



**PRINCIPLES OF INTERNATIONAL
COMMERCIAL CONTRACTS**
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Model Clauses**
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**Model Clauses for Use of the UNIDROIT Principles of International Commercial Contracts
in Transnational Contract and Dispute Resolution Practice**

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INTRODUCTION

1. - The UNIDROIT Principles of International Commercial Contracts (hereinafter “the UNIDROIT Principles”), now in their third edition (hereinafter “the UNIDROIT Principles 2010”), represent a private codification or “restatement” of the general part of international contract law. Welcomed right from their first appearance in 1994 as “a significant step towards the globalisation of legal thinking” (J.M. Perillo) and “a particularly authoritative and valid expression of the *lex mercatoria*” (P.Lalive), over the years they have been well received not only by academics but also in practice. Notwithstanding their non-binding nature, they are increasingly being used not only by parties when drawing up their contracts but also by courts and arbitral tribunals for the settlement of disputes, as demonstrated by the numerous court decisions and arbitral awards rendered world-wide and referring 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. Yet 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. In fact unlike binding instruments, such as e.g. the United Nations Convention on Contracts for the International Sale of Goods (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 applicable only by virtue of their persuasive value, offer a greater range of possibilities of which parties are not always fully aware. Hence the idea of preparing Model Clauses parties may wish to adopt in their contract in order to indicate more precisely in what way they wish to see the UNIDROIT Principles be used during the performance of the contract or when a dispute arises. The Governing Council of UNIDROIT decided at its 91st session in May 2012 to set up a restricted Working Group to prepare such Model Clauses. The present position paper with the draft Model Clauses suggested therein is intended to provide a basis for discussion by the Working Group.

3. – The Model Clauses suggested below are based on the use of the UNIDROIT Principles in transnational contract and dispute resolution practice. In other words, they reflect the different ways in which the UNIDROIT Principles are actually being referred to by parties or applied by judges and arbitrators. With respect to the decisions applying in one way or another the UNIDROIT Principles, due consideration is given also to those cases – actually the majority – in which judges and arbitrators have applied the UNIDROIT Principles even in the absence of any reference to them by the parties. This, in order to demonstrate that if parties were to adopt the

(*) As of 1 January 2013 the total number of decisions referring in one way or another to the UNIDROIT Principles collected in the database UNILEX (www.unilex.info) was 308, 167 of which were arbitral awards and 141 court decisions. Since most of arbitral awards remain confidential, the number of awards is in fact likely to be much greater.

suggested Model Clauses, they would basically be requesting courts or arbitral tribunals to use the UNIDROIT Principles in a way the latter are already often doing on their own motion.

4. – In view of the actual use of the UNIDROIT Principles in transnational contract and dispute resolution practice, four main categories of Model Clauses may be distinguished: Model Clauses referring to the UNIDROIT Principles as the rules of law governing the contract or applicable to the substance of the dispute (I); Model Clauses referring to the UNIDROIT Principles as terms to be incorporated in the contract (II); Model Clauses referring to the UNIDROIT Principles as a means of interpreting and supplementing international uniform law instruments (III); Model Clauses referring to the UNIDROIT Principles as a means of interpreting and supplementing domestic laws (IV). Within each of these categories, whenever appropriate, a further distinction will be made among various ways in which the reference to the UNIDROIT Principles may be structured.

I. MODEL CLAUSES REFERRING TO THE UNIDROIT PRINCIPLES AS THE RULES OF LAW GOVERNING THE CONTRACT OR THE RULES OF LAW APPLICABLE TO THE SUBSTANCE OF THE DISPUTE

5. – There are several reasons for which parties – be they powerful “global players” or small or medium businesses – may wish to refer to genuinely neutral a-national or transnational rules, such as 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.

6. – Apart from situations 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, and prefer to avoid the inconveniences which inevitably follow the choice of a “neutral” law, *i.e.* the law of a third country. The UNIDROIT Principles offer an alternative neutral set of rules which the parties may wish to choose to govern their contract. There are intrinsic merits which render the UNIDROIT Principles particularly apt to provide the normative framework for transnational business transactions. Prepared by a group of experts representing all the major legal systems of the world and available in virtually all the major international languages, the UNIDROIT Principles lay down a balanced set of rules 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.

7. – 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. The reason for this is that domestic courts are bound by the rules of private international law of the forum which traditionally limit the parties’ freedom of choice to domestic laws, with the result that a reference to the UNIDROIT Principles will be considered as an agreement to incorporate them into the contract with the consequence that they bind the parties only to the extent that they do not affect the rules of the applicable law from which the parties may not derogate. On the contrary, in the context of international commercial arbitration parties are nowadays generally permitted to choose instead of a state law soft-law instruments such as the UNIDROIT Principles as the “rules of law” on which the arbitrators are to base their decisions (cf. Article 28(1) of the *1985 UNCITRAL Model Law on*

International Commercial Arbitration; Article 21(1) of the 2012 *ICC Rules of Arbitration*; Article 28(1) of the 1997 *American Arbitration Association International Arbitration Rules*; Art. 42(1) of the 1965 *ICSID Convention*), with the result that within their scope the UNIDROIT Principles would apply 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.

8. – Parties may combine a choice-of-law clause in favour of the UNIDROIT Principles with an arbitration agreement in a special provision in their contract or in a separate agreement after a dispute has arisen. In so doing they may opt for arbitration administered by an arbitral institution or for non-administered or *ad hoc* arbitration, using existing model clauses such as the Standard ICC Arbitration Clauses, the Model Arbitration Clause of the Arbitration Institute of the Stockholm Chamber of Commerce, the American Arbitration Association Clauses for Use in International Disputes, the Model Clause of the Kuala Lumpur Regional Centre for Arbitration, the UNICITRAL Model Arbitration Clause for Contracts, etc.^(**)

(a) Reference to the UNIDROIT Principles as the sole rules of law governing the contract or applicable to the substance of the dispute

9. – Parties may choose the UNIDROIT Principles as the sole rules of law governing their contract or applicable to the substance of the dispute, and in so doing they may refer to the UNIDROIT Principles either in their entirety or with the exception of individual provisions thereof.

Example

1. Distribution agreement between a Mexican grower and a U.S. distributor containing an arbitration clause providing that: "In case of a dispute relating to this contract and deriving from its non-performance, termination or validity, the parties agree to settle it finally by arbitration conducted in conformity with the Arbitration Rules of the Centro de Arbitraje de México (CAM), and, as to the law applicable to the substance of the dispute, governed by the UNIDROIT Principles [...]."

2. Membership Agreement of COVISINT, an electronic marketplace set up among DaimlerChrysler, Ford, General Motors, Nissan, Peugeot and Renault for their suppliers, providing that: "The Product Agreement shall be construed in accordance with the UNIDROIT Principles of International Commercial Contracts, with the exception of Section 4.6 [*"Contra proferentem rule"*] which is excluded due to the difficulty of providing explicit language to cover each possible interpretation that may arise in a multi-national legal structure."

10. – Parties may – and in fact often do – choose the UNIDROIT Principles as the rules of law applicable to the substance of the dispute even after commencement of the arbitral proceedings. Such a choice may be made either expressly, e.g. in the Terms of Reference, or implicitly, e.g. by arguing in the statements of claim and statements of defence exclusively on the basis of individual provisions of the UNIDROIT Principles.

^(**) For example, parties wishing to combine a choice-of-law clause in favour of the UNIDROIT Principles with a Standard ICC Arbitration Clause may adopt a provision entitled "Governing Law. Arbitration" to read as follows:

"(1) This contract shall be governed by the UNIDROIT Principles (2010) [...]."

(2) All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules [...]."

Examples

1. Memorandum of Understanding between a Swedish manufacturer and an Iranian company; Terms of Reference providing that “the arbitral tribunal should base its decision on the agreement between the parties and, to the extent the Arbitral Tribunal finds it necessary and appropriate, the UNIDROIT Principles” (ICC Award Paris, No. 8331 of December 1996).
 2. Contract of commercial agency between an Italian and a United States company; at the outset of the arbitral proceeding the parties agreed that the dispute would be settled in conformity with the UNIDROIT Principles tempered by recourse to equity (Award of the Camera Arbitrale Nazionale ed Internazionale di Milano of 1.12.1996).
 3. Sales contract between a Russian trade organisation and a Hong Kong company; UNIDROIT Principles chosen after the commencement of the arbitral proceedings to resolve any question not expressly regulated in the contract (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 20.01.1997).
 4. Contract between two Belgian individuals and a Spanish company whereby the former undertook to provide the latter with ideas and share their experience with respect to the manufacturing and marketing of new products; UNIDROIT Principles chosen after the commencement of the arbitral proceedings (Award of the Arbitration Court of the Lausanne Chamber of Commerce and Industry of 25.01.2002).
 5. Agreement concerning highly sophisticated equipment between a Turkish company and a company incorporated in Anguilla, West Indies, with an office in the Philippines; UNIDROIT Principles chosen after the commencement of the arbitral proceedings (Award of the Arbitration Court of the Lausanne Chamber of Commerce and Industry of 17.05.2002)
 6. In a dispute the Arbitral Tribunal, in view of the fact that the contract was silent as to the applicable law and that both parties in their statement of claim and statement of defence referred to individual provisions of the UNIDROIT Principles, decided to base its decisions on the UNIDROIT Principles (ICC Award No. 11601 of 2002).
11. – Yet sometimes arbitral tribunals choose the UNIDROIT Principles as the sole legal basis for their decisions even in the absence of any request to this effect by the parties.

