

ICC DISPUTE RESOLUTION BULLETIN

EXTRACT | 2020 | ISSUE 1

ICC Dispute Resolution Bulletin | 2020 Issue 1

E-journal of the International Chamber of Commerce (ICC)
Périodique numérique de la Chambre de commerce internationale

Editors-in-Chief | Rédacteurs en chef

Julien Fouret
Samaa Haridi

Editorial Board | Comité de rédaction

Cecilia Azar
Chiann Bao
Utku Cosar
Valeria Galindez
Rémy Gerbay
Daniel Kalderimis
Tejas Karia
Swee Yen Koh
Yasmine Lahlou
Reza Mohtashami QC
Sara Nadeau-Séguin
Ziad Obeid
Ucheora Onwuamaegbu
Dámaso Riaño
Othmane Saadani
Sabina Sacco
Galina Zukova
Alberto Zuleta

Dispute Resolution Services Publications

Stéphanie Torkomyan, Publications Manager
Claire Héraud, Senior Publications Assistant

Articles for publication should be sent to the Editors-in-Chief, members of the Editorial Board, or to the Publications Manager (stn@iccwbo.org). Suggestions for book reviews are also welcome.

ICC Publication No. @20BUL1
ISBN: 978-92-842-0573-8
ISSN: 2520-6052

Price | Prix

Subscription | abonnement: 180 euros (excl. VAT | hors TVA)

Per issue | par numéro: 49 euros (excl. VAT | hors TVA)

Publication date | Date de parution

March 2020 | mars 2020

Published by ICC | Édité par ICC

Président, directeur de la publication: John Denton

Head Office
33-43 avenue du Président Wilson
75116 Paris, France

Directeur général, directeur adjoint de la publication:
Emmanuel Jolivet

Copyright © 2020 International Chamber of Commerce (ICC)

All rights reserved. No part of this work may be reproduced, distributed, transmitted, translated or adapted in any form or by any means except as permitted by law without the written permission of the ICC. Authors should request the permission of ICC prior to any reproduction or subsequent publication of an article (electronic or print). Permission can be requested from ICC through copyright.drs@iccwbo.org.

Tous droits réservés. Il est interdit de reproduire, de distribuer, de transmettre, de traduire ou d'adapter tout ou partie de cet ouvrage, sous quelque forme ou par quelque procédé que ce soit, en dehors des exceptions prévues par la loi, sans l'autorisation écrite de la Chambre de commerce internationale. Toute demande d'autorisation est à adresser à copyright.drs@iccwbo.org.

Disclaimer

Except where otherwise indicated, the views expressed and statements made herein are those of their authors and should not be construed as creating any duty, liability or obligation on the part of the ICC and its constituent bodies, including the International Court of Arbitration, the International Centre for ADR and their respective Secretariats.

Sauf indication contraire, les points de vue et les commentaires exprimés dans la présente publication sont ceux de leur(s) auteur(s) et ne sauraient créer aucun devoir, ni aucune responsabilité ou obligation à la charge de la Chambre de commerce internationale ou de ses organes, y compris la Cour internationale d'arbitrage, le Centre international d'ADR et leurs secrétariats respectifs.

Trademarks

ICC, the ICC logo, CCI, International Chamber of Commerce (including Spanish, French, Portuguese and Chinese translations), World Business Organization, International Court of Arbitration and ICC International Court of Arbitration (including Spanish, French, German, Arabic and Portuguese translations) are all trademarks of the ICC, registered in several countries.

ICC, le logo ICC, CCI, International Chamber of Commerce (y compris des traductions en espagnol, français, portugais et chinois) World Business Organization, International Court of Arbitration et ICC International Court of Arbitration (y compris des traductions en espagnol, français, allemand, arabe et portugais) sont des marques de la Chambre de commerce internationale et ont été enregistrées dans plusieurs pays.

Subscriptions/Individual issues

publications@iccwbo.org

The ICC Dispute Resolution Bulletin is available :

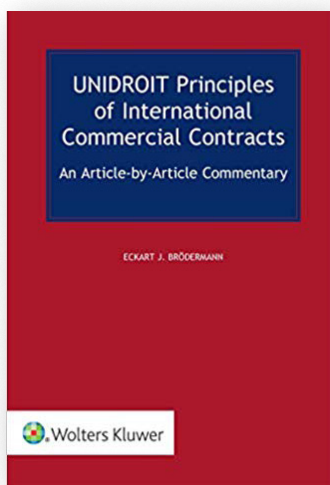
- ICC Knowledge 2 Go at <https://2go.iccwbo.org/>

- ICC Digital Library at <http://library.iccwbo.org/>

UNIDROIT Principles 2016: An Article-by-Article Commentary

Andrew Tetley

Partner, Reed Smith LLP, Paris



UNIDROIT Principles of International Commercial Contracts

By Eckart Brödermann
Kluwer Law International, 2018
ISBN 978-9041199560

In the introduction to his work, Professor Brödermann writes that 'The commentary is written in the

expectation that nobody is likely to read such a book from cover to cover'. For this review, that expectation has been dashed. It may also be confounded by the body of general readers.

The commentary is intended primarily as a practical guide and introduction to the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles 2016). It is useful to both those who hope to gain first insight into the UNIDROIT Principles and those who seek to navigate its structure to immediate practical purpose. It succeeds as an orientation guide to newcomers and seasoned practitioners alike.

