish to incorporate the UNIDROIT Principles in their contract. One of the reasons for opting for this approach may be that – as is generally the case in court proceedings – according to the relevant rules of private international law parties cannot choose a "soft law" instrument such as the UNIDROIT Principles as the rules of law governing their contract (see model Clauses No. 1, General Remarks, § 4, *supra* p. 3).

2. Parties may incorporate in their contract the UNIDROIT Principles in their entirety, or only specific chapters or sections thereof, and in so doing they may either merely refer to them or reproduce the relevant texts. This Model Clause incorporates the UNIDROIT Principles in their entirety and does so by reference to them.

3. By stating that the UNIDROIT Principles are incorporated to the extent that they are not inconsistent with the other terms of the contract, the Model Clause makes it clear that in case of a conflict between the UNIDROIT Principles and the other terms of the contract, the latter prevail. In order to avoid any uncertainty in this respect the parties may wish to list all the documents forming part of their contract and establish their priority.

4. Parties incorporating the UNIDROIT Principles in their contract may also indicate the domestic law governing the contract. Absent an express choice by the parties, the domestic law governing the contract will be determined by the adjudicating body according to the relevant rules of private international law.

5. As terms of the contract, the UNIDROIT Principles will prevail over the non-mandatory or "default" rules of the applicable domestic law but not over the mandatory rules, i.e. the rules from which parties cannot vary by agreement. It is true that in the field of general contract law mandatory rules are rather rare; however, domestic mandatory rules that prevail over conflicting rules of the UNIDROIT Principles may exist, if at all, *inter alia* with respect to special requirements as to form, contracting on the basis of standard terms, illegality, public permission requirements, contract adaptation in case of hardship, exemption clauses, penalty clauses and limitation periods.

3. MODEL CLAUSES REFERRING TO THE UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) WHEN THE LATTER IS CHOSEN BY THE PARTIES

General remarks

1. It is nowadays widely recognised that international uniform law instruments, even after their incorporation in the various domestic laws, remain an autonomous body of law which should be interpreted and supplemented according to autonomous and internationally uniform principles and rules, and that recourse to domestic law should be only a last resort. In the past, such autonomous principles and rules had to be found each time by the judges and arbitrators themselves. The UNIDROIT Principles could considerably facilitate their task in this respect (see UNIDROIT Principles 2010, Preamble, § 5).

2. The use of the UNIDROIT Principles as a means of interpreting and supplementing uniform law instruments is particularly relevant with respect to the CISG. Notwithstanding the different scope of application of the two instruments – international commercial contracts in general in the case of the former, international sales contracts in the case of the latter – the instruments deal with many of the same issues concerning contract formation, interpretation, performance, non-performance and remedies. Since the provisions contained in the UNIDROIT Principles are more comprehensive and in general more detailed, they may in many cases provide a solution for ambiguities or gaps in the CISG.

3. Article 7 of the CISG states that "[i]n the interpretation of this Convention regard is to be had to its international character and to the need to promote uniformity in its application [...]" (paragraph 1) and that "[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based and, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law" (paragraph 2).

4. Parties wishing to ensure that, if the CISG governs their contract, it will be interpreted and supplemented by the UNIDROIT Principles should expressly stipulate this in their contract or in a separate agreement. However, in so doing the parties should be aware that the effects of their reference to the UNIDROIT Principles as a means of interpreting and supplementing the CISG differ considerably depending on whether CISG applies (i) as a result of a choice by the parties (even though the CISG would not otherwise govern as a matter of domestic law) or (ii) as a matter of the domestic law governing the contract (see Model Clause No. 3 (a) Comment § 2, *infra* p. 9 and Model Clause No. 4 (a) Comment § 3, *infra* p. 10, respectively).

(a) Model Clause 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

1. This Model Clause may be used when parties choose the CISG to govern their contract, even though the objective requirements for the application of the CISG are not met, and wish the CISG to be interpreted and supplemented by the UNIDROIT Principles. As to the role of the UNIDROIT Principles as a means of interpreting and supplementing the CISG where the CISG applies as integral

part of the domestic law governing the contract, see Model Clause No. 4 (a), Comment § 3, *infra* p. 10).

2. By using this Model Clause, the parties achieve a twofold result: first, their contract will be governed by the CISG and not by the otherwise applicable domestic law which has not incorporated the CISG; second, since the CISG will apply not as a matter of binding domestic law but, rather, only as a "soft law" instrument chosen by the parties to govern their contract, the UNIDROIT Principles may be used to interpret and supplement the CISG not only with respect to issues covered by the CISG but not expressly settled by it (cf. Article 7(2) CISG), but also with respect to other issues of general contract law which are outside the scope of the CISG but may become relevant also in the context of sales contracts (such as contracting on the basis of standard terms, authority of agents, defects of consent, illegality, conditions, set-off, assignment of rights, limitation periods, etc.).

