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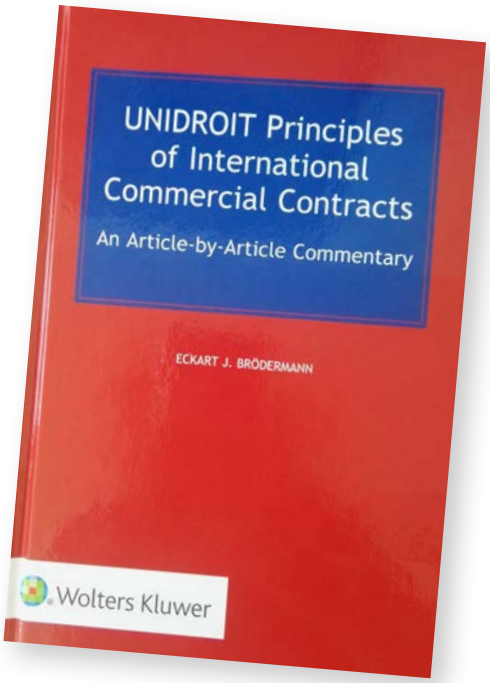
The Future of International Contract Drafting Has Begun

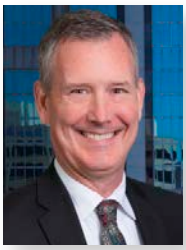
An Interview of Eckart Brödermann by Marc O. Dedman and Caroline Berube



In May 2017, the council of the intergovernmental organization "The International Institute for the Unification of Private Law" (UNIDROIT), uniting the governments of 63 nations, released the fourth edition 2016 of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles). In two resolutions of 2007 and 2012, the United Nations Commission in International Trade Law (UNCITRAL) recommended the use of previous versions.

Here, Caroline Berube and Marc Dedman conduct an interview with Eckart Brödermann, the author of a recently published article-by-article commentary on the UNIDROIT Principles of International Commercial Contracts (Wolters Kluwer 2018). As an added note to this interview, Caroline Berube is common law educated but practices civil law. Marc Dedman is civil law educated but practices common law.


Eckart Brödermann


Marc O. Dedman


Caroline Berube

Eckart Brödermann is the founding partner of Brödermann Jahn in Hamburg, Germany, RA GmbH and professor of law for international contract law, choice of law and arbitration at the University of Hamburg. He has worked with the UNIDROIT Principles since 2001, was one of the experts observing the process of their creation between 2005 and 2010 (on behalf of a committee of the International Bar Association) and he wrote an article-by-article commentary on the UNIDROIT Principles of International Commercial Contracts (Wolters Kluwer 2018).

Brödermann Jahn
ABC-Straße 15
Hamburg, 20354
Germany

+49 40 37 09 05 0 Phone

eckart.broedermann@german-law.com
german-law.com

Marc O. Dedman is a partner in Spicer Rudstrom LLC's Nashville office. Civil law educated and licensed, he has practiced common law for over 30 years. His primary focus is on business and international contracts and litigation and insurance coverage. He was involved as proofreader of Brödermann's commentary on the UNIDROIT Principles of International Commercial Contracts.

Spicer Rudstrom PLLC
414 Union Street
Suite 1700
Nashville, Tennessee 37219

615.259.9080 Phone

mdedman@spicerfirm.com
spicerfirm.com

Caroline Berube is the managing partner of HJM Asia Law (with offices in China and Singapore). She is admitted to practice in New York and Singapore. She has worked in Singapore, Bangkok and China for a British and a Chinese firm before setting up her own firm 12 years ago. Caroline has been representing international corporate clients and family-owned companies in M&A cross-border manufacturing and technology transactions and IP in the Asia Pacific region for 20 years.

