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

(Comments by Professors Don Wallace Jr., William E. Park and Eckart Brödermann)

[Professor Don Wallace Jr.]

Dear Joachim,

I've read your paper which is excellent. Here are some comments and questions.

(i) inevitably, the clauses address, ex post facto, the shape of arbitrator and court decisions; and as a consequence there are also a multitude of suggested model clauses. Would it be possible, ex ante, to have slightly fewer and different clauses, thereby 'nipping in the bud' some arbitrator/court behaviors. Or, given that 2012/2013 is still early in the advent of the Principles, there is no alternative to multiplicity.

(ii) somewhat contradictory to the general point in (i), a more specific question: how do arbitrators/courts handle incomplete or defective clauses?

(iii) again, somewhat contradictorily, is there anything to be learned from the content of decisions rejecting the application of the Principles?

(iv) a question from ignorance: why is the alternative formulation " the contract shall be governed by" versus the "[court][arbitral]tribunal "shall decide" strictly necessary?

(v) the greater receptivity to the Principles of arbitral tribunals, as opposed to courts, and a discussion in Rome of the several facets of an effort to promote greater court receptivity, might be of some value, or do you think otherwise?

(vi) how frequent, in your experience, are post dispute compromises, generally(not just referring to the Principles)?

(vii) you remember our incisive NY state court judge; please remind me of his precise comment re the NY Civil Procedure Code

(viii) Alexander Komarov's arbitration court seems mightily receptive to the Principles

(ix) in paragraph 32, should the reference be to *supra* para. 7 ?

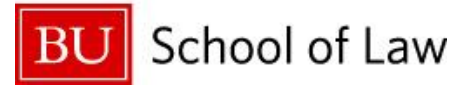
(x) is "supplemented" in Clause 3 and elsewhere the perfect verb?

(xi) in Clause 2 and elsewhere, why specify "[except...]"?

Regards,
Don

Professor William W. Park
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215

Telephone: (617) 353-3149
Fax: (617) 353-3077
E-mail: wwpark@bu.edu



28 January 2013

Professor M.J. Bonell
UNIDROIT
Rome, Italy

Joachim:

Having looked over the materials for your agenda again, my comments are rather limited.

In my experience, the UNIDROIT principles have been used in a gap-filling role, to supplement the applicable national law chosen by the parties. In deliberations in my own cases, we have had recourse to UNIDROIT rules in particular on force majeure, modification of contracts, interest illegality and impossibility. In some instances, the recourse was useful for bridging the gap between common law and civil law members of the tribunal. Thus far, however, the applicable law clauses themselves do not bring UNIDROIT into the equation.

In part, this may be due to the fact that my recent cases are subject to considerable “path dependency” in the sense that the transactional lawyers want to follow what they know (national law) and fear that something else would bring them into the realm of unjustifiable legal risk. In this regard, the “top three” areas are insurance, oil & gas and investor state.

1. Insurance. The “Bermuda Form” policies governing big-ticket liability of multinational corporations generally provide New York law (with certain modifications, like exclusion of contra proferentem rule) and London situs. This is a compromise knocked out between the insurance companies and the policy holders. My guess is that neither side’s counsel has any informed objection to UNIDROIT. They just shy away from the unknown.

2. Oil & Gas. Some of these cases are long-term gas price adjustment, subject to English law, thought to be predictable in matters of contract interpretation. The joint ventures and Farm-out agreements may be subject to Texas law, thought to be developed in petroleum matters, or the law of the oil producing country (Nigeria or Algeria) for reasons related to national sovereignty.

3. Investor-State Cases. On occasion, investor-state cases raise collateral issues of commercial law, particularly in connection with “umbrella clause” arguments about meeting commitments pursuant to concessions. Also, some investor-state cases will be brought on the basis of an investment code, which will have references to excluded “commercial activities” for example. In both instances, UNIDROIT principles might be useful. However, one would probably have a high hurdle to get over in ICSID cases,

governed by Article 42 of the Washington Convention, which speaks of the laws of the host country as well as international principles. When investor-state cases are done pursuant to UNCITRAL rules, there may be a greater opportunity to push the parties into reference to UNIDROIT principles as a more “neutral” set of standards.

As to normal commercial cases, the big market, of course would be sales. My sense is that the transactional lawyers who draft joint ventures and corporate acquisitions, or licenses, will be less teachable.

In any event, my intuition, from dealing with transactional lawyers through the years, would be that the choice-of-law clause which might be most attractive would be one which designates UNIDROIT principles as a supplement to either a chosen national law, or in some cases to fill gaps in general principles of international law. Without any hard data on the matter, my hunch is that UNIDROIT would see much less success with model clauses that either substituted the principles for national law, or incorporated the principles by reference as contract terms.

As we all know, the big obstacle is ignorance. Just as banks go to court rather than arbitration because it is what they are used to, so the guys who draft the agreements insert the national law clauses they came to know as younger lawyers in a domestic context. Of course, as you know there will be some legal systems that do not allow reference to anything other than national law, or which disapprove of references that smack of “a-national lex mercatoria”. However, my sense is that across-the-board resistance to lex mercatoria is breaking down among the bar itself, particularly with the rise of “soft law” (non-governmental instruments, such as the IBA rules) in procedural contexts.

Look forward to hearing about your discussions.

All the best,

A handwritten signature in black ink, appearing to read "Rusty". The signature is stylized with a long horizontal stroke at the beginning and a loop at the end.