Examples

1. In a dispute the Sole Arbitrator stated with no further explanation that “The Arbitral Tribunal will decide the merits of the dispute in accordance with the UNIDROIT Principles” (ICC Award No. 12698 of 2004).
2. Contract for the supply of gas between a trading company registered in Gibraltar and a State-owned Company X of an Central Asian Republic; the Arbitral Tribunal awarded interest which it held should be calculated on the basis of international rather than national rules; in this respect the Arbitral Tribunal referred to Art. 7.4.9 UNIDROIT Principles considered “to be an appropriate basis for determining the interest” (Award of the Arbitration Institute of the Stockholm Chamber of Commerce of 29.03.2005).
3. Contracts for the delivery, in several stages, of tanks and other military equipment between an English company (International Military Services Ltd.) and the Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran (Modsaf) and the Islamic Republic of Iran; in interpreting the contract, the Arbitral Tribunal referred, among other provisions, to Art. 7.3.6 (2) [Art. 7.3.7 of the 2010 edition] UNIDROIT Principles. The Arbitral Award was challenged before the Supreme Court of the Netherlands which however confirmed it (Hoge Raad der Nederlanden of 24.04.2009).
4. Contract for the lease of commercial premises between a Russian company and a Hungarian company; the Arbitral Tribunal applied the UNIDROIT Principles defined as “a document adopted by an authoritative intergovernmental organisation and reflecting the most common approaches of the majority of national legal systems in regulating problems of international commercial transactions [and] broadly applied in international commercial

practice and widely used by international business community as a background for settling the disputes” (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 30.10.2009).

5. Series of exploration and exploitation agreements between two U.S. oil companies and Government of Ecuador silent as to applicable law; Arbitral Tribunal decided to apply “the substantive provisions of the BIT and any relevant provisions of other sources of international law” and in deciding the merits of the case with no further explanation referred to UNIDROIT Principles (Ad hoc Arbitration of March 2010 (The Hague))

6. Settlement agreement between a Liechtenstein seller and a Spanish buyer following a dispute arising from a sales contract; with no further explanation, the Arbitral Tribunal decided to apply UNIDROIT Principles to determine whether the settlement agreement had been concluded by Seller under economic duress; accordingly, Seller based its claim against Buyer on several provisions of the UNIDROIT Principles: Arts. 1.7, 1.9, 3.8, 3.9, 3.10 [Art. 3.2.5, 3.2.6 and 3.2.7 of the 2010 edition, respectively], 5.1.3, 5.1.4 and 7.4.8; the Arbitral Tribunal dismissed all of Seller’s claims (ICC Award No. 13009, date unknown).

- SUGGESTED MODEL CLAUSE No. 1 (***)

“This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts (2010) [except as to Articles ...]”.

- SUGGESTED MODEL CLAUSE No. 2

“The Arbitral Tribunal shall decide the dispute in accordance with the UNIDROIT Principles of International Commercial Contracts (2010) [except as to Articles ...]”.

(b) Reference to the UNIDROIT Principles in conjunction with a particular domestic law

12. – The UNIDROIT Principles constitute a comprehensive set of rules on most matters relevant for international contracts. Nevertheless, there are still issues which fall within the scope of the UNIDROIT Principles but are not expressly settled by them. Moreover other issues are outside the scope of the UNIDROIT Principles (e.g. lack of capacity; the authority of organs, officers or partners of a corporation; etc.), as are issues relating to specific types of contracts (e.g. with respect to sales contracts, the duty to examine the goods; special remedies for defects of the goods; the passing of the risk; etc.). Hence, the advisability for parties to indicate, when choosing the UNIDROIT Principles as the rules of law governing their contract or as the rules of law applicable to the substance of the dispute, a particular domestic law applicable to matters not dealt with in the UNIDROIT Principles.

Examples

1. Choice of law clause of the *Chinese European Arbitration Centre*: “The contract shall be governed by [...] the UNIDROIT Principles of International Commercial Contracts supplemented by the otherwise applicable law”.

2. Contract between French, Lithuanian and Russian businessmen concerning a joint venture in the satellite business through off-shore companies in British West Indies and the U.S.A., which provides: “This Agreement shall be exclusively governed by the UNIDROIT

(***) Model Clause already appearing in a footnote to the Preamble of the UNIDROIT Principles.

Principles of International Commercial Contracts (2004) supplemented by the substantive law of the Federal Republic of Germany”.

3. Letter of intent negotiated by a Korean and a French-owned Hong Kong based company stating: “The agreements contained in this document shall be governed by the Principles of International Commercial Contracts [...]. Should it become necessary to rely in addition on a national law, this will be the law of Hong Kong.”

13. – Sometimes a similar approach is taken by arbitral tribunals on their own motion.

Examples

1. Agreement on technology exchange and technical co-operation between two Chinese companies and a European company silent as to the applicable law; the Arbitral Tribunal found that the dispute should be decided on the basis of such rules of law as have found their way into international codifications or such as that enjoy a widespread recognition among countries involved in international trade, and concluded that in deciding the dispute at hand it would base itself primarily on the UNIDROIT Principles, and only where the UNIDROIT Principles do not provide an answer to any question of substantive nature raised in the arbitration, it would resort to domestic law, i.e. the law of Sweden as a neutral law (Award of the Arbitration Institute of the Stockholm Chamber of Commerce of 2001).

2. In a dispute the Arbitral Tribunal, after having decided to base its decision on the *lex mercatoria* as expressed in the UNIDROIT Principles, noted that the UNIDROIT Principles at that time did not deal with the effects of illegality and consequently decided to apply French law as an additional source of law (ICC Award No. 11018 of 2002).

3. Contract relating to high-technology based services between parties from two different Middle Eastern countries silent as to the applicable law; the Arbitral Tribunal decided to apply the UNIDROIT Principles, if and where necessary supplemented by the otherwise applicable law as determined in accordance with Art. 17 ICC Rules; the Arbitral Tribunal defined the UNIDROIT Principles as “an international re-statement (and pre-statement) of modern contract law in its most authoritative form”, well-known in international arbitration practice and endorsed by UNCITRAL (ICC Award No. 15089 of 15.09.2008).

- SUGGESTED MODEL CLAUSE No. 3 (***)

“This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts (2010) [except as to Articles...], supplemented when necessary by the law of [jurisdiction X]”

- SUGGESTED MODEL CLAUSE No. 4

“The Arbitral Tribunal shall decide the dispute in accordance with the UNIDROIT Principles of International Commercial Contracts (2010) [except as to Articles...], supplemented when necessary by the law of [jurisdiction X]”

(c) Reference to the UNIDROIT Principles in conjunction with general principles of law, the *lex mercatoria* or the like

14. – Parties unable or unwilling to choose a particular domestic law as the law applicable to their contract sometimes provide that the contract shall be governed by vaguely defined principles and rules of international or supranational character. This is especially the case when the parties are States or international organisations on the one hand and private enterprises or individuals on the other, but it may also occur in connection with ordinary commercial contracts.

(***) Model Clause already appearing in a footnote to the Preamble of the UNIDROIT Principles.

The formulae used may vary, ranging from “general principles of law”, “generally recognised principles of international commercial law”, “generally accepted principles of international contract law”, “general principles of equity”, “laws and rules of natural justice”, to a reference to the *lex mercatoria*, the rules and principles generally recognised in international trade with respect to a particular type of contract, or to international trade usages. They all have one common purpose, *i.e.* to avoid the application of any particular domestic law to the transactions in question and to “internationalise” the relationship between the parties, thereby putting them on a more equal footing.

15. – The choice of general principles of law, the *lex mercatoria* or the like as the rules of law governing the contract or applicable to the substance of the dispute has been criticised on account of the extreme vagueness of those concepts and the risk of arbitrariness in determining their content. In order to avoid, or at least to reduce considerably, any uncertainty that might arise, parties may wish to combine the reference to general principles of law, the *lex mercatoria* or the like with a reference to the UNIDROIT Principles.

Examples

1. *Standard Material Transfer Agreement for Plant Genetic Resources of Food and Agriculture* adopted by the *U.N. Food and Agriculture Organization (F.A.O.)* refers as the applicable law to “General Principles of Law, including the UNIDROIT Principles of International Commercial Contracts 2004 [...]”.

2. Art. 13.1 of the 1999 *ICC Model Occasional Intermediary Contract* providing “Unless otherwise agreed in writing [...] any questions relating to this [...] Agreement shall be governed by the rules and principles of law generally recognised in international trade as applicable to international contracts with occasional intermediaries together with the UNIDROIT Principles of International Commercial Contracts”.

3. Art. 32A of the 2000 *ICC Model International Franchising Contract* providing “This Agreement is governed by the rules and principles of law generally recognised in international trade together with the UNIDROIT Principles of International Commercial Contracts.”

4. Art. 24.1 A of the 2002 *ICC Model Commercial Agency Contract*, Art. 24.1 of the 2002 *ICC Model Distributorship Contract–Sole Importer–Distributor*, Art. 23.1 A of the 2004 *ICC Model Selective Distributorship Contract*, and Art. 18.1 B of the 2004 *ICC Model Mergers & Acquisitions Contract*, all of which provide “Any questions relating to this contract which are not expressly or implicitly settled by the provisions contained in this contract shall be governed, in the following order: (a) by the principles of law generally recognized in international trade as applicable to international [agency] [distributorship] [selective distributorship] [merger and acquisition] contracts, (b) by the relevant trade usages, and (c) by the UNIDROIT Principles of International Commercial Contracts.”

5. Art. 31 of the 2004 *International Trade Centre (ITC) UNCTAD/WTO Contractual Joint Venture Model Agreements* providing “[...] In the interpretation and application of the Parties’ rights and obligations under this Agreement, due weight shall be given to applicable practices in international trade. When defining these practices, reference shall be made *inter alia* to the UNIDROIT Principles of International Commercial Contracts.”

