

**PRÉCIS OF THE CIARB NEW YORK BRANCH PROGRAM OF 25 FEBRUARY 2015 ON
THE
2010 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS**

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On 25 February 2015, a two-hour program, *The 2010 UNIDROIT Principles of International Commercial Contracts*, took place in six video-linked locations: New York, London, Paris, Berlin, Frankfurt, and Washington D.C.

The event, an initiative of the New York Branch of the Chartered Institute of Arbitrators (CI Arb NY Branch), was organized and hosted by Squire Patton Boggs, and co-sponsored by ICC/SICANA, Inc., the New York International Arbitration Center (NYIAC), the College of Commercial Arbitrators (CCA), and the CI Arb European Branch and Washington D.C. Chapter.

Six prominent academics active in the UNIDROIT Principles Working Group made presentations on specific topics and answered questions from an audience sophisticated in international commercial law and dispute resolution. The event provided an occasion for a lively introduction to key provisions of the UNIDROIT Principles, to their actual and potential use in cross-border commercial contracts, and to their influence in the evolution of commercial law in civil, common law and developing legal systems.

The program was introduced by Peter Michaelson (independent arbitrator and chair of CI Arb New York Branch), and moderated by Richard Mattiaccio (Squire Patton Boggs (US) LLP partner, chair of the CI Arb New York Branch Programming Committee, CCA Fellow, NYIAC director, and UNIDROIT Principles Working Group observer.)

Professor M. Joachim Bonell (University of Rome La Sapienza, and chairman of the UNIDROIT Working Group since its inception in the 1990's) provided an overview of the Principles and their significance.¹ From London, Professor Bonell explained why practitioners should care about the UNIDROIT Principles. Using the Preamble of the UNIDROIT Principles as a starting point, Professor Bonell explained that the

¹ For further information, please see: <http://www.unidroit.org/overview-principles-2010/309-instruments/commercial-contracts/unidroit-principles-2010/unidroit-principles-2010-history/780-michael-joachim-bonell-curriculum-vitae>

ambitious goal of the Principles is to provide an international restatement of contracts as well as a source of a considered, “better rule” approach in some circumstances. He elaborated that the UNIDROIT Principles can apply to international commercial contracts in various circumstances, including as the law or rules chosen by the parties or as a gap-filler when the governing law does not provide a clear answer.² Professor Bonell characterized the UNIDROIT Principles as representing a balance between and among different legal traditions.

The second speaker, Professor Alejandro Garro (Columbia Law School, representative of Argentina in the Working Group of the United Nations Commission on International Trade Law (UNCITRAL) on secured transactions, and a member in the UNIDROIT Principles Working Group)³ spoke from New York. Professor Garro introduced certain provisions of the Principles familiar both to civil and common law practitioners. The common elements discussed included (1) the sufficiency of a mere agreement to form a contract without further formal requirements;⁴ (2) the distinction between a duty to achieve a specific result and a duty of best efforts; and (3) factors to consider in determining whether a contract may impose one or the other of these duties.⁵ Professor Garro also pointed out a commonality of approach to contracts that require public permission and the consequences of lack of receipt of such permission.⁶ Professor Garro emphasized that these were only some illustrations of the growing convergence between common law and civil law traditions as reflected in the UNIDROIT Principles.

Dr. Eckart Brödermann, founding partner of a Hamburg law firm, professor at Hamburg University, co-editor of the Hamburg Law Review, managing director of the Chinese European Arbitration Centre, and an observer in the 2010 UNIDROIT Working Group,⁷ spoke from Frankfurt regarding UNIDROIT Principles familiar to civil law and unfamiliar to common law traditions. In particular, he noted that the

² UNIDROIT Principles of International Commercial Contracts 2010, Preamble, available at: <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

³ For further information, please see: <http://www.law.columbia.edu/null?exclusive=filemgr.download&id=87145>

⁴ UNIDROIT Principles of International Commercial Contracts 2010, Article 2.1.1, available at: <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

⁵ UNIDROIT Principles of International Commercial Contracts 2010, Articles 5.1.4 and 5.1.5, available at: <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

⁶ UNIDROIT Principles of International Commercial Contracts 2010, Articles 6.1.14 to 6.1.17, available at: <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

⁷ For further information, please see: <http://www.german-law.com/en/professionals/partners/eckart-broedermann/>

UNIDROIT Principles apply the “knock-out” doctrine rather than the “last shot” rule in the event that the contracting parties exchange inconsistent standard terms and that, under the knock-out doctrine, the terms that are common in substance prevail regardless of the sequence in exchange of forms.⁸ He also pointed out that the UNIDROIT Principles recognize the relevance of drafting history in the interpretation of contracts, rather than adopt a more restrictive, common law approach primarily based on the language of the contract.⁹ Professor Brödermann further observed that the UNIDROIT Principles impose a duty to negotiate in good faith, or at least a duty not to negotiate in bad faith, more in line with civil law tradition than the common law emphasis on freedom to terminate negotiations.¹⁰