HJM Asia Law & Co LLC
49, Kim Yam Road
Singapore, 239353
Singapore

+65 6755 9019 Phone

cberube@hjmasialaw.com
hjmasialaw.com

Marc: ***Eckart, I am a U.S. attorney. You are a European attorney with much practice involving the UNIDROIT Principles. Why is there benefit for U.S. clients to consider utilizing the UNIDROIT Principles rather than the Uniform Commercial Code or similar U.S. laws?***

Eckart: Marc, you are essentially asking the "what's in for me?" question for a U.S. client. The answer is simple. A U.S. client can save money and reduce risks by using the UNIDROIT Principles for its international contracts. I give you a concrete example from my practice. Earlier this year, the general counsel of a well-known U.S. company in the automotive industry followed our advice to integrate a UNIDROIT Principles clause in the standard terms of its German subsidiaries for the purchase of goods from foreign suppliers. We combined this choice with an arbitration clause because, in Germany, the arbitration law explicitly permits the choice of rules of law such as the UNIDROIT Principles. Thereby the company can avoid the domestic German law on standard terms. German law on standard terms is mandatory if German law applies, but it is not "internationally mandatory" law. If ever the risk of arbitration substantiates, the U.S. client can point at the chosen regime in Articles 2.1.19 through 2.1.21 and other principles of fair dealing in the UNIDROIT Principles, which provide a balanced and special regime for standard clauses. Thereby the U.S. company or its affiliate can avoid costly legal uphill battles in case of a dispute, which would be bound to happen if German law applies. Under the German law on standard terms (which is not made for international, but rather for domestic contracting), the user of the standard terms bears the burden of proof that deviations from the decisions of the German legislator (e.g. with regard to warranty periods) are justified. By choosing the UNIDROIT Principles, this kind of uphill battle becomes unnecessary. In this example, the choice of the UNIDROIT Principles saves the attorney fees in case of dispute and avoids the risk that an arbitrator does not accept an industry-based argument justifying the deviation. Under the UNIDROIT Principles, there is no doubt that warranty periods can be reasonably extended. (This follows from Article 10.3 UNIDROIT Principles on limitation periods which is, distinctly from U.S. law, in many jurisdictions a substantive legal issue). Compared to the German law on standard terms, the UNIDROIT Principles enhance the freedom of the U.S. company when acting in the German market. This is just one concrete example. There are numerous other examples, starting with language. Distinctly from the Uniform Commercial Code (UCC), the UNIDROIT Principles have been translated in 15 languages; contract partners can read them in their native language.

A U.S. company could also use the same technique which a German client (i.e., a major German corporation quoted on the German DAX stock exchange) used in 2008. We used the UNIDROIT Principles to subcontract to over 80 different sub-suppliers in a major construction project. We offered to all sub-suppliers from four continents a choice to either contract under our "home" law – well known to the company (in that case German law) – or to contract under the UNIDROIT Principles. In the same way, a U.S. client could offer to its international business partner to accept the choice of its favorite U.S. law (such as New York law or the UCC), or to accept the truly neutral set of self-explanatory rules in the UNIDROIT Principles. In my German example, many of the sub-contractors accepted that offer. Specifically designed to cope with international "business-to-business" needs, the UNIDROIT Principle thus provides a perfect "Plan B" to any international contract negotiation. When you get to know them better, you will discover that they should be even considered as your first option, your "Plan A." My first example of our U.S. client from the automotive industry speaks for itself.

Caroline: ***Eckart, I got to know about the UNIDROIT Principles many years ago when we agreed on a Chinese-German cooperation agreement and chose the UNIDROIT Principles to govern our relationship. This was long before our firms both joined Primerus. As you know, much of my legal practice of law is in Asia. I want to follow up on Marc's question. What's in it for my Canadian clients acting in Asia or for my Asian clients negotiating with foreign companies? What do they gain by relying upon the UNIDROIT Principles versus contractual provisions they have used, many times for decades, in the past? Why would they want to change what they have done?***