6. Contract between an international organisation and a company situated in an African State for services to be rendered in the context of the organisation’s operations in a neighbouring African State; during the course of the arbitration, the parties agreed on the application of “general principles of international contract law” and both relied on the UNIDROIT Principles to establish such general principles (Ad hoc Arbitration, New York (December 1997)).

7. Contract between a company situated in Turkmenistan and a company situated in Switzerland; after the commencement of the arbitral proceedings parties authorised the Tribunal, in case of discrepancy between the laws of Turkmenistan and Switzerland, to have regard to the general principles of law and, in particular, to the UNIDROIT Principles (ICC Award No. 10865 of 2002).

16. – Yet even where the parties do not refer to the UNIDROIT Principles to determine the content of the general principles of law, the *lex mercatoria* or the like, they have in practice chosen as the rules of law governing their contract or applicable to the substance of the dispute, arbitral tribunals often refer to the UNIDROIT Principles for this purpose on their own motion.

17. – In a number of cases the arbitral tribunals applied the UNIDROIT Principles considering them to be an expression of “general principles of law”, “generally accepted principles of international commercial law”, “generally recognised principles of international contract law” or the like.

Examples

1. Contract between a Canadian corporation and the United Nations concerning the transport of United Nations personnel and military personnel on behalf of the U.N. throughout the world; at the beginning of the arbitral proceedings parties agreed that the arbitral tribunal should apply “generally accepted principles of international commercial law”; the Arbitral Tribunal decided to resort to the UNIDROIT Principles (Ad hoc Arbitration, New York (date unknown)).

2. Series of contracts between an English company and a government agency of a Middle Eastern country for the supply of equipment, some of which referred to settlement according to “laws or rules of natural justice”; the Arbitral Tribunal held that the parties intended to exclude the application of any domestic law in favour of “general principles and rules enjoying wide international consensus” and concluded that such “general rules and principles [...] are primarily reflected by the UNIDROIT Principles” (ICC Award No. 7110 of June 1995).

3. Contracts between the National Bank of Country X and a foreign company for the printing of bank notes, providing that the Arbitral Tribunal was to decide “fairly”; at the beginning of proceedings parties agreed to apply “the general standards and rules of international contracts”; the Arbitral Tribunal decided to apply in addition to CISG “other recent documents that express the general standards and rules of commercial law” such as the UNIDROIT Principles and the Principles of European Contract Law (ICC Award No. 9474 of February 1999).

4. Andersen Worldwide Organization’s Member Firm Interfirm Agreements (MFIFAs) containing arbitration clause whereby the arbitral tribunal would decide in accordance with the terms of the Agreement “taking into account general principles of equity”; the Arbitral Tribunal held that the UNIDROIT Principles are “a reliable source of international commercial law in international arbitration for they contain in essence a restatement of those *‘principes directeurs’* that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice” (ICC Award No. 9797 of 28.07.2000).

5. Agreement for sale of shares between a wholly State-owned Polish insurance company and a Dutch company; the dispute between the parties was to be decided on the basis of the Dutch/Polish Treaty for the protection of investments and “the universally acknowledged rules and principles of international law”. With no further explanation the Arbitral Tribunal referred to Art. 7.1.3(1) UNIDROIT Principles (Ad hoc Arbitration, Brussels (19.08.2005)).

6. Settlement agreement between a national of the United States and the Government of Ukraine referring to Art. 54 of the ICSID Additional Facility Arbitration Rules as to the applicable law; the Arbitral Tribunal decided to apply the rules of international law, and within these, to have particular regard to the UNIDROIT Principles, defined as “a private codification of civil law, approved by an intergovernmental institution which are neither

treaty, nor compilation of usages, nor standard terms of contract but in fact are a manifestation of transnational law" (express reference to Para. 3 of the Preamble to the Principles) (Award of the International Centre for Settlement of Investment Disputes (ICSID) of 14.01.2010).

7. Concession for water distribution and wastewater treatment granted by the Argentinian authorities to French and Spanish investors; the dispute between the parties was to be decided on the basis of the Argentina-France BIT and the Argentina-Spain BIT; in a separate opinion, one of the Arbitrators referred, with no further explanation, to Arts. 6.2.2 and 6.2.3 UNIDROIT Principles as an expression of an international standard for long-term contracts which in the event of hardship aims to require the parties to negotiate the adaptation of the contract (Award of the International Centre for Settlement of Investment Disputes (ICSID) of 30.07.2010).

8. Lease agreement between an Italian real estate company and the International Fund for Agricultural Development (IFAD) containing a choice of law clause according to which it was to be interpreted and applied according to "[...] the recognized principles of international commercial law" to the exclusion of Italian law; the Arbitral Tribunal decided to apply the UNIDROIT Principles considered "as indicative of recognized principles in the field of international commercial law" (Award of the Permanent Court of Arbitration of 17.12.2010).

9. Investment agreement between a United States company and the Republic of Argentina; the Arbitral Tribunal decided to apply the Bilateral Investments Treaty and international law, when applicable, as well as Argentinian law; reference to the UNIDROIT Principles described as "a sort of international restatement of the law of contracts reflecting rules and principles applied by the majority of national legal systems" (Award of the International Centre for Settlement of Investment Disputes (ICSID) of 27.10.2011).

10. Production sharing agreement between U.S. joint-venture and a foreign State for exploration and development of geological resources; pursuant to the agreement, the applicable law was the law of the foreign State together with "principles of law common to the law of [the state] and the United States and, in the absence of such common principles, [...] principles of law normally recognized by civilized nations in general, including those which have been applied by international tribunals"; reference to the UNIDROIT Principles which, in the Arbitral Tribunal's view, "offer reasonable solutions to respond to the needs of the modern economy in light of the experience of some of the major legal systems" (ICC Award No. 14108, date unknown).

18. – On other occasions the arbitral tribunals applied the UNIDROIT Principles considering them an expression of the *lex mercatoria*.

Examples

1. Contract between an Italian company and a government agency of a Middle Eastern country silent as to the applicable law; the Arbitral Tribunal decided to base its decision "on the terms of the contract, supplemented by general principles of trade as embodied in the *lex mercatoria*" and referred, without further explanation, to individual provisions of the UNIDROIT Principles (ICC Award No. 8261 of 27.09.1996).

2. License agreement between a French company and a Japanese company silent as to the applicable law; the Arbitral Tribunal held that "[t]he most appropriate 'rules of law' to be applied to the merits of this case are those of the '*lex mercatoria*', which it defined as "the rules of law and usages of international trade which have been gradually elaborated by different sources such as the operators of international trade themselves, their associations, the decisions of international arbitral tribunals and some institutions like UNIDROIT and its recently published Principles of International Commercial Contracts" (ICC Award No. 9875 of January 1999).

3. Service contract between a Russian company and a German company providing that all disputes arising out of it were to be resolved in accordance with the general principles of the *lex mercatoria*; the Arbitral Tribunal decided to apply the UNIDROIT Principles as an expression of such general principles (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 05.11.2002).

4. Sales contract between a Romanian seller and an English buyer referring to “international law” as the law governing the contract; the Arbitral Tribunal held that the term “international law” was to be understood as a reference to the *lex mercatoria* and general principles of law applicable to international contracts, and since such general principles are reflected in the UNIDROIT Principles it concluded that the dispute should be governed by the UNIDROIT Principles (ICC Award No. 12111 of 06.01.2003).

5. In a dispute the Arbitral Tribunal decided to apply the UNIDROIT Principles rather than other national principles and rules in view of the fact that they are much more precise than the *lex mercatoria* and other similarly “vague and heteroclitic” principles and rules (ICC Award No. 11575 of 2003).

6. Contract between a French company and a U.S. company silent as to applicable law; since both parties indicated the general principles of law as a subordinate alternative to their respective national laws, the Arbitral Tribunal decided to base its decision on general principles of law or the *lex mercatoria* and to have recourse to the UNIDROIT principles “as a primary set of guidelines in determining international rules of law applicable to the parties’ contract” (ICC Award No. 13012 of 2004).

19. – On still other occasions the arbitral tribunals applied the UNIDROIT Principles considering them an expression of “trade usages”, “usages of international trade”, “internationally recognised trade usages” or the like.

Examples

1. Contract for the supply of rice between a Vietnamese seller and a Dutch buyer (acting through a French company as its agent); the contract did not contain a choice of law clause, but did provide for the application of the Incoterms 1990 (with respect to the price) and of the Uniform Customs and Practice for Documentary Credits (UCP) 500 (with respect to force majeure); the Arbitral Tribunal inferred that parties intended their contract be governed by trade usages and generally accepted principles of international trade and decided to apply, with respect to the issues not regulated by either Incoterms or the UCP, CISG and the UNIDROIT Principles, as evidencing admitted practices under international trade law (ICC Award No. 8502 of November 1996).

2. Agreement between two Italian companies and a US subsidiary concerning the use of a trademark, which expressly indicated the law of the State of New York as the law governing the validity of the agreement; the Arbitral Tribunal, holding that the silence with respect to all other matters was to be understood as an indication of the parties’ intention not to have these matters governed by a particular domestic law, decided to apply, in addition to the terms of the agreement, “the usages of international trade”, having regard whenever necessary to “international public policy” and for this purpose to refer to the UNIDROIT Principles which it considered an “accurate representation, although incomplete, of the usages of international trade” (ICC Award No. 9479 of February 1999).

3. Sales contract between a Russian seller and a Swedish buyer silent as to the applicable law; the Arbitral Tribunal applied the UNIDROIT Principles which in its view were gradually gaining the status of internationally recognised trade usages (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 27.07.1999).