3. As to the different effects this Model Clause may have on the application of the CISG and of the UNIDROIT Principles as a means of interpreting and supplementing the CISG, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, § 4, *supra* p. 3.

(b) Model Clause 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

1. This Model Clause may be used by parties wishing to choose, after a dispute relating to their contract has arisen, the CISG as the rules of law applicable to the substance of the dispute, even though the objective requirements for the application of the CISG are not met, and to refer to the UNIDROIT Principles as a means of interpreting and supplementing the CISG.

2. Depending on the applicable rules of procedure parties may do so by a separate agreement either before or after the commencement of the court or arbitration proceedings.

3. As to the different effects this Model Clause may have on the application of the CISG and of the UNIDROIT Principles as a means of interpreting and supplementing the CISG, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, § 4, *supra* p. 3.

4. MODEL CLAUSES REFERRING TO THE UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING THE APPLICABLE DOMESTIC LAW

General remarks

The UNIDROIT Principles may play – and, in fact, increasingly do play – an important role in the interpretation and supplementation of the domestic law governing the contract or applicable to the substance of the dispute (see UNIDROIT Principles 2010, Preamble, § 6). This is the case in particular when the domestic law in question is that of a country with a less developed legal system. Yet even highly developed legal systems do not always provide a clear-cut solution to

specific issues arising out of international commercial contracts, either because opinions are sharply divided or because the issue at stake has so far not been addressed at all. In both cases, a clause referring to the UNIDROIT Principles may be used to ensure an interpretation and supplementation of the applicable domestic law in accordance with the internationally accepted principles and rules set forth in the UNIDROIT Principles.

(a) Model Clause for inclusion in the contract

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

Comment

1. This Model Clause may be used by parties who choose a particular domestic law as the law governing their contract and wish that law to be interpreted and supplemented by the UNIDROIT Principles. In so doing, the parties ensure that the domestic law that is designated will be interpreted and supplemented in accordance with internationally accepted principles and rules as laid down in the UNIDROIT Principles.

2. Parties may wish to refer to the UNIDROIT Principles as a means of interpreting and supplementing the applicable domestic law not only when the domestic law in question is that of a country with a less developed legal system but also when it is a highly developed legal system. Even highly developed legal systems do not always provide a clear-cut solution to specific issues arising out of international commercial contracts, so that a solution has to be found on a case to case basis. By referring to the UNIDROIT Principles to interpret and supplement the applicable domestic law, parties will in both cases achieve greater predictability and thereby reduce transactional and litigation costs.

3. This Model Clause has also the effect that international uniform law instruments incorporated in the domestic law governing the contract are, to the extent needed, to be interpreted and supplemented in accordance with the UNIDROIT Principles. In particular, as far as the CISG is concerned, by using this Model Clause the parties would impliedly derogate from Article 7(2) CISG by indicating that gaps in the Convention are to be filled in conformity with the UNIDROIT Principles, and only as a last resource with reference to the applicable domestic law, rather than "in conformity with the general principles on which [the CISG] is based and, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law". However, contrary to the effects of Model Clause No. 3, under this Model Clause the UNIDROIT Principles would act as gap-filler only with respect to issues governed by the CISG but not expressly settled in it, whereas issues outside the scope of the CISG would be governed by the applicable domestic law.

(b) Model Clause for use after a dispute has arisen

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

Comment

1. This Model Clause may be used by parties wishing to choose, after a dispute relating to their contract has arisen, a particular domestic law as the law applicable to the substance of the dispute and to refer to the UNIDROIT Principles as a means of interpreting and supplementing the domestic law in question.

2. Depending on the applicable rules of procedure, parties may do so by a separate agreement either before or after commencement of the court or arbitration proceedings.

3. The effects of this Model Clause on the application of the UNIDROIT Principles as a means of interpreting and supplementing the domestic law chosen as the law governing the contract are basically the same regardless as to whether the parties invoke it before a domestic court or an arbitral tribunal. It is true that domestic courts consider the interpretation and gap-filling of the applicable domestic law in principle to be their prerogative. However, at least with respect to issues covered by party autonomy, not only arbitral tribunals but also domestic courts will normally follow the indications made by both of the parties as to how they wish to have ambiguities in the applicable law resolved or gaps filled, and to this effect it is irrelevant whether such indications are made by the parties in their pleadings with respect to specific issues under dispute or by a reference to the UNIDROIT Principles with respect to all issues that may become relevant.