CHINESE EUROPEAN ARBITRATION CENTRE



CEAC GmbH · c/o Handelskammer Hamburg · Adolphsplatz 1 · 20457 Hamburg

UNIDROIT- International Institute for the Unification
of Private Law / Institut International Pour
L'Unification du Droit Prive
Attn : Professor M.J. Bonell
-Consultant-
Via Panisperna, 28
00184 Roma
Italia

CHINESE EUROPEAN ARBITRATION CENTRE GmbH
c/o Handelskammer Hamburg
Adolphsplatz 1
20457 Hamburg, Germany

Tel.: + 49-(0)40-668640-85
Fax: + 49-(0)40-668640-699

e-mail management@ceac-arbitration.com

Upfront via email: mj.bonell@unidroit.org

Hamburg, 15 January 2013

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

Dear Professor Bonell,

dear Joachim,

I was very impressed by your "Study L" on Model Clauses for the use of the UNIDROIT Principles. Please, allow me to congratulate you on the precise roster of Model Clauses developed out of the several hundred reported cases of decisions and the numerous practice reports containing choice of UNIDROIT Clauses. I could not have come up with a more suitable set of clauses.

I have also noted with pleasure that I could recognize five of the many examples given in that study to actual cases or to the history of the emergence of a quoted clause in one way or another.

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I am honored to be invited to participate in the next steps of work by the Study Group, chaired by Don Wallace. Parallel to this letter, I accepted the invitation today and have enclosed a copy.

I.

In preparation for the working group's first session in Rome on 11th -12th of February 2013, I have the following remarks. Most of them minor; they are set forth here after without any particular order or priority:

1. **Introduction, § 1:** in line 12, at the end of the third sentence, I propose to replace the words "*of which parties are not always fully aware*" by the words "*of which parties are not always aware or fully aware*". In my experience with the blatant ignorance of the Principles on the other side of the negotiation table at the beginning of negotiations, this phrasing comes closer to reality.
2. Similarly on **page three § 6**, it is closer to the truth if we describe parties as being "*often reluctant*", instead of being "*usually reluctant*" to agree on the application of domestic law of the other party.
3. Generally, I would suggest some **discussion on the wording of § 6**. Would it make sense to mention the motives as to why parties (sometimes, not usually) avoid the inconveniences which inevitably ensue from the choice of "neutral" law? It might be helpful to relate to observations and practice experience of many practitioners; these thoughts and motives are cost driven.
4. I am not convinced by **§ 7, sentence 2** which refers to incorporating the principles. This entire passage treats the choice of the principles as "governing" the contract. That is, in my mind, more than incorporating. Maybe, this is simply a phrasing issue.
5. I would also suggest to also refer to the practical experience that it has proven helpful to choose the UNIDROIT Principles as the governing law in situations, such as large industrial complex construction, where a key party (the key contractor) needs to conclude a contract with parties in several jurisdictions. In such situations they may be inclined to use the UNIDROIT Principles in its **standard terms** (as in my example reported in "*Rivista di Diritto del Commercio Internazionale*, 2012, 831,836).
6. With respect to **Model Clauses 9, 10, 11 and 12**. I see room for some debate, in particular in light of Art. 7, para. 2 of the CISG. I wonder whether the UNIDROIT Principles should be suggested as a tool for interpretation of the CISG or as a tool for interpreting the principles underlying the CISG.

7. With respect to **Model Clause 14 and 15**, I wonder if it might be advisable to offer the choice of the UNIDROIT Principles as alternatives for the purpose of interpretation and supplementation of the domestic law. In particular, **a state (as a contracting party) might take offense** if one imposes on that state that its domestic law be interpreted by the UNIDROIT Principles. Thus, sometimes supplementation of domestic law may be the *only* function chosen in connection with the choice of the domestic law. Therefore it might be prudent that the Model Clause on this point offers this alternative. I propose that this be a subject for discussion within the group.

Note: In this context I would like to note that I applied the UNIDROIT Principles in the past as an indirect tool to interpret domestic law. In a state contract, we managed to agree with a state on the choice of its domestic law as interpreted according to the international standards. Then, in a following step, we argued using the UNIDROIT Principles in order to actually interpret domestic law in light of the international practice.

II.

On a more general level I dare to pose the following question: **What would be a suitable format to present the new Model Clauses**, once we have agreed on the phrasing?

The answer to this question should originate from the potential **user's perspective**. The goal being; to make it easy for practitioners who are not used to working with the UNIDROIT Principles. We want to help them to pick these principles by choosing the right clause, appropriate for their business cases.

Therefore, it might be helpful to create **a separate chapter for the existing Official Comments** of the UNIDROIT Principles. This chapter could be placed at the beginning or at the end of the Principles. It might be most effective if it is placed at the beginning, behind the introduction.

If that idea – which you might have had long before me - finds a consensus, it would then be appropriate to develop the proposal for clauses in the **form of official comments**. That entails work, but can make it much easier for the users. It would then be necessary, after an introduction as contained in your Study L, to place the proposed clauses at the front and commenting on them with illustrations drawn from the examples given in your Study L.

As an **alternative**, such comments could be produced as a separate booklet. Moreover, if we were to create such "Official Comments" of Model Clauses, it would be important to keep in mind that the average reader may not be an expert on the UNIDROIT Principles.

In order to convince the practitioner who has not yet worked with the UNIDROIT Principles, to actually use them they need the **answers to two questions**:

- What are the key principles?
- How do I choose them (Model Clauses)?

Therefore, it might be helpful to mention the most important principles – only these – in the introduction of such a chapter.

I am very much looking forward to our meeting in Rome. I thought I would share these thoughts with you beforehand and in a language to share my comments with other participants, in particular our Chair, Professor Don Wallace.

I enclose a **copy** of my letter to the Secretary General of UNIDROIT by which I have accepted the participation in the Working Group.

Yours sincerely,



Eckart Brödermann
University of Hamburg,
Managing Director CEAC
Honorary Member of the Board of the CELA