4. Sales contract between a company situated in the Bermudas and a company situated in Rwanda silent as to the applicable law; the Arbitral Tribunal, noting that the contract had no significantly close connection to any particular domestic law but equally strong (or loose) contacts with a number of jurisdictions and should therefore not be subjected to any particular domestic law but governed by a-national principles and rules, decided to apply the UNIDROIT Principles, defined as “a codification of trade usages and an expression of the general principles of contract law” (ICC Award No. 11265 of 2003).

5. In a dispute the parties requested the Arbitral Tribunal to base their decision on “international trade usages”; the Arbitral Tribunal, after pointing out that “a general reference to trade usages is sometimes criticized for its vagueness”, found that “consideration of a specific codification as the UNIDROIT Principles of International

Commercial Contracts (1994) may provide a more precise set of rules" and in this respect also referred to the Comment to the Preamble of the Principles (p. 4) (ICC Award No. 12040 of 2003).

- SUGGESTED MODEL CLAUSE No. 5

"This contract shall be governed by [generally accepted principles of international commercial law] [generally recognised principles of international contract law] [the *lex mercatoria*] [usages of international trade] as stated in the UNIDROIT Principles of International Commercial Contracts (2010)."

- SUGGESTED MODEL CLAUSE No. 6

"The Arbitral Tribunal shall decide the dispute in accordance with [generally accepted principles of international commercial law] [generally recognised principles of international contract law] [the *lex mercatoria*] [usages of international trade] as stated in the UNIDROIT Principles of International Commercial Contracts (2010)."

II. MODEL CLAUSES REFERRING TO THE UNIDROIT PRINCIPLES AS TERMS TO BE INCORPORATED IN THE CONTRACT

20. – Instead of choosing the UNIDROIT Principles as the rules of law governing their contract or applicable to the substance of the dispute, parties may wish to incorporate the UNIDROIT Principles into 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 or the rules of law applicable to the substance of the dispute (see *supra* para. 7).

21. – Parties may incorporate into 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.

Examples

1. *United States Uniform Commercial Code, Comment 2 to § 1-302 ("Variation by Agreement")*, as revised in 2001, stating that "[...] parties may vary the effect of [the Uniform Commercial Code's] provisions by stating that their relationship will be governed by recognised bodies of rules or principles applicable to commercial transactions [...] [such as e.g.] the UNIDROIT Principles of International Commercial Contracts) [...]."

2. Investment agreement between a national of the United States and the Government of Ukraine concerning the establishment by the former of broadcasting stations in Ukraine; settlement agreement reached by the parties laying down "Principles of Interpretation and Implementation of the Agreement" and containing provisions concerning the interpretation, validity and performance and non-performance of the settlement agreement taken almost literally from the UNIDROIT Principles (Arts. 1.7, 3.3(1), 4.1, 4.2, 4.3, 4.5, 5.3, 5.4(1) [Arts. 5.1.3 and 5.1.4(1) of the 2004 edition], 6.2.1, 6.2.2, 6.2.3, 7.1.1, 7.1.4 and 7.1.5(1)(2)(3)). (Award of the International Centre for Settlement of Investment Disputes (ICSID) of 20.03.2000)

22. – As terms of the individual contract the UNIDROIT Principles will bind the parties only within the limits of the freedom of contract granted by the applicable domestic law. In other words, despite their incorporation into the contract the UNIDROIT Principles will apply only if and to the extent that they do not conflict with the rules of the domestic law governing the contract from

which the parties cannot derogate (so-called mandatory rules of the applicable domestic law). It is true that in the field of general contract law such domestic 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.

- SUGGESTED MODEL CLAUSE No. 7

“This contract shall incorporate the UNIDROIT Principles of International Commercial Contracts (2010) [in their entirety] [Chapters X, Y, Z] subject to the mandatory rules of the applicable law.

23. – Since in case of contractual incorporation of the UNIDROIT Principles the law governing the contract has still to be determined according to the relevant rules of private international law, parties may wish to avoid any uncertainty regarding such determination by expressly choosing a particular domestic law as the law governing their contract.

- SUGGESTED MODEL CLAUSE No. 8

“This contract shall incorporate the UNIDROIT Principles of International Commercial Contracts (2010) [in their entirety] [Chapters X, Y, Z] subject to the mandatory rules of the law of jurisdiction [X].”

III. MODEL CLAUSES REFERRING TO THE UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING INTERNATIONAL UNIFORM LAW INSTRUMENTS

24. – It is nowadays widely recognised that international uniform law instruments, even after their incorporation into the national legal systems, 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 only be a last resort (cf. Article 7 (1) and (2) of the CISG, but similar provisions are to be found in numerous other recent international Conventions). 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.

25. – 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 the former, international sales contracts the latter – they deal with many of the same issues concerning contract formation, interpretation, performance, non-performance and remedies, and since the provisions contained in the UNIDROIT Principles are in general more comprehensive and detailed, they may in many cases provide a solution for ambiguities or gaps in the CISG. Moreover, if – as is generally the case in international arbitral proceedings – it is admissible under the relevant rules of private international law, the UNIDROIT Principles may be applied even with respect to matters not covered at all by the CISG but nevertheless relevant also in the context of sales contracts, such as the authority of agents, mistake, fraud, threat and gross

disparity, illegality, third party rights, conditions, set-off, assignment of rights, transfer of obligations and assignment of contracts, limitation periods and plurality of obligors and of obliges.

26. – There has been some criticism concerning the use of the UNIDROIT Principles as a means of interpreting and supplementing the CISG, and this not only on account of the non-binding nature of the UNIDROIT Principles, but also on the basis of the rather formalistic argument that, coming later, the UNIDROIT Principles could be of no relevance to the CISG. However in actual practice both judges and arbitrators do not seem to give too much attention to such arguments and increasingly resort to the UNIDROIT Principles to interpret and supplement the CISG.

27. – There are cases where recourse to the UNIDROIT Principles has been justified on the ground that the individual provisions of the UNIDROIT Principles invoked as gap-fillers could be considered an expression of general principles underlying both the UNIDROIT Principles and CISG.

Examples

1. Contracts for the sale of rolled metal sheets between an Austrian seller and a German buyer governed by the CISG; the Arbitral Tribunal held that the interest rate is a matter governed, but not expressly settled, by the CISG and has to be determined according to the general principles on which the CISG is based (Art. 7(2) CISG); the Arbitral Tribunal applied Art. 7.4.9(2) of the UNIDROIT Principles in order to fill the gap in Art. 78 CISG on the ground that it could be considered an expression of the general principle of full compensation as underlying both the CISG and the UNIDROIT Principles (Awards of the International Court of Arbitration of the Federal Chamber of Commerce of Vienna, SCH-4318 and SCH-4366 of 15.06.1994).

2. Contract for the supply of chemical fertilizer between a Swiss buyer and an Austrian seller governed by CISG; since CISG does not determine the rate of interest, the Arbitral Tribunal applied the rule of average bank short term lending rate to prime borrowers contained in Art. 7.4.9 UNIDROIT Principles and Art. 4.507 Principles of European Contract Law, which must be considered as general principles on which CISG is based (Art. 7(2) CISG) (ICC Award No. 8128 of 1995).

3. Contract for the sale of industrial equipment between a French buyer and a German seller governed by CISG; in order to determine the place of payment of price, the Court referred to Art. 57 CISG as an expression of a general principle underlying CISG pursuant to which obligations to payment are to be performed at the creditor's place of business; reference to the same general principle contained in Art. 6.1.6 UNIDROIT Principles (Cour d'appel de Grenoble of 23.10.1996).

4. Agreement for the exclusive distribution and sale of food products between a Spanish company and a Dutch company silent as to the applicable law; the Arbitral Tribunal found that the elements of sale prevailed over those of exclusive distribution and decided to apply "the provisions of [CISG] and its general principles, now contained in the UNIDROIT Principles" (ICC Award No. 8817 of December 1997).

5. International sales contract governed by CISG; the Sole Arbitrator held that the matters governed by the Convention but not expressly settled by it were to be settled according to general principles underlying the Convention and, since one of these principles is the need to promote uniformity in the application of the Convention, it is more likely to be fulfilled by applying the UNIDROIT Principles than any domestic law; with respect to the matters outside the scope of the Convention, the Sole Arbitrator held that the application of the UNIDROIT Principles should be preferred to any domestic law which has not been designated by the parties, the content of which has not been established and which therefore does not seem appropriate to solve the dispute at hand (ICC Award No. 11638 of 2002).

6. Sales contract between a Finnish company and a French company; the English version of the contract was silent as to the applicable law, while its Russian version made reference to "legislation of Sweden and generally accepted standards of international trade"; the Sole Arbitrator, after pointing out that the CISG was also part of Swedish law

though, like in Finland, only with respect to Part I and III, decided to apply the CISG supplemented by the UNIDROIT Principles, which should govern the formation of the contract as well as supplement the CISG also in other respects according to Arts. 7 and 9 CISG (ICC Award No. 12097 of 2003).

7. International sales contract containing a choice of law clause in favour of the “substantive law” (“droit matériel”) of a country party to the CISG; the Arbitral Tribunal interpreted this clause as an indication that the CISG was applicable in the case at hand, but pointed out that the gaps in the CISG would have to be filled on the basis of the general principles underlying the Convention, which are contained and further developed in the UNIDROIT Principles; only where the solution cannot be found in the UNIDROIT Principles reference to the domestic law of the country in question was justified (ICC Award No. 12460 of 2004).

