



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW  
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**PRINCIPLES OF INTERNATIONAL  
COMMERCIAL CONTRACTS**  
**Working Group for the Preparation of  
Model Clauses**  
**Rome, 11-12 February 2013**

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

(Comments submitted by UNCITRAL)





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Dear Professor Bonell,

Thank you for the opportunity to comment on the document "Model Clauses for use of the Unidroit Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice" which we understand will be considered at a Unidroit working group session on 11-12 February 2013.

Specifically, the UNCITRAL secretariat would like to comment on Suggested Model Clauses No. 9 and No. 10 referring to the Unidroit Principles of International Commercial Contracts as a means of interpreting and supplementing the United Nations Convention on Contracts for the International Sale of Goods (CISG).

• 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)."

While recognizing the general principle of freedom of contract, and that parties to a contract may seek to determine, as much as possible, such issues by express agreement, the UNCITRAL secretariat notes that the relationship between the CISG and the Unidroit Principles has been considered previously. Indeed, in 2007 when UNCITRAL discussed endorsement of the 2004 Unidroit Principles<sup>1</sup> it was observed that the CISG already contains comprehensive rules on contracts for the international sale of goods that, when properly applied, do not require application of the Principles. The Commission further noted that questions concerning matters governed by the CISG not expressly settled in it were to be settled, as provided in Article 7 of the Convention, in conformity with the general principles on which the Convention was based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. Thus, the optional use of the Principles was subordinate to the rules governing the applicability of the CISG.

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<sup>1</sup> *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/62/17)*, paras. 209-213 at para 211.

As UNCITRAL has already addressed the issue of the proper relationship between the CISG and the Unidroit Principles, the UNCITRAL secretariat can only offer comments informed by that determination. In this regard, the UNCITRAL secretariat is concerned that suggested model clauses No. 9 and No. 10, in their current form, in effect "elevate" the Unidroit Principles so that the CISG is "interpreted... by the Unidroit Principles". Accordingly, pursuant to this formulation, the Unidroit Principles are not subordinate to the CISG. This construction is contrary to the Commission's views on this issue.

With this in mind, and understanding that the purpose of the suggested model clauses is to promote the use of the Unidroit Principles generally to the exclusion of national law, the UNCITRAL secretariat proposes the re-drafting of Suggested Model Clause No. 9 as follows:

• REVISED SUGGESTED MODEL CLAUSE NO. 9

"This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG). Matters not expressly settled by the CISG are to be settled in conformity with the general principles upon which it is based or, in the absence of such principles and in variation of CISG Article 7, in conformity with the UNIDROIT Principles of International Commercial Contracts (2010)."

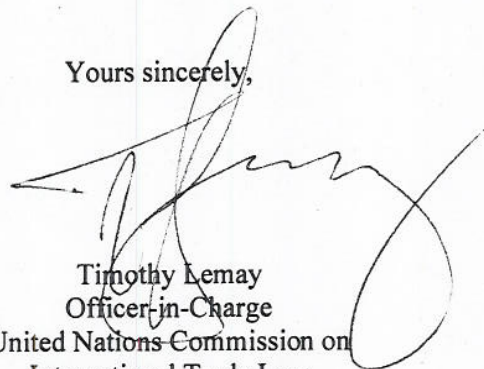
The UNCITRAL secretariat understands that this formulation, while attempting to maintain the interpretive hierarchy found in the Convention and insisted upon by the Commission, may be too complex for parties, courts or tribunals to easily apply but hopes it is a useful starting point for discussion. Furthermore, as may be obvious, it should be noted that parties' use of the model clause in this form would represent, as allowed in Article 6, a variation from the terms of the Convention.

With regards to Suggested Model Clause No. 10, the UNCITRAL secretariat could imagine a similar revision but notes, at this point, that the validity of such post-contractual agreements after a dispute has been initiated may vary among jurisdictions. This point may be worth discussing prior to the further development of Model Clause No. 10.

We would be happy to work with you on further drafting which aims to meet your objectives and at the same time reflects the recognized hierarchy for interpretation of CSIG governed contracts. The policy/legal issues that need to be considered and addressed in such a drafting exercise are possibly matters that can be discussed as a part of the coordination activities of UNCITRAL and Unidroit.

In the meantime, we trust that our comments on this work will inform your, and your fellow experts', consideration of the document at your Working Group meeting next week. The UNCITRAL secretariat remains at the service of Unidroit to provide our perspectives on the relationship between the CISG and the Unidroit Principles.

Yours sincerely,



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