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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 Klaus Peter Berger)

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Dear Professor Bonell

I have studied the document "Study L" and have the following comments:

The idea of providing choice of law clauses for the UNIDROIT Principles (UPICC) is to be welcomed, both with respect to the application of the UPICC and as a marketing tool.

I wonder, however, whether the large number of clauses and alternatives may prove counterproductive in situation in which no such clause has been agreed upon and an arbitral tribunal considers whether to apply the UPICC (for example for the "internationally useful" construction of the applicable domestic law). The Report rightly indicates that the cases in which arbitral tribunals have applied the UPICC absent a choice by the parties are in the majority.

So far, the area of transnational legal rules has been characterized by its informality, while the drafting of choice of law clauses which we know from domestic laws tends to "formalize" their application. That may convey to non-experts (contract drafters are sometimes non-lawyers) the wrong idea of the UPICC being a legal system or at least similar in character to a domestic legal system.

Also, I find some of these clauses rather vague. Thus, Clauses No. 3 und No. 4 use the langue "supplemented *when necessary* by the law of". I am not sure whether parties would really accept such a clause and put it into their contract. While arbitral tribunals may discuss with the parties in a *pending arbitration* and faced with a *specific legal issue* whether the UPICC and domestic law can be applied to a certain legal issue (I have done that once in an ICC case where the contract was governed by Dutch law and I decided to interpret the specific force majeure provision of the Dutch Burgerlijk Wetboek in the light of the force majeure provision of the UPICC after having discussed that specific issue with the parties, ICC Award No. 8468, Yearbook Commercial Arbitration 1999, 162 et seq), it may be more problematic for parties to accept such a vague language *ex ante*, i.e. in a choice of law clause without any connection to an existing legal disputes, i.e. without knowledge of the legal issues for which such a combined application of UPICC and domestic law may be appropriate. I am therefore skeptical as to the clauses No. 14 and 15 and (to a lesser extent) as to clauses 16 and 17.

I also wonder whether the mentioning of "principles" "usages"....in No. 5 und 6 weakens instead of strengthens the position of UNIDROIT and the quality of the UPICC (eg, as to the CISG, one would state in the clause that the contract is "governed by the CISG" and not "by the laws and rules as stated in the CISG").

Given their transnational character, which is similar to the character of international uniform law and given that, as the Study L rightly states, the UPICC do not contain solutions for any legal problem that may arise out of an international commercial contract, I consider clauses 9 to 13 as most relevant.

I know that there is a Working Group at the ICC that deals with the New Lex Mercatoria. The Group is chaired by Professor Bortolotti. That Group also deals with choice of law issues in the context of transnational law and looks at the various choice of law clauses in ICC Model Contracts (as the UNIDROIT Study L does). Is there any kind of communication or coordination between the two Groups?

These are my preliminary comments on Study L. Please feel free to come back to me if you have any questions.

With my warmest regards.

Yours ever

Klaus Peter Berger