8. Contract for the sale of steel tubes between a Dutch company and a French company governed by CISG; faced with a request for re-negotiation of the contract on grounds of hardship, the Court pointed out that in order to fill CISG gaps in a uniform manner, regard must be had to the general principles governing the law of international commerce, and concluded that according to such principles as laid down, among others, in the UNIDROIT Principles, a party invoking a change in circumstances fundamentally disrupting the contractual equilibrium has the right to request re-negotiation of the contract (Court of Cassation of Belgium of 19.06.2009).

28. – On other occasions the UNIDROIT Principles have been applied as evidence of “usages widely known in international trade” according to Article 9(2) of the CISG.

Examples

1. Sales contract between a Bulgarian and a Russian party governed by CISG; after having found that the CISG is silent on penalty clauses, the Arbitral Tribunal decided to resort to the UNIDROIT Principles in order to fill the gap on the ground that they reflect usages of which the parties knew or ought to have known and which are widely known to in international trade and are therefore applicable according to Art. 9(2) CISG (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 05.06.1997).

2. Sales contract between a Finnish company and a French company; the English version of the contract was silent as to the applicable law, while its Russian version made reference to “legislation of Sweden and generally accepted standards of international trade”; the Sole Arbitrator, after pointing out that the CISG was also part of Swedish law though, as was the case with Finland, only with respect to Part I and III, decided to apply the CISG supplemented by the UNIDROIT Principles, which should govern the formation of the contract as well as supplement the CISG also in other respects in accordance with Arts. 7 and 9 CISG (ICC Award No. 12097 of 2003).

3. Sales contract between a Russian buyer and an Indian seller governed by CISG; the Arbitration Court, noting that the issue of the interest rate is not addressed in CISG, referred to domestic law; however, since in the Russian Federation there is no rate of bank interest for Indian currency, the Arbitration Court decided to apply the international trade practice adopted in such cases as reflected in the UNIDROIT Principles (bank interest rate in the State of the currency of payment) (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 19.05.2004).

4. Sales contract between Belarusian company and Russian company governed by CISG; in order to determine the applicable rate of interest, the Court referred to the applicable domestic law (law of Belarus), according to which in contracts with foreign elements international usages apply provided that they do not contravene the law of Belarus; since in the case at hand the currency of payment was foreign, the Court held that the rate of interest should be determined according to “principles of international commercial contracts” and in this context quoted the full text of Art 7.4.9 UNIDROIT Principles (Commercial Court of Brest Region of 08.11.2006).

5. Contract for the sale of sugar between a Serbian seller and an Italian buyer governed by CISG; the Arbitral Tribunal decided also to apply the Principles of European Contract Law and the UNIDROIT Principles 2004 as an expression of the trade usages it had to take into account according to the relevant arbitration rules (Award of the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce of 23.01.2008).

6. Sales contract between a Russian and an Italian company governed by CISG; the Arbitral Tribunal referred to Art. 9.2.1 lit. a) of the 2004 edition of the Principles in order to affirm that transfer of obligation to pay the price from original buyer to a third person “is widely used in international commercial practice” (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 19.12.2008).

29. – Yet there are even cases where the UNIDROIT Principles have been applied on the ground that they “reflect a world-wide consensus in most of the basic matters of contract law” or with no further explanation.

Examples

1. Sales contract between a Russian seller and a Canadian buyer governed by CISG; reference to Arts. 2.17 and 2.18 [Arts. 2.1.17 and 2.1.18 of the 2010 edition] UNIDROIT Principles, “said to reflect a world-wide consensus in most of the basic matters of contract law”, to confirm the rule laid down in Art. 29(2) CISG (ICC Award No. 9117 of March 1998).

2. Sales contract between a Belarusian company and a French company governed by CISG; reference to Art. 7.4.9 UNIDROIT Principles to determine the applicable interest rate (Award of the International Court of Arbitration of the Chamber of Commerce and Industry of the Republic of Belarus of 30.05.2000 and of 31.05.2000).

3. Distributorship agreement between an Italian manufacturer and a U.S. distributor providing the application of CISG, notwithstanding the fact that CISG does not, in principle, apply to long term distribution contracts; reference to Arts. 2.18 [Art. 2.1.18 of the 2004 edition] and 7.4.2 UNIDROIT Principles to interpret Arts. 29(2) and 74 CISG, respectively (ICC Award No. 11849 of 2003).

4. Sales contract between a Belarusian company and a Polish company governed by CISG; reference to Art. 7.4.9 UNIDROIT Principles to determine the applicable interest rate (Supreme Economic Court of the Republic of Belarus of 03.01.2003).

5. Contract for the sale of goods between a Russian seller and a German buyer governed by the CISG and, with respect to issues not covered by it, by Russian law as the law of the seller; reference to Art. 7.4.13 UNIDROIT Principles to support the existence of a general principle of “proportionality and conformability with the negative consequences of the breach of the obligations to the sum of the penalty claimed” underlying CISG (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 04.04.2003).

6. Sales contract between a U.S. and a Belarusian company governed by CISG; reference to Art. 7.4.9 UNIDROIT Principles to determine the applicable interest rate (Supreme Economic Court of the Republic of Belarus of 20.05.2003).

7. Sales contract between a Russian seller and a South Korean buyer governed by CISG according to its Art. 1(1)(b); reference to Art. 7.4.7 UNIDROIT Principles to interpret Arts. 74 and 77 CISG (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 06.06.2003).

8. Sales contract between a German company and a Russian company governed by the CISG; recourse to Art. 7.2.2 UNIDROIT Principles to determine the requirements for the application of the remedy of specific performance available to the buyer in the absence of a specific provision either in the CISG or in Russian law applicable under Art. 7(2) CISG (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 30.01.2007).

9. Sales contract between an Estonian company and a Kazakhstani company governed by CISG; reference to Arts. 7.2.1, 7.2.2 and 1.3 UNIDROIT Principles to confirm the solution adopted under Art. 81 CISG (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 01.02.2007).

10. Sales contract between Russian and Canadian companies governed by CISG; reference to Art. 7.4.9 UNIDROIT Principles to determine the applicable interest rate (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 13.05.2008).

30. – Parties to an international sales contract governed by the CISG may wish to stipulate either in their contract or after commencement of the court or arbitral proceedings that the CISG should be interpreted and supplemented by the UNIDROIT Principles. In so doing, the parties ensure that judges or arbitrators, when faced with ambiguities or veritable gaps in the CISG, will primarily resort to the UNIDROIT Principles to settle the issues and turn to domestic law only as a last resort. Moreover, if the relevant rules of private international law so permit (see *supra* para. 7), parties may even with respect to matters outside the scope of the CISG avoid the application of a particular domestic law and subject such matters to the UNIDROIT Principles.

Examples

1. *International Trade Centre UNCTAD/WTO Model Contract for the International Sale of Perishable Goods (1999)*: “In so far as any matters are not covered by the foregoing provisions, this Contract is governed by the following, in descending order of precedence: the United Nations Convention on Contracts for the International Sale of Goods, the UNIDROIT Principles of International Commercial Contracts, and for matters not dealt with in the above-mentioned texts, the law applicable at [...] or in the absence of a choice of law, the law applicable at the seller’s place of business through which this Contract is to be performed”.

2. Alternative A of Art. 36.1 of the 2003 *ICC Model Contract for the Turnkey Supply of an Industrial Plant*: “Unless otherwise agreed, any questions relating to this Contract which are not expressly or impliedly settled by the provisions contained in this Contract shall be governed in the following order: (a) by the principles of law generally recognised in international trade as applicable to international turnkey contracts, (b) by the United Nations Convention on the International Sale of Goods (CISG), (c) by the relevant trade usages, and (d) by the UNIDROIT Principles of International Commercial Contracts with the exclusion of the clauses 6.2.1 – 6.2.3, with the exclusion of national laws.”

3. Choice of law clause of the *Chinese European Arbitration Centre*: “[...] The contract shall be governed by [...] the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) without regard to any national reservation, supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts and these supplemented by the otherwise applicable national law [...]”.

4. Sales contract between a foreign buyer and an Ukrainian seller referring to CISG, the *lex mercatoria* and the UNIDROIT Principles (1994 edition) as applicable to the contract (Award of the Tribunal of International Commercial Arbitration at the Ukrainian Chamber of Commerce and Trade of 22.12.2004).

5. Contract for the trade of steel between a Chinese company and a Swiss company; choice of law clause providing that “The application and interpretation of this contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods. On Issues not covered by this Convention, the UNIDROIT Principles (1994) shall apply. In case both instruments cannot cover the issue under dispute, international customs and the law of Seller’s place of business (Swiss law) shall apply”; the Court confirmed the validity of the arbitration agreement (Xiamen Intermediate People’s Court of 2006).

6. Contract for the supply of goods between the United Nations Organisation and a European company in the context of a peace-keeping mission in Africa; UNIDROIT Principles chosen after the commencement of the arbitral proceedings together with CISG (Ad hoc Arbitration, New York (date unknown)).

- SUGGESTED MODEL CLAUSE NO. 9

“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).”

- SUGGESTED MODEL CLAUSE NO. 10

“[The Court] [The Arbitral Tribunal] shall decide the dispute 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).”

31. – In view of their broad scope the UNIDROIT Principles may also be used to interpret and supplement international uniform law instruments dealing with contracts other than sales contract (e.g. the 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR); the 1988 UNIDROIT Convention on International Factoring; the 2008 U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea; etc.).

32. – Parties to a contract governed by an international uniform law instrument other than the CISG may wish to stipulate either in their contract or after commencement of the court or arbitral proceedings that the instrument in question should be interpreted and supplemented by the UNIDROIT Principles. In so doing, the parties ensure that judges or arbitrators, when faced with ambiguities or veritable gaps in that instrument, will primarily resort to the UNIDROIT Principles to settle the issues and turn to domestic law only as a last resort. Moreover, if the relevant rules of private international law so permit (see *supra* para. 7), parties may even with respect to matters outside the scope of the instrument in question avoid the application of a particular domestic law and subject such matters to the UNIDROIT Principles.