The appearance of the UNIDROIT Principles 2016 is evidence of the enthusiasm within the international community to support their development. The original 1994 edition ran to 274 pages with 120 indexed articles/sub-articles. The UNIDROIT Principles 2016 is the fourth edition and runs to some 512 pages and 211 articles/sub-articles. The most important changes brought about by the UNIDROIT Principles 2016 are those directed at long term contracts. Substantive changes are more limited than those introduced into the earlier UNIDROIT Principles 2010 and UNIDROIT Principles 2004. This state of affairs undoubtedly reflects the maturity of the UNIDROIT Principles 2016, naturally attained following 20 plus years of development since 1994.

Throughout his commentary, Professor Brödermann's own enthusiasm for the UNIDROIT Principles rings through. It is coupled with broad practical experience of the UNIDROIT Principles endowing his work with genuinely useful insight for the reader.

In the desire to establish themselves as the *lex mercatoria* of commercial contracts, there is the ever present risk of overcomplicating the UNIDROIT Principles. Professor Brödermann's commentary stands fast against that risk, first, by using simple and clear language and, secondly by not entering into academic debate on contentious issues, referring the reader to other sources for that purpose. Above all else Professor Brödermann's commentary seeks to offer practical guidance and for that purpose eschews complexity. For these reasons, his commentary will come to the ready assistance of any reader seeking answers or clarifications on its subject matter and may on many occasion serve as a first (and possibly last) port of call beyond the Official Comments released by UNIDROIT alongside the Blackletter Rules.

Professor Brödermann's commentary is structured in a clear and logical way. The table of contents at the beginning quickly positions the reader while the index at the end is sufficiently detailed to allow for more forensic interrogation. The commentary includes a section on Latin terms. Latin terms are found throughout the Official Comments, but also in the UNIDROIT Principles themselves. For some readers, latin terms such as *ex nunc*, *ex æquo et bono*, *mutatis mutandis* and the like will be unfamiliar territory. The section on Latin terms offers practical help to such readers. The commentary also contains a compendious

bibliography as well as frequent cross references to more detailed works on the UNIDROIT Principles. Stepping back, the reader is left in no doubt as to the scholarship of Professor Brödermann.

Readers from civil and common law backgrounds will learn much on where differences between their legal cultures may exist in matters of contract. They will also be comforted that there is much in common: For example, as the commentary points out in its instruction to the subject, the basic principles applicable to assessment of damages contained in the UNIDROIT Principles will be familiar to common lawyers and civil lawyers alike. In other areas, Professor Brödermann invites the reader to cast aside the sometimes challenging areas of contract law that can exist in either or both legal systems. The UNIDROIT Principles free them of such troubles by simply not incorporating them. For example, the notions of 'consideration' and 'la cause' - present respectively in the English and (until recently, arguably) French legal systems - are not matters that feature in the UNIDROIT Principles.

At other times, differences between the common law and civil law legal systems are exposed to view: For example, provisions on liability for breaking off contractual negotiations (Article 2.1.15) and rules on hardship (Article 6.2.2), mostly absent in common law systems but not infrequent in civil law systems, are both present in the UNIDROIT Principles. Conversely, the UNIDROIT Principles contain express provisions on mitigation (Article 7.4.8), a concept familiar to a common lawyer but not to all civil lawyers (French law has no such concept, for example). At other times, the commentary goes out of its way to explain cross cultural differences where a compromise position has been adopted in the UNIDROIT Principles: For example, on 'entire agreement clauses' (Article 2.1.17). Nuances between different civil law systems are also revealed, sensitising common law readers in particular to the risks of over generalisation in such matters.

The UNIDROIT Principles have made steady headway in the first 25 years of their existence. It is perhaps in international arbitration that the UNIDROIT Principles have made most progress. This is because transnational soft norms such as the UNIDROIT Principles can be adopted with greater certainty of outcome within an international arbitral process conducted by experienced international arbitrators, as opposed to within a national court setting. All that said, Professor Brödermann's commentary hints at significant citation of the UNIDROIT Principles not just in arbitration but also in domestic court decisions across the world.

The UNIDROIT Principles can also play a number of roles. It is perhaps rare that they appear as the sole governing norm chosen by the parties. On the other hand, it is not uncommon to see the UNIDROIT Principles accepted by international arbitral tribunals, in part or in whole, as representative of universally accepted general principles in matters of contract. According to the parties' choice, they can also usefully fill gaps left by the selected national law or even by other more specialised soft law norms, such as the CISG. In inverse fashion, the UNIDROIT Principles are sometimes selected by contracting parties as the prevailing norm, with a national law relegated to a secondary role.

In all this, Professor Brödermann's commentary will undoubtedly contribute to a wider appreciation of the form, function and possibilities offered by the UNIDROIT Principles. Contract law is central to international trade. Long gone are the days when international trade was the purview of a limited number of pioneering states. It is now irreversibly global. A global system of contract law for global trade is not yet with us. But reading Professor Brödermann's commentary, the reader is left thinking that it may be tantalisingly close, subject only to mandatory rules. More immediately, the reader is left well-informed and well-equipped to handle his or her next case involving the UNIDROIT Principles 2016. If the reader is having to grapple with the UNIDROIT Principles 1994, then Professor Brödermann's commentary may not be the best starting point, although his work helpfully lists the rules which have been unchanged since 1994. Overall, amongst the wide body of literature on the UNIDROIT Principles, Professor Brödermann's commentary stands out and is well deserving of unreserved recommendation and a place in the international practitioner's armoury of law books.