Eckart: The UNIDROIT Principles are all about freedom of contract. This is the first of the 211 principles, enshrined in Article 1.1. Thus, there is no need for your clients to change their substantive individual contractual provisions if they want to keep it. As the world is constantly changing, it may be wise to consider change and to read what the UNIDROIT Principles do offer. But they do not impose any need to change an existing practice. Respecting freedom of contract, (i.e., party autonomy) as a starting point, the UNIDROIT Principles do respect just about all contractual clauses as long as they do not manifestly contravene the principles of good faith and fair dealing in Article 1.7 UNIDROIT Principles. By the way, in this respect, the UNIDROIT Principles will sound familiar to U.S. lawyers because § 1-302 lit. b) provides in a similar way: "The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement." The choice of the UNIDROIT Principles provides in essence for an adequate regime of default rules for issues not explicitly covered in the contract. As we all know, in an ordinary contractual setting, there is never enough time, budget and energy to cover all issues. This is why

neutral default rules are helpful both for your Canadian clients acting in Asia and for your Chinese clients engaging in contracts with foreign business partners. The UNIDROIT Principles are based on a very straightforward business-driven concept by which, in essence, each party accepts the responsibility for its own sphere (this follows e.g., from Articles 7.1 and 7.2 of the UNIDROIT on non-performance in general). Exceptions can derive from *force majeure* (act of God) or a contractual allocation of risk, e.g., by an exemption clause pursuant to Article 7.1.6. In this respect, the clients can gain time and save money by avoiding having to orchestrate their international trade activities through a myriad of different national contract laws.

The UNIDROIT Principles provide a neutral compromise, agreed between experts from all major regions of the world between 1985 and 2016. Why not take that modern international standard, acceptable around the globe, as a default regime of those issues which are not explicitly covered in your contract? For Chinese clients, this step is particularly easy to take. Here is why: First, in 1999, at the reform of the Chinese contract law, the Chinese law switched from the German regime of fault to the regime of responsibility by spheres. This concept constitutes the basis of both the Convention of the International Sale of Goods (CISG) and of the UNIDROIT Principles. Secondly, the UNIDROIT Principles are quite well known in China and taught at several Chinese universities. A group of Chinese professors is already working on a Chinese translation of my book.

Last, let me add that I have one Asian client from the Philippines with a French background. He has been using the UNIDROIT Principles, worldwide, in all its companies, in contracts with European, Russian, African, Chinese and other Asian business partners for 15 years. Its contract partners have always accepted the UNIDROIT Principles. That was never an issue.

Marc: ***How do the UNIDROIT Principles address the tension that can exist between U.S. UCC provisions and international mandatory laws, multinational treaties, Conventions and other national laws?***

Eckart: We need to distinguish between two kinds of possible tensions. First, regarding possible tensions with internationally mandatory law of national, regional or international regime, it is always important to bear in mind which national or international mandatory law may apply on top of and irrespective of the contractual regime. This question arises irrespective of the contractual regime. If the parties choose the UNIDROIT Principles, there will be no tension with such international mandatory law. Article 1.4 of the UNIDROIT Principles explicitly provides that "[n]othing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law." Which private international rules apply depends on the competent court or arbitration tribunal. If a contract infringes a mandatory rule, a section on illegality sets forth the consequences in a very straightforward and nuanced way. Article 3.3.1 UNIDROIT Principles enumerates the multitude of circumstances which will have to be considered.

Second, regarding conflicts with "other national laws," by choosing the UNIDROIT Principles instead of the UCC, an American company operates with a set of rules which is based on a compromise between all major legal systems. As a matter of logic, such a set of rules will often be closer to any "other national laws" than the UCC. This is true at least when the other law comes from another family of law like the two branches of continental European law which derive from German and French law (e.g., Greek or Japanese civil law being based on German law or the civil law in Romania, Egypt, Qatar and Mexico which is based on French law). This is also true with regard to modern mixed laws incorporating inspirations from many sources (like Chinese civil law which still has a lot in common with German law).