- SUGGESTED MODEL CLAUSE NO. 11

“This contract shall be governed by [the international uniform law instrument X] interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010).”

- SUGGESTED MODEL CLAUSE NO. 12

“[The Court] [The Arbitral Tribunal] shall decide the dispute in accordance with [the international uniform law instrument X] interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010).”

33. – Even with respect to instruments not dealing with substantive contract law (e.g. the 1995 Inter-American Convention on the Law Applicable to International Contracts; EC Regulation N° 593/2008 on the Law Applicable to Contractual Obligations (Rome I); the 1975 Inter-American Convention on Commercial Arbitration; EC Regulation N° 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, etc.), reference to the UNIDROIT Principles may be made to interpret individual notions used therein (e.g. “international contract”; “place of delivery”; “matters relating to a contract” and “matters relating to tort, delict or quasi-delict”, etc.).

Examples

1. In a decision of the Supreme Court of Venezuela concerning the interpretation of the notion of “international contract” in Art. 1 of the 1975 Inter-American Convention on Commercial Arbitration reference was made among others to Comment 1 to the Preamble of the UNIDROIT Principles which states that “[...] the concept of ‘international’ contracts should be given the broadest possible interpretation, so as ultimately to exclude only those situations where no international element at all is involved, *i.e.* where all the relevant elements of the contract in question are connected with one country only” (Supreme Court of Venezuela, 09.10.1997)

2. Faced with the question as to whether a claim based on pre-contractual liability fell within “matters relating to a contract” or within “matters relating to tort, delict or quasi-delict” in the sense of Art. 5 no. 1 or Art. 5 no. 3 of the 2000 EC Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters the European Court of Justice decided in favour of the latter solution and in so doing followed the conclusions of the Advocate General who had based his reasoning, among others, on Art. 2.15 of the UNIDROIT Principles [Art. 2.1.15 of the UNIDROIT Principles 2010] (*Case 334/00 Fonderie Officine Meccaniche Tacconi S.p.A. v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*).

3. Concerning the notion of “the place of delivery” under Art. 5(1)(b) of the 2000 EC Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, the Court stated that it had to be interpreted “autonomously” and that, unless otherwise agreed between the parties, in cases where the contract involves carriage of the goods the place of delivery is to be considered the place where the seller hands the goods over to the first carrier for transmission to the buyer. In reaching this conclusion the Court referred first of all to Art. 31(a) of the CISG, but at the same time it pointed out that “this solution is confirmed by two other equally autonomous, though not binding, instruments such as the UNIDROIT Principles of International Commercial Contracts (Art. 6.1.6(1)) and the Principles of European Contract Law (Art. 7:101(1)(b))” (Tribunale Padova – Sezione Este of 10.01.2006).

34. – Since the need to interpret specific notions used in the latter category of international uniform law instruments will normally arise after commencement of the court or arbitral proceedings, a Model Clause is suggested only with respect to this situation.

- SUGGESTED MODEL CLAUSE NO. 13

“[The Court] [The Arbitral Tribunal] shall interpret [the notion(s)...] used in [Article(s) ...] of [the international uniform law instrument X] in accordance with the UNIDROIT Principles of International Commercial Contracts (2010).”

IV. MODEL CLAUSES REFERRING TO THE UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING DOMESTIC LAWS

35. - 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 chosen by the parties or applicable by virtue of the relevant rules of private international law. 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 commercial contracts especially if international in nature, either because opinions are sharply divided or because the issue at stake has so far not been addressed at all. In both cases, the UNIDROIT Principles may be used as a yardstick to ensure an interpretation and supplementation of the domestic law in question

consistent with internationally accepted standards and/or the special needs of cross-border trade relationships.

36. – In more than half of the reported decisions the UNIDROIT Principles were used by courts and arbitral tribunals as a means of interpreting and supplementing the applicable domestic law. Most of the cases in question concerned international disputes, but there are also decisions referring to the UNIDROIT Principles which related to disputes of a purely domestic character. More important, the domestic laws in question were far from being only those of less developed countries but included *inter alia* the laws of Australia, England, Finland, France, Germany, Italy, the Netherlands, New Zealand, Spain, Switzerland and the State of New York. It is true that in a number of cases the reference to the UNIDROIT Principles had no direct impact on the decision of the merits of the dispute at hand, and individual provisions of the UNIDROIT Principles were cited essentially to demonstrate that the solution adopted under the applicable domestic law was in conformity with current internationally accepted standards and rules. Yet in numerous other cases the courts and arbitral tribunals resorted to the UNIDROIT Principles in support of the adoption of one of several possible solutions under the applicable domestic law, or in order to fill a veritable gap in the latter.

37. – In some cases courts and arbitral tribunals referred to the UNIDROIT Principles to interpret or supplement the applicable domestic law with no explanation at all.

Examples

1. Contract for the supply of equipment for an industrial plant and the supervision of the construction of the plant between an Egyptian company and a French company governed by Egyptian law; in addressing the question of the quantification of the losses the Arbitral Tribunal referred not only to the relevant provisions in the Egyptian Civil Code but also to Swiss law, as the law of the place of arbitration, and to Arts. 7.4.1, 7.4.2 and 7.4.3 UNIDROIT Principles (ICC Award No. 9950 of June 2001).

2. Agreement between a Swedish company (licensor) and a German company (licensee) whereby the latter undertook no longer to manufacture and sell licensed goods; the Arbitral Tribunal, since it could not find a clear answer as to whether damages for a lost opportunity could be awarded under the applicable German law, referred to French and Swiss law and to the UNIDROIT Principles to support the decision to award such damages (ICC Award No. 9078 of October 2001).

3. Distributorship contract between a New Zealand manufacturer and an English distributor governed by the law of New Zealand; in a dissenting opinion one of the judges referred, among others, to Art. 1.7 UNIDROIT Principles to affirm with respect to long-term or relational contracts the existence of an implied duty of good faith in contract performance (Court of Appeal of New Zealand of 03.10.2001).

4. Sales contract between a company situated in the British Virgin Islands and a Russian company governed by Russian law; in support of its interpretation of the rules of the Russian Civil Code concerning the imputation of performance of non-monetary obligations, the Arbitral Tribunal referred to the Comments to Art. 6.1.13 UNIDROIT Principles (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 27.03.2007).

5. Sales contract between two Dutch parties; the Court referred to Art. 2:204(2) Principles of European Contract Law and to Art. 2.1.20(1) UNIDROIT Principles and affirmed that the Principles' approach appeared preferable to the Dutch solution, which allows standard terms to be avoided on formal grounds, even if they are commonly used in a given sector and therefore should not be surprising to the other party (Hoge Raad der Nederlanden of 21.09.2007).

6. Joint venture agreement governed by Australian law; reference by the Court to Arts. 7.3.1 and 7.3.3 UNIDROIT Principles to assert that the so called doctrine of “intermediate” terms, as proposed in some English decisions and supported by legal writings, should not become part of Australian law; according to the Court the correct statement of the common law of Australia in this respect was that a right to terminate the contract arises in respect of breach of either an essential term, or a non-essential term causing substantial loss of benefit, or repudiation (High Court of Australia of 13.12.2007).

7. Construction contracts between Government of Democratic Republic of Congo and U.S.-controlled Congolese company governed by Congolese law; Arbitral Tribunal based its decision on both Congolese law and relevant provisions of UNIDROIT Principles (Award of the International Centre for Settlement of Investment Disputes (ICSID) of 23. 07. 2008)

8. Works contract between two Italian companies; the Court granted the contractor an allowance in money corresponding to the value the parts of the plant already built had for the owner and in support of its decision the Court expressly referred to Art. 7.3.6 (1) [Art. 7.3.6(2) of the 2010 edition] UNIDROIT Principles (Tribunale of Catania of 06.02.2009).

9. Contract between two Australian companies; reference by the Court to Art. 1.7 UNIDROIT Principles to assert that the agreement to negotiate in good faith is enforceable under Australian law (Supreme Court of New South Wales - Court of Appeal of 03.07.2009).

10. Dispute between two Italian parties; the Court made a generic reference to the UNIDROIT Principles and to Art. 81(2) CISG to affirm that, on termination a party is entitled to restitution of the performance it has rendered under the contract only if that party is in a position concurrently to make restitution of the performance it has received from the other party; in the case at hand, since restitution in kind was by its very nature impossible, Defendant was condemned to pay only compensatory damages (Tribunale of Nola of 06.12.2010).

11. Sales contract between two Dutch parties; the Advocate-General referred, among others, to Arts. 7.4.1 and 7.3.2 UNIDROIT Principles to assert that a party may terminate the contract by mere notice to the other party and that termination is not preclusive of the right to damages (Hoge Raad der Nederlanden of 08.07.2011).

12. In two cases concerning contracts between two New Zealand companies one of the judges referred to Art. 4.3 UNIDROIT Principles to affirm that pre-contractual negotiations should be admissible in contract interpretation as a general principle also under New Zealand law (Court of Appeal of New Zealand of 10.02.2010; Auckland High Court of 19.07.2011).

13. Contract between two Colombian companies; the Supreme Court referred to Arts. 7.3.1(1), 7.3.3, 7.3.2(1) UNIDROIT Principles to affirm that unilateral termination by one party with respect to contracts for an indefinite period of time was admissible even in the absence of a specific provision in the Colombian Civil Code (Corte Suprema de Justicia of 30.08.2011).