Professor Henry Gabriel (Elon University Law School, member of the UNIDROIT Governing Council and member of the 2010 Principles Working Group, CI Arb Fellow, life member of the Uniform Law Commission, elected member of the American Law Institute, US delegate to UNCITRAL, and member of the US State Department Advisory Committee on Private International Law)¹¹ discussed provisions of the UNIDROIT Principles that are familiar to common law and unfamiliar to civil law traditions. Professor Gabriel noted, for example, that the UNIDROIT Principles allow avoidance or termination by simple notice.¹² Professor Gabriel emphasized that this common law approach, as adopted by the UNIDROIT Principles, fostered greater flexibility in the termination of contracts than in some civil law traditions. He also noted that this approach inevitably exposed the party terminating a contract to great risk of liability for a termination later determined to be unjustified. Professor Gabriel added that the UNIDROIT Principles limit specific performance to cases in which there is no reasonable alternative.¹³

The fifth speaker, Professor Benedicte Fauvarque-Cosson (University Pantheon-Assas Paris II, scientific director of the weekly law review *Recueil Dalloz*, president

⁸ UNIDROIT Principles of International Commercial Contracts 2010, Article 2.1.22, available at: <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

⁹ UNIDROIT Principles of International Commercial Contracts 2010, Article 4.3, available at: <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

¹⁰ UNIDROIT Principles of International Commercial Contracts 2010, Article 2.1.15, available at: <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

¹¹ For further information, please see: http://www.elon.edu/e-web/law/faculty/gabriel_henry.xhtml

¹² UNIDROIT Principles of International Commercial Contracts 2010, Articles 3.2.11 and 7.3.2, available at: <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

¹³ UNIDROIT Principles of International Commercial Contracts 2010, Article 7.2.2, available at: <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

of the French Society of Comparative Legislation, vice-president of the International Law Academy, member of the UNIDROIT Working Group, and member of the Working Groups for the European Civil Code and the Hague Principles of Choice of Law in International Contracts)¹⁴ spoke from Paris. Professor Fauvarque-Cosson introduced provisions of the UNIDROIT Principles that are new both to the civil law and common law traditions. She noted that the UNIDROIT Principles provide that a mere agreement is sufficient to conclude, modify or terminate a contract, without applying the common law doctrine of consideration or the civil law theory of cause.¹⁵ Professor Fauvarque-Cosson also noted that the UNIDROIT Principles are quite innovative with regard to hardship in performance of contractual obligations. In particular, she explained that the Hardship provisions entitle a party to request renegotiation or termination if the party would be significantly disadvantaged by its performance on account of unforeseeable and uncontrollable events.¹⁶

Professor Neil B. Cohen (Brooklyn Law School, director of research for the Permanent Editorial Board of the Uniform Commercial Code, fellow and regent of the American College of Commercial Finance Lawyers, US delegate to the UNCITRAL, member of the US State Department's Advisory Committee on Private International Law, observer to the 2010 UNIDROIT Working Group, and member of the Working Group on the Hague Principles of Choice of Law)¹⁷ spoke from New York. Professor Cohen presented an overview of some of the new topics addressed in the 2010 Principles, with specific emphasis on the new chapter on plurality of obligors. Professor Cohen noted the presumption in the UNIDROIT Principles of joint and several liability when several obligors are contractually bound for the benefit of an obligee, and specific rules regarding the effect of a single release or judgment on the co-obligors, the sharing of liability, and the right to recourse as among the obligors.¹⁸

¹⁴ For further information, please see: http://ec.europa.eu/civil_service/docs/special_advisers/2011/fauvarque-cosson-cv_en.pdf

¹⁵ UNIDROIT Principles of International Commercial Contracts 2010, Article 3.1.2, available at: <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

¹⁶ UNIDROIT Principles of International Commercial Contracts 2010, Articles 6.2.1 to 6.2.3, available at: <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

¹⁷ For further information, please see:

<http://www.brooklaw.edu/faculty/directory/facultymember/biography.aspx?id=neil.cohen>

¹⁸ UNIDROIT Principles of International Commercial Contracts 2010, Articles 11.1.2, 11.1.6, 11.1.8 to 11.1.12, available at: <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

The presenters fielded questions including (1) the potential interaction between the UNIDROIT Principles and the Vienna Convention for the International Sale of Goods (CISG); (2) how to determine which specific provisions of the UNIDROIT Principles represent international consensus as contrasted by a “better rule” conclusion of the drafters; and (3) the extent to which the UNIDROIT Principles are having an influence in contract disputes in Latin America.

The multi-location program attracted approximately 150 participants and reflected growing interest in the 2010 UNIDROIT Principles on both sides of the Atlantic.