Caroline: ***On an even more basic level, how do the UNIDROIT Principles ameliorate tensions that can exist between common law and civil law?***

Eckart: That is a very good question. The tensions between common and civil law are multiple. They often start with language. Living in China, you know best the difficulties of translation from complex Chinese signs to English. English is a language which lives from its variety of words. A non-native English speaker has no chance to ever capture that diversity. People like me speak a global English or, as we call it in Europe, a "Commission English." This expression refers to the fact that the majority of legal experts at the European Commission are not native English speakers. In contrast to the English language, the languages used in civil law jurisdictions tend to be structurally different. German, for example, is a much more abstract language than English. The entire German legal system is based on abstract structures and sentences which determine the contents of the law. For certain expressions in the German legal language (like *Schuldverhältnis*), there simply exists no English word. Certain German concepts (like *Abstraktionsverhältnis*) remain difficult to translate. The same applies for the French language. For example, only as recently as 2016, the French legislature has abrogated the complex theory of cause as a requirement of contract formation. Incidentally, this development was inspired by the UNIDROIT Principles (here: Article 3.1.2) which have inspired several modern civil law legislators. By their neutral and internationally agreed-upon

language, the UNIDROIT Principles do overcome tensions between civil and common law. During the over 30 years of the making of the UNIDROIT Principles, the approximately 150 experts in charge, representing all major economic regions of the world, have spent hours addressing these language problems. They have made it a point to choose language which is understandable to lawyers around the globe, regardless of their formation. With regard to many principles, where there is a common ground between civil and common law lawyers, the UNIDROIT Principles state this common ground in neutral language.

Further, common and civil law have different pre-concepts. For example, in civil law countries you will often find a concept of responsibility in case of withdrawing from a contract negotiation, while this concept may be strange for a U.S. lawyer. During the writing of my book, I encountered about 30 situations where the UNIDROIT working group had to cope with sometimes entirely different pre-concepts of common and civil law lawyers (or between different common laws or different civil laws). There is no general "better;" human nature is inventive. By agreeing on the UNIDROIT Principles, parties can incorporate – at no cost – the results of the working group which will have spent usually days, weeks or years to find the best possible solution as a compromise between the different systems. Sometimes the compromise will be closer to one side and sometimes closer to the other side. On rare occasions, the work has resulted in an entirely new approach like in the case of hardship (Article 6.2.2). On balance, the advantage of a neutral set of rules where these kinds of conflicts are resolved, or at least addressed, has a big advantage. Pursuant to the principle of party autonomy, the parties are always free to negotiate deviations if they so wish. For example, in my standard terms for the client agreement with foreign clients of my law firm, which are based on the UNIDROIT Principles and not on German law, we always add a clause pursuant to which negotiations can interrupt the statute of limitation. That is a concept which was not integrated into the UNIDROIT Principles, but which we like. Our contract has been always accepted regardless of the common or civil law origin of the client.

Marc: ***Following up on Caroline's question, the UNIDROIT Principles are only approximately 25 years old. Legal authority interpreting those Principles is not as well developed as are many countries' existing laws. Given your premise that the UNIDROIT Principles lessens potential for conflict in contract interpretation between the civil and common law systems, where would legal practitioners who seek to advise their clients on the effect of the inclusion of a UNIDROIT provision to a cross-border contract look to give advice to clients as to how such provision should likely be interpreted in the event of dispute?***

Eckart: First of all, it helps to look at the UNIDROIT Principles itself which are written in neutral English, including some explicit definitions and trying to avoid as much as possible words with a concrete connotation in certain domestic jurisdictions.

Secondly, UNIDROIT itself has issued Official Comments, with illustrations, which are available on the internet. They have been produced by the working group. Many of the illustrations will sound familiar because, for example, famous examples known from jurisprudence, e.g., old English cases, and examples from practice, have been included.