14. Contract for the carriage of goods by sea between a Colombian and a U.S. company; the Supreme Court referred among others to Art. 7.1.6 UNIDROIT Principles to affirm that also under the pertinent provisions of Colombian law the parties are not entirely free to limit their liability for breach of contract (Corte Suprema de Justicia of 08.09.2011).

15. Dispute between a German athlete and the German Sport Association resulting from the latter's refusal to nominate the former as participant in the 2008 Olympic Games in Beijing; interpretation of the German Sport Association Rules for the nomination of the German Olympic Team; in interpreting the Rules in favour of the athlete, the Court referred to Art. 4.6 UNIDROIT Principles in order to affirm that the *contra proferentem* rule is a general principle of interpretation (Landgericht Frankfurt of 15.12.2011).

16. In two disputes between Italian nationals and an agency of the Italian Government, in order to affirm that the conduct of the agency violated the principle of prohibition of inconsistent behaviour, two Italian Courts referred among others to Art. 1.8 UNIDROIT Principles which affirms the prohibition of *venire contra factum proprium* at international

level (Tribunale of Torino - Sezione Lavoro of 02.02.2011; Corte dei Conti - Sezione Giurisdizionale per la Regione Siciliana of 24.01.2012).

17. Investment contract between U.S. oil company and Government of a State formerly belonging to the Soviet Union for construction of power station with the granting in return of a long term contract for the supply of electricity to customers in that State; contract contained choice-of-laws clause in favour of domestic law of hosting State; Arbitral Tribunal, finding that domestic law in question contained a number of ambiguities and lacunae having a bearing on the dispute, decided to refer to UNIDROIT Principles to supplement that law (Ad hoc Arbitration, place and date unknown).

18. Share purchase agreement governed by French law; with no further explanation, the Arbitral Tribunal referred to Art. 9.3.4(2) UNIDROIT Principles to affirm that an assignment concluded between the parties was not effective on the agreed date since it had not been timely notified to the assigned party (ICC Award No. 12745, date unknown).

19. Sales contract between Australian seller and buyer of unknown nationality governed by English law; in interpreting the arbitration clause, the Arbitrator applied the principles of "*in favorem validitatis*" and "*contra proferentem*" and, in this context, expressly referred to the UNIDROIT Principles (Arts. 4.5 and 4.6) which, in his view, "though [...] are to a large extent identical to the English canons of construction [...] include certain additional or broader rules that supplement the English principles to avoid that bad drafting leads to the uncertainty of a contract" (ICC Award No. 11869, date unknown).

20. Joint-venture agreement between two foreign investors and a state agency of State Y for cultivation of agricultural products on the territory of State Y; parties' choice of law of State Y as governing law; the Arbitral Tribunal affirmed that the State partner was under a strict duty to assess social and political conditions on its territory before entering into agreements with foreign investors to make sure that it is able to perform its contractual obligations; in this context, the Tribunal referred to the general principle of good faith recognised by applicable domestic law as well as to Arts. 6.14 - 6.17 UNIDROIT Principles which, in its view, regulate the behaviour of a national contracting party, even not public, in similar circumstances (ICC Award No. 12112, date unknown).

38. – In other cases courts and arbitral tribunals referred to the UNIDROIT Principles on the ground that the UNIDROIT Principles represent "principles generally applicable in international commerce", "a useful source for establishing general rules for international commercial contracts", "a restatement of the commercial contract law of the world", or the like.

Examples

1. Distributorship agreement between parties from Switzerland, Singapore and Belgium governed by Swiss law; the Arbitral Tribunal, in deciding the rate of exchange to be chosen for the payment in the local currency, referred to Art. 6.1.9(3) UNIDROIT Principles for a confirmation at an international level of a similar rule of Swiss law (ICC Award No. 8240 of July 1995).

2. Contract for the installation and maintenance of electrical works between an Italian company and a Kuwaiti company silent as to the applicable law; the Tribunal decided to apply Kuwaiti law, as the law most closely connected with the relevant elements of the contract, together with "principles generally applicable in international commerce"; without further explanation, the Arbitral Tribunal referred to Arts. 7.1.6, 7.4.3(3), 7.4.7 and 7.4.9(3) UNIDROIT Principles to interpret the corresponding provisions of Kuwaiti law (ICC Award No. 5835 of June 1996).

3. Pre-bid agreement between a supplier of telecommunications systems in the United States and a Middle Eastern manufacturer of telecommunications cables silent as to the applicable law; the Arbitral Tribunal decided to apply the law of the State of New York but referred also to the UNIDROIT Principles, defined as a useful source for establishing general rules for international commercial contracts, in order to demonstrate that the conclusion reached under the law of the State of New York (enforceability of the parties' agreement to negotiate in good faith) was also confirmed by the general principles of law as reflected

in the UNIDROIT Principles (in particular Arts. 1.1, 1.3, 1.7 and 2.15 [Art. 2.1.15 of the 2010 edition]) (ICC Award No. 8540 of 04.09.1996).

4. Contract for the installation of a machine for the production of lump sugar between a Dutch and a Turkish party governed by Dutch law; in order to exclude the existence of the hardship, the Arbitral Tribunal referred not only to Art. 6.258 of the new Dutch Civil Code, but also to Art. 6.2.1 UNIDROIT Principles, as in applying Dutch law in an international context attention should be given to the prevailing view in the field of international commercial contracts (ICC Award No. 8486 of September 1996).

5. Contract between a Spanish company and a company based in India for the delivery and installation of industrial machinery governed by English law; the Arbitral Tribunal, in rejecting Defendant's claim for consequential damages on account of the fact that Defendant had failed to take all reasonable steps to mitigate the loss consequent on Claimant's breach, not only referred to the leading English cases stating the duty of mitigation but added that a similar standard has been established internationally, primarily in Art. 7.4.8(1) UNIDROIT Principles (ICC Award No. 9594 of March 1999).

6. Contract between a New Zealand company and a Japanese businessman governed by the law of New Zealand; one of the judges referred to Art. 8 CISG and to Arts. 4.1-4.3 UNIDROIT Principles, described as a "a restatement of the commercial contract law of the world [which] refines and expands the principles contained in [CISG]", to affirm that a more liberal interpretation of contracts was permissible under New Zealand law but not under English law; however, the Court decided to stick to a literal or objective interpretation of the contract in question, since the Privy Council in London would not have permitted to do otherwise (Court of Appeal of New Zealand of 27.11.2000).

7. License and sales agreement between a French company and a US company governed by French law; supervening hardship; the Arbitral Tribunal referred not only to French Law, but also to Arts. 6.2.2 and 6.2.3 UNIDROIT Principles to demonstrate that the duty to renegotiate the contract in case of hardship is a principle also prevailing in international commercial law (ICC Award No. 9994 of December 2001).

8. In four cases concerning contracts between two Australian companies the Courts referred to Art. 1.7 UNIDROIT Principles as embodying "a fundamental principle to be honoured in international commercial contracts" to confirm, despite sharp differences of judicial and scholarly opinion on this point, the existence also under Australian law of an implied duty of good faith (Federal Court of Australia of 30.06.1997; Supreme Court of New South Wales of 16.07.1998 and 01.10.1999; Supreme Court of Western Australia - Court of Appeal of 23.04.2002).

9. Contract governed by Australian law; the Court referred to Arts. 1.7 and 2.1.18 UNIDROIT Principles to demonstrate that, although under Australian law there was no mandatory rule of law imposing on the parties the duty of good faith and fair dealing, such duty was to be considered an implied term of all contracts, and the mere fact that the contract contained a "entire agreement" clause was not sufficient to preclude such an implication (Federal Court of Australia of 12.02.2003).

10. Dispute between two Costa Rican parties; the Arbitral Tribunal, while basing its decision on the law of Costa Rica, also referred to the UNIDROIT Principles (Art. 1.7) "not as a source of law not agreed upon or invoked by the parties, but instead for their doctrinal value" (Award of the Arbitration Centre of the Costa Rican Chamber of Commerce of 01.06.2003).

11. In two cases concerning the interpretation of contracts between two English companies, Lady Justice Arden stated that evidence as to pre-contractual negotiations may be admissible even on a wider basis than English law presently permitted and for this purpose "it may be appropriate to consider international instruments such as the UNIDROIT Principles which on questions of interpretation require regard to be had to all the circumstances, including the pre-contractual negotiations of the parties (Article 4.3)" (Court of Appeal (Civil Division) of 17.02.2006 and 18.12.2006).

12. Dispute between a German athlete and the German Sport Association; the Arbitral Tribunal decided in favour of the athlete by applying the *contra proferentem* rule also to the interpretation of the sportive rules governing the dispute; in doing so, the Arbitral Tribunal affirmed that, even if in German law the *contra proferentem* rule is expressly stated only with respect to standard terms (see § 305c, para.2 of the German BGB), the rule should apply since this was the approach prevailing at international level as demonstrated by Article 4.6 of the UNIDROIT Principles (Deutsches Sportschiedsgericht of 17.12.2009).

39. – Parties may wish to stipulate either in their contract or after commencement of the court or arbitral proceedings that the applicable domestic law be interpreted and supplemented by the UNIDROIT Principles. In so doing, the parties ensure that judges or arbitrators, when faced with ambiguities or actual gaps in the domestic law in question, will resort to the UNIDROIT Principles as a sort of background law or the general part of transnational contract law.

Examples

1. Agreement between Chinese company and East European car manufacturer for after sales service for vehicles delivered by latter; when a dispute arose parties agreed that Chinese law was the law governing the merits of the dispute, but requested Arbitral Tribunal to apply also UNIDROIT Principles as an expression of international practices (ICC Award of March 2000).

