

PREAMBLE II

THE USE OF THE PICC IN ARBITRATION

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I. Application of the PICC as the *lex contractus*

The PICC are particularly relevant in the context of international arbitration. Arbitral tribunals benefit from liberties unknown to state courts when it comes to determining the rules applicable to the substance of a dispute. Unlike state courts, arbitral tribunals do not have a *lex fori* in the sense of substantive laws automatically applicable by virtue of the place where the tribunal is established. The selection of the place of arbitration (the 'seat' of the arbitration) does not lead to the application of the substantive laws of the country of the seat.¹ It will, however, determine the *lex arbitri*; that is, the law at the place of arbitration governing the procedural aspects of international arbitration.² The *lex arbitri* also comprises rules regarding the determination of the law applicable to the substance of a dispute.

Traditionally, under most *leges arbitrii*, arbitrators were obliged to apply national conflict of laws rules in order to select the law applicable to the merits of the case. It is nowadays admitted under most modern arbitration laws that arbitrators are not bound to apply the conflict of laws rules of any national legal system, but can instead directly determine the applicable law (*voie directe*).³ The question of whether an arbitral tribunal is authorized to apply the PICC, which are not state law but form a private set of rules,⁴ as the *lex*

¹ P Fouchard et al, *International Commercial Arbitration* (1999) 633–634; Arbitral Award March 2002, ICC case no 10385 [2005] ICC Int'l Ct Arb Bull, Special suppl 80, 82, Unilex. See also the historical note by J-F Poudret and S Besson, *Comparative Law of International Arbitration* (2007) 571–573.

² eg in England, the Arbitration Act 1996; in Switzerland, Chapter 12 of the Bundesgesetz über das internationale Privatrecht (1987 Private International Law Act); in France, Arts 1504–1527 NCPC.

³ Fouchard et al (n 1 above) 875–876; Poudret and Besson (n 1 above) 586–589; V Heiskanen, 'And/Or: The Problem of Qualification in International Arbitration' (2010) 26 Arb Int'l 441, 450; M Piers and J Erauw, 'Application of the Unidroit Principles of International Commercial Contracts in Arbitration' (2012) 8 J Private Int'l Law 441, 448; L Radicati di Brozolo, 'Règles transnationales et conflit de lois' in M Kohen and D Bentolilla (eds), *Mélanges en l'honneur du Professeur Jean Michel-Jacquet* (2013) 275, 281–282; Arbitral Award 2004, ICC case no 13012, Unilex: as the contract was silent on the applicable law, the tribunal adopted the 'direct method' under Art 17(1) of the ICC Rules (now Art 21(1)) and decided 'the material law applicable to the case shall be the general principles of law resulting from the UNIDROIT Principles (2004 edition) and from the aforesaid fundamental rules of the *lex mercatoria*, as well as from the commercial usages prevailing in the sector of activities to which the parties' agreement relates'.

⁴ *Joseph Charles Lemire v Ukraine*, ICSID case no ARB 06/18, Decision on Jurisdiction and Liability, 14 January 2010, at [109]: the PICC are '[a] private codification of civil law, approved by an intergovernmental institution...'; see above, Preamble I para 85.

contractus does not depend on the self-declared scope of application of the PICC, but rather on the *lex arbitri* governing the arbitration.

- 3 Where arbitrators are not acting as *amiables compositeurs*,⁵ they are in principle bound to apply a given municipal law unless the *lex arbitri* allows the application of private rules. Certain laws permit, and may even require, arbitrators to apply ‘rules of law’ instead of (or in addition to) a particular domestic law.⁶ Such language is usually construed as allowing arbitrators to apply private sets of rules that do not have the status of laws, which includes the PICC.⁷
- 4 Arbitrators’ freedom to apply ‘rules of law’ may be stated explicitly in the *lex arbitri*.⁸ If that is not the case, this power may be given implicitly insofar as the *lex arbitri* allows parties to submit their dispute to private sets of arbitration rules that allow arbitrators to apply ‘rules of law’ rather than ‘laws’ only.⁹ Art 28(1) of the UNCITRAL Model Law (as well as the national laws based on it, such as § 1051 German Code of Civil Procedure) allows parties to designate ‘rules of law’, while arbitral tribunals may only apply ‘a law’ where there is no choice of law by the parties (Art 28(2) of the UNCITRAL Model Law). German authors overwhelmingly interpret § 1051 of the Code as precluding arbitrators from applying ‘rules of law’ to the merits of a dispute, unless they are explicitly empowered by the parties.¹⁰ Similar

⁵ See para 64 below.

⁶ E Gaillard, ‘Du bon usage du droit comparé dans l’arbitrage international’ [2005] Rev arb 375, 376.

⁷ (1991) Study L—Doc 50, p 4; MJ Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, 2005) 196–198; P Bernardini, ‘International Arbitration and A-National Rules of Law’ (2004) 15(2) ICC Int’l Ct Arb Bull 58, 64; J Lew et al, *Comparative International Commercial Arbitration* (2003) 452–453; Poudret and Besson (n 1 above) 591–592. For Swiss law, see P Karrer, ‘Article 187’ in SV Berti (ed), *International Arbitration in Switzerland: An Introduction and Commentary on Articles 176–194 of the Swiss Private International Law Statute* (2000) 479, 499–500; M Courvoisier, *In der Sache anwendbares Recht vor internationalen Schiedsgerichten mit Sitz in der Schweiz* (2005) 179 (with further references in n 757); Arbitral Award 2006, ICC case no 13450 (2014) 141 Clunet 193 (excerpts), 196; also see above, Preamble I para 58. Compare, however, Arbitral Award September 1998 (Lugano), ICC case no 9419 (1999) 10(2) ICC Int’l Ct Arb Bull 104, 105, Unilex: the tribunal ‘firmly believes that the search for a law that can be applied to a contractual relationship must necessarily lead to the identification of a national law’ and declined to apply the PICC as the *lex contractus*, as requested by the claimant.

⁸ eg Art 1496 NCP; Art 187 of the 1987 Swiss Private International Law Act (n 2 above); s 46(1)(b) English Arbitration Act 1996. At least one arbitration law (Panama) explicitly states that arbitral tribunals should ‘take’ the PICC ‘into account’: see Art 27 of the Decreto Ley de 8 de Julio de 1999 (1999 Panamanian Arbitration Act—French translation in [2005] Rev arb 822, 834).

⁹ eg Art 21(1) of the ICC Rules; Art 22(3) of the LCIA Rules; Art 33(1) of the Swiss Rules. See also First Partial Arbitral Award June 1995, ICC case no 7110 (1999) 10(2) ICC Int’l Ct Arb Bull 39, 51, Unilex: ‘the application of the UNIDROIT Principles does not depend on their self-given criteria of application, but on the powers vested with this Tribunal under Art 13(3) of the ICC Arbitration Rules [then in force], which... authorize it to directly determine the applicable law it deems more appropriate to govern the merits’; cf Art 35(1) of the UNCITRAL Arbitration Rules, referring to ‘the law designated by the Parties’ and ‘failing such law the arbitral tribunal shall