Third, the Chairman of the Working Group, Professor Michael Joachim Bonell, has been editing a website at unilex.info for years. It compiles over 444 court and arbitration decisions from around the globe. This is, of course, only the tip of the iceberg because arbitration decisions are, by their nature, usually confidential. In a recent project of the International Bar Association (IBA), we are presently compiling further cases from over 25 jurisdictions. The website also includes a detailed bibliography. For example, an international team of authors from around the globe with Stefan Vogenauer, a German academic who used to teach at Oxford University, has written a detailed article-by-article commentary of 1,500 pages. With my article-by-article commentary of 433 pages, I have added a practice-driven tool. It includes many observations from my international practice using the UNIDROIT Principles around the globe since 2001.

Caroline: ***In a business transaction, parties can seek many purposes; however, two primary ones include: 1) creation of a binding effect on the transaction; and, 2) limitation of potential risks. How are the UNIDROIT Principles more beneficial to parties than the laws currently used between parties for a cross-border contract?***

Eckart: When negotiating an international contract, different mindsets of lawyers meet; often, they even speak different languages. The number of contracts concluded in English with at least one non-native party probably outweighs the number of contracts where you have native English speakers on both sides. Against that background, it helps to operate with a set of rules which is not bending toward any one side, directly or indirectly. On formation of contract, the UNIDROIT Principles provide an international compromise. For example, article 2.1.12 on Writings in Confirmation contains a strange rule for many common law lawyers in that it permits any alteration of contract by silence, but it goes less far than some European legal systems where the silence upon receipt of a commercial confirmation

letter can serve as evidence for the entire contract formation. By providing a written compromise rule, both parties know what they can expect if one of them summarizes its understanding of the entire contract subsequently to contract conclusion by handshake. This kind of agreement sometimes does happen in international life, e.g., in the lobby of an airport lounge prior to a long-distance flight. If one of the parties summarizes the results during the flight in an email, Article 2.1.12 provides in clear language: "If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy." In other words, as long as the email does not materially alter the agreed terms, it becomes a binding documentation of the contract, unless the other party objects to the contents without undue delay. This is straightforward, fair and operable. In contrast, in an international contract setting where one of the state laws would apply, one party might need to research foreign law which will be often written in a strange language and not easily accessible. By addressing this kind of background point with regard to contract formation, the UNIDROIT Principles reduce the risk of a potential dispute. Further, the UNIDROIT Principles provide in Article 2.1.22 an innovative solution for the battle of forms when different standard forms collide. This is another example where the UNIDROIT Principles may be more beneficial to parties than the laws currently used between parties to a cross-border contract. The application of Article 2.1.22 of the UNIDROIT Principles avoids discussions of multiple contrasting concepts from the *last shot* to the *first shot* rule which might otherwise apply in case of a battle of form.

The UNIDROIT Principles also reduce risk by addressing a number of typical points of international practice which a national legislator will usually not consider worth special attention and special rules, e.g., on time-zone management (Article 1.12(3)) or language (Article 4.7).

Marc: ***Again, following up on Caroline's question, let me ask about a specific example: In an international contract, a key consideration is frequently choice of currency denomination. What currency fluctuation risk-minimizing opportunity do the UNIDROIT Principles afford to parties that may not be offered by existing laws?***

Eckart: The UNIDROIT Principles contain only rules for the contractual regime. They have no influence whatsoever on currency fluctuation. When parties agree on payment in a specific currency, it is up to them to provide for any hedging. However, with regard to currency issues, the UNIDROIT Principles very helpfully address explicitly a number of specific contractual situations which relate to currency issues. Article 6.1.9 contains a rule on the applicable exchange rate at the place of payment, with an exception in case of late payment (paragraphs 3-4). It stipulates a compromise for situations in which a monetary obligation is expressed in a currency other than that of the place of payment (in paragraphs 1-2). Article 6.1.10 provides a default rule when the currency is not expressed. This sometimes does happen in practice, for example because a technical transmission process renders the sign for Euro unreadable or because the parties forget to specify which kind of "dollars" they mean. Article 7.4.12 addresses the question of the currency in which to assess a damage. Article 8.2 regulates the issue of foreign currency set-off which many national laws, like German law, will either not address and/or not even admit. With respect to currency issues, the UNIDROIT Principles thus offer more to the parties than most existing laws.