2. Cabotage contract between two Brazilian companies subject to Brazilian law; during arbitration proceedings both parties invoked UNIDROIT Principles in support of their arguments based on Brazilian law (Ad hoc Arbitration of 21 December 2005 (Brazil)).

- SUGGESTED MODEL CLAUSE No. 14

“This contract shall be governed by the law of [jurisdiction X] interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010) [as an expression of internationally accepted principles and rules of contract law].”

- SUGGESTED MODEL CLAUSE No. 15

“[The Court] [The Arbitral Tribunal] shall decide the dispute in accordance with the law of [jurisdiction X] interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010) [as an expression of internationally accepted principles and rules of contract law].”

40. – Domestic courts are in general not prepared to resort to the UNIDROIT Principles to interpret or supplement the applicable domestic law where the solutions provided in the UNIDROIT Principles, though reflecting internationally accepted principles and rules, contradict statutory provisions or firmly established case law of the domestic law in question. On the contrary, arbitral tribunals may feel free to do so, either because expressly requested by the parties to apply the domestic law in question together with the UNIDROIT Principles as two equally authoritative sets of rules, or because they consider the UNIDROIT Principles as “usages of trade applicable to the transaction” which the relevant arbitration laws and rules require them to take into account “in all cases” (cf. Article 28(4) of the 1985 UNCITRAL Model Law on International Commercial Arbitration; Article 21(1) of the 2012 ICC Rules of Arbitration; Article 28(2) of the 1997 American Arbitration Association International Arbitration Rules).

Examples

1. Catering contract between a French and a French-Kazakh company governed by French law; since French law is unclear as to whether the dispatch principle or the receipt principle prevails, the Arbitrator, on the basis of Art. 13(5) ICC Rules of Arbitration, referred to the usages of international trade and to the UNIDROIT Principles, indicated as a "codification" of such usages (ICC Award of 25.04.1996).

2. Agreement for the supply of industrial equipment and transfer of know-how between a United States manufacturer and an Algerian industrial development corporation, referring to Algerian law as the law governing the contract yet at the same time requesting the Arbitral Tribunal to consider the general principles of law and the usages of trade; Arbitral Tribunal held that the UNIDROIT Principles "consecrate rules [...] broadly recognised throughout the world and the practice of international contracts" (ICC Award No. 8264 of April 1997).

3. Exclusive distribution agreements between an Anglo-Japanese supplier and an Ivorian distributor governed by Ivorian law; the Arbitral Tribunal held that in addition to Ivorian law it would also take into account, pursuant to Art. 13(5) of the ICC Rules, the relevant trade usages; in order to confirm its conclusion that the obligation to cooperate in good faith in the performance of a contract amounts to a general principle applicable to international trade, the Arbitral Tribunal referred, without further explanation, to Art. 5.3 [Art. 5.1.3 of the 2010 edition] UNIDROIT Principles (ICC Award No. 9593 of December 1998).

4. Agreement for the provision and organisation of after sales service for vehicles between a Chinese company and an East European car manufacturer; after the commencement of the arbitral proceedings the parties agreed that Chinese law was the law governing the merits of the dispute, but at the same time requested the Arbitral Tribunal to apply also the UNIDROIT Principles as an expression of international practices (ICC Award No. 10114 of March 2000).

5. Sales contract between a German and a Russian company governed by Russian law; in order to affirm that the parties had reached an agreement through exchange of documents and electronic messages, the Arbitral Tribunal referred to the applicable rules of the Russian Civil Code as well as to "customs effective now in international trade [...] set forth in Arts. 2.1.1, 4.1, 4.2, 4.3 UNIDROIT Principles" (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 22.12.2008).

6. Sales contract between a Russian company and a Chinese company governed by Russian law; faced with a request to return the advance payment and to repay the costs of participating in settlement negotiations, the Arbitral Tribunal, having found no specific regulation in Russian law addressing the issue at stake, referred to Art. 7.4.8 UNIDROIT Principles as *lex mercatoria* in order to justify their subsidiary application to Russian law (Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 02.06.2009).

41. – Parties may wish to stipulate either in their contract or after commencement of the arbitral proceedings that the arbitral tribunal shall apply, together with the applicable domestic law, the UNIDROIT Principles as an expression of the "usages of trade" referred to in the relevant arbitration law or rules. In so doing, the parties ensure that the arbitral tribunal, in applying the domestic law in question, will in all cases take into account the UNIDROIT Principles as a sort of background law or the general part of transnational contract law and apply them, whenever appropriate, even when they conflict with the domestic law in question.

- SUGGESTED MODEL CLAUSE No. 16

"This contract shall be governed by the law of country X and by the UNIDROIT Principles as an expression of the "usages of trade" referred to in Article ... of the [Arbitration Law ...] [Rules of Arbitration ...]".

- SUGGESTED MODEL CLAUSE No. 17

“The Arbitral Tribunal shall decide the dispute in accordance with the law of country X and with the UNIDROIT Principles as an expression of the “usages of trade” referred to in Article ... of the [Arbitration Law ...] [Rules of Arbitration ...]”.

APPENDIX

LIST OF THE SUGGESTED MODEL CLAUSES

I. MODEL CLAUSES REFERRING TO THE UNIDROIT PRINCIPLES AS THE RULES OF LAW GOVERNING THE CONTRACT OR THE RULES OF LAW APPLICABLE TO THE SUBSTANCE OF THE DISPUTE

- MODEL CLAUSE No. 1 (cf. paras. 5 to 11)
“This contract shall be governed by the UNIDROIT Principles of international Commercial Contracts (2010) [except as to Articles...]”.
- MODEL CLAUSE No. 2 (cf. paras. 5 to 11)
“The Arbitral Tribunal shall decide the dispute in accordance with the UNIDROIT Principles of International Commercial Contracts (2010) [except as to Articles ...]”.
- MODEL CLAUSE No. 3 (cf. paras. 12 to 13)
“This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts (2010) [except as to Articles...], supplemented when necessary by the law of [jurisdiction X]”
- MODEL CLAUSE No. 4 (cf. paras. 12 to 13)
“The Arbitral Tribunal shall decide the dispute in accordance with the UNIDROIT Principles of International Commercial Contracts (2010) [except as to Articles...], supplemented when necessary by the law of [jurisdiction X]”
- MODEL CLAUSE No. 5 (cf. paras. 14 to 19)
“This contract shall be governed by [generally accepted principles of international commercial law] [generally recognised principles of international contract law] [the *lex mercatoria*] [usages of international trade] as stated in the UNIDROIT Principles of International Commercial Contracts (2010)”
- MODEL CLAUSE No. 6 (cf. paras. 14 to 19)
“The Arbitral Tribunal shall decide the dispute in accordance with [generally accepted principles of international commercial law] [generally recognised principles of international contract law] [the *lex mercatoria*] [usages of international trade] as stated in the UNIDROIT Principles of International Commercial Contracts (2010).”

II. MODEL CLAUSES REFERRING TO THE UNIDROIT PRINCIPLES AS TERMS TO BE INCORPORATED INTO THE CONTRACT

- MODEL CLAUSE No. 7 (cf. paras. 20 to 22)
“This contract shall incorporate the UNIDROIT Principles of International Commercial Contracts (2010) [in their entirety] [Chapters X, Y, Z], subject to the mandatory rules of the applicable law.
- MODEL CLAUSE No. 8 (cf. para. 23)
“This contract shall incorporate the UNIDROIT Principles of International Commercial Contracts (2010) [in their entirety] [Chapters X, Y, Z] subject to the mandatory rules of the law of jurisdiction [X].”

III. MODEL CLAUSES REFERRING TO THE UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING INTERNATIONAL UNIFORM LAW INSTRUMENTS

- MODEL CLAUSE No. 9 (paras. 24 to 30)

“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).”
- MODEL CLAUSE No. 10 (paras. 24 to 30)

“[The Court] [The Arbitral Tribunal] shall decide the dispute 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).”
- MODEL CLAUSE No. 11 (cf. paras. 31 to 32)

“This contract shall be governed by [the international uniform law instrument X] interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010).”
- MODEL CLAUSE No. 12 (cf. paras. 31 to 32)

“[The Court] [The Arbitral Tribunal] shall decide the dispute in accordance with [the international uniform law instrument X] interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010).”
- MODEL CLAUSE No. 13 (cf. paras. 33 to 34)

“[The Court] [The Arbitral Tribunal] shall interpret [the notion(s)...] used in [Article(s) ...] of [the international uniform law instrument X] in accordance with the UNIDROIT Principles of International Commercial Contracts (2010).”

IV. MODEL CLAUSES REFERRING TO THE UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING DOMESTIC LAWS

- MODEL CLAUSE No. 14 (cf. paras. 35 to 39)

“This contract shall be governed by the law of [jurisdiction X] interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010) [as an expression of internationally accepted principles and rules of contract law].”
- MODEL CLAUSE No. 15 (cf. paras. 35 to 39)

“[The Court] [The Arbitral Tribunal] shall decide the dispute in accordance with the law of [jurisdiction X] interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010) [as an expression of internationally accepted principles and rules of contract law].”
- MODEL CLAUSE No. 16 (cf. paras. 40 to 41)

“This contract shall be governed by the law of country X and by the UNIDROIT Principles as an expression of the “usages of trade” referred to in Article ... of the [Arbitration Law ...] [Rules of Arbitration ...].”

- MODEL CLAUSE No. 17 (cf. paras. 40 to 41)

“The Arbitral Tribunal shall decide the dispute in accordance with the law of country X and with the UNIDROIT Principles as an expression of the “usages of trade” referred to in Article ... of the [Arbitration Law ...] [Rules of Arbitration ...]”.