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

(Comments by Professor Herbert Kronke)

-----Messaggio originale-----

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Dear Joachim,

Miraculously, I found an open slot in our current flow of Tribunal-related activities and I should like to submit, albeit rather late, the following brief comments on Docs 1 Rev, 2 and 2 a.

1. First of all, I wish to commend the Secretariat and, in particular, your good self as the Co-ordinator of the Working Group on the excellent quality of the preparatory work for the Working Group's up-coming session. Secondly, I share most of the more general, or strategic, considerations reflected in the comments you received so far. In particular I would support the note of caution: the more model clauses UNIDROIT may eventually propose the greater the likelihood that - overly conservative, time-pressed or lazy - practitioners because of too many trees will lose sight of the forest.

2. Section I (b) para 13

Since I chaired the Tribunal that rendered the decision in your Example 3 (ICC Case 15089), I wish to slightly modify the description of the situation, thereby giving more credit to the parties and their counsel and, not less important, to the substantive quality of the UPICC.

(i) It was not at the Tribunal's own motion that we determined the UPICC as the governing law. Rather, the parties (who had not inserted a choice-of-law clause in their contract and initially insisted on their respective national law to be applied) accepted the Tribunal's advice that there was a better alternative and then submitted that, if the Tribunal considered that alternative more functional, they wished to have the UPICC govern their contract.

(ii) The reference to the applicable law determined in accordance with Article 17 ICC Rules to supplement "where necessary" the UPICC was a purely ritual, face-saving, formality.

3. Sections III and IV

Although I am aware of the history and the analytical value of the "four main categories" (Doc 1, para 4), I am not sure whether it is wise to keep those two categories of using the UPICC separate. Oftentimes they will coincide.

Example (an ICC case where I acted as sole arbitrator and which I intend to discuss in more detail in an up-coming publication): a contract for the sale of huge quantities of a certain mineral, in a series of shipments over more than a year, and the transport of the goods from the country of origin in Europe to China. The law of a European country (not the one where the mines and the seller were located) was chosen in the contract as the governing law. The country was a Contracting State of the CISG. The purchase price was stipulated in a complicated formula (quotes at the commodity exchange, shipping rates, exchange rates, etc), and on the basis of that formula the seller ended up to owe the buyer significant payments. The CISG obviously has no solution. The law chosen (i.e. the domestic law of the Contracting State) has case law recognising the doctrine of *Wegfall der Geschäftsgrundlage*, *la théorie de l'imprévision* etc, yet nothing sufficiently robust for

the Tribunal to base its decision on. Articles 6.2.1 - 6.2.3 provided the perfect template for subsuming the facts step-by-step and giving the reasons for the decision.

In summation, might it be an idea not to insist on the two categories "interpretation.... of uniform instruments" and "... of domestic law" but to merge the clauses into one (".....uniform law instrument/Ruritanian law")?

4. Characterisation of the UPICC

I agree with Professor Berger's comment (6th paragraph of his letter) that characterising the UPICC as "usages" etc is not only plainly wrong but also confusing and risky undermining of their authoritativeness and under-selling of the product. In the old days, we taught that in commenting on early writings and awards where people were still struggling with finding the right labels. I think that the reasons given by the Tribunal in the ICSID Award referred to in Doc 1 para 17, No 6 are perfect and merit to be amplified.

As mentioned before, I am very sorry not to be able to join you next week. But the new internal rules of the Tribunal require physical presence.

Wishing you and all participating friends and colleagues fruitful discussions, I am,

Yours ever,

Herbert

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