Caroline: ***Given the wide breadth of the UNIDROIT Provisions, is a party's freedom to contract in a manner they may prefer undermined? In other words, are the UNIDROIT Principles more limiting than existing laws?***

Eckart: Certainly not! That follows already from the approach of the UNIDROIT Principles which are based on very few underlying concepts such as freedom of contract, binding extent of contracts (*pacta sunt servanda*), openness to usages, upholding the contract if possible (*favor contractus*), the observance of good faith and fair dealing. These are principles which will sound familiar and acceptable to any company engaged in international business. In contrast, a domestic legislator creating national laws will have additional concerns in mind, like protection of the consumer or lobbying interests. Thus, most national laws will be much more limiting of a party's freedom than the UNIDROIT Principles. For example, in my jurisdiction, this is the law and the jurisprudence on standard terms. Except for internationally mandatory law which provides hand-cuffs to freedom regardless of the contractual regime, the limits of good faith and fair dealing underlying the UNIDROIT Principles provide a solid ground for international business to business contracts. It has the approval of the 63 member states of UNIDROIT which are represented in the Council, including the U.S. Even the United Nations Commission in International Trade Law (UNCITRAL) has recommended the use of the UNIDROIT Principles in two resolutions of 2007 and 2012, which relate to the previous versions of 2004 and 2010.

Marc: ***That is interesting, Eckart. Let me ask this: Can the UNIDROIT Principles offer benefit to two parties from, for example, different states in the U.S. given that different states sometimes interpret the same UCC provision differently?***

Eckart: The laws of the US are still the laws of 50 different states. In light of the existing differences, the rules developed as an international compromise may also be helpful or inspiring for contracts between different U.S. states with a different understanding of certain UCC provisions.

Marc: ***If what you say is accurate, Eckart, are you suggesting that there may be benefit to U.S.-based parties by adopting certain UNIDROIT provisions to an agreement between them even if the contract is not international?***

Eckart: Yes, of course. In the business world, contracting is all about party autonomy used to realize business goals. You can do anything as long as you do not infringe third parties' rights or mandatory law. If the UNIDROIT Principles offer concepts or clauses, such as the concept of hardship in Chapter 6.2, why would a party from Tennessee be prohibited from incorporating the three provisions on hardship from the UNIDROIT Principles into its own contract, when contracting with a party from, say, the state of Washington? As noted once by the Chairman of the Working Group, Professor Michael Joachim Bonell, the Official Comments to § 1-302 of the U.S. UCC explicitly state that "[...] parties may vary the effect of [the Uniform Commercial Code's] provisions by stating that their relationship will be governed by recognised bodies of rules or principles applicable to commercial transactions [...] [such as e.g.,] the UNIDROIT Principles of International Commercial Contracts) […]." In international scenarios, where I was obliged to accept operating under a foreign law, I have used the UNIDROIT Principles as a checklist. I have then integrated certain concepts, ideas and clauses and gotten them accepted by the other side. I see no reason not to do the same in a U.S. – U.S. federal context. Following an analysis of Professor Michael Joachim Bonell, it is worth noting that most of the mandatory provisions of the UCC are restricted to consumer transactions so that the choice of the UNIDROIT Principles appears to be possible for business-to-business transactions.

Caroline: ***I want to focus on the concept of contract enforcement. How can the UNIDROIT Principles be more advantageous to parties with respect to enforcement of terms of an agreement between them than existing laws?***

Eckart: Depending on their training in any of the various common law or civil law systems, a lawyer will have a different understanding of enforcing the terms of an agreement. For a civil lawyer, it will appear self-evident that "enforcement of the terms of an agreement" means, first of all, enforcing a claim for specific performance. Such a claim would include non-monetary claims. In contrast, a common law lawyer will think in damages. Chapter 7 of the UNIDROIT Principles, which concentrates on non-performance, describes in self-explanatory language when and under what circumstances a party may insist on specific enforcement. It does accept the principle, but provides for multiple exceptions, where a party may claim only damages. Such a transparent compromise avoids frustration in an international setting with different pre-concepts. It creates a clear, joint understanding of the parties about the type of enforcement which they must expect if the other party does not perform as due pursuant to the contract and/or to Chapter 5 of the UNIDROIT Principles on Content and Chapter 6 on Performance.

Marc: ***At the end of the day, a conflict in a contract between parties must be interpreted. With a myriad of languages, culture and legal systems in the world – including civil law, common law, Shariah law, etc. – what are examples of existing impediments to contract negotiation and interpretation that the UNIDROIT Principles address better than existing laws?***

Eckart: I give you an example which I discovered during my writing of my commentary on the UNIDROIT Principles. The approach to interpretation differs between civil and common law jurisdictions. While every lawyer will look at the ordinary meaning of the words as a starting point, native and non-native English speakers will often have a different understanding and different reference points with regard to such ordinary meaning. This will often lead to language in a contract which, when interpreted by a foreign judge or an international arbitration panel, may not be as crystal clear as it was conceived by the drafting lawyer. In case of a dispute, the UNIDROIT Principles can help. Chapter 4 on Interpretation includes the possibility of "supplying an omitted term" in article 4.8. This is a technique used under certain circumstances by lawyers trained in civil law. It may sound unfamiliar for a lawyer trained in common law. Chapter 5 on Content includes in Articles 5.1.1 and 5.1.2 rules on "implied obligations" which relies on a legal technique which is more familiar to lawyers trained in common law. If the arbitrators on a panel include both common and civil law trained lawyers, the panel can develop a joint understanding of what was meant by certain contract language. However, they can leave open the question whether they consider (1) an obligation to be *implied* in the contents of the contract or (2) *supplied* because the words in the contract might not state the obligation expressly. Each arbitrator can support the result which is perceived as correct

more easily because the UNIDROIT Principles offer both avenues and thereby contribute to finding a consensus. At the same time, they help to avoid a highly complex legal question on how to interpret a contract.

Caroline: ***What can an international organization such as Primerus, which has become involved in the education of clients and others about the UNIDROIT Principles and whose member firms span the globe, offer to clients as a benefit that those clients do not currently receive?***

Eckart: Primerus members have an open mind. With the UNIDROIT Principles and their implementation into international contracts, the future of international contracting has begun. Primerus members trust each other and meet regularly. They can afford to integrate new developments in the law and combine this with sound practice and experience. In international teams they can offer, at very reasonable cost, tailor-made solutions to clients. By integrating the UNIDROIT Principles in their portfolio, Primerus members can reduce risks and costs for their clients. Instead, they can concentrate on the negotiation of the individual contract (rather than the default rules) to make their clients' concrete goals happen. Also, there are enough other issues to concentrate on which lay beyond the UNIDROIT Principles, such as mandatory law, the company set-up and a legal structure for worldwide distribution. The UNIDROIT Principles just offer a very reasonable starting point. As an international organization, Primerus thrives by taking a lead here and continuing to organize conferences teaching the UNIDROIT Principles. Primerus has done this in Hamburg in 2016 jointly with the Association of Corporate Counsel (ACC). Primerus is doing this at its Global Conference in Boston October 17-21, 2018. And Primerus will do this at its next International Convocation in Miami, Florida, May 3-5, 2019. There, we will again mix Primerus colleagues from at least 35 U.S. jurisdictions, 25 jurisdictions around the globe, and general counsel of internationally and worldwide acting companies.

Marc: ***Thank you, Eckart, for the time you spent with us. Having been a proofreader, and now user, of your outstanding book, I concur with you that the UNIDROIT Principles can facilitate transactions between parties in ways that existing laws sometimes do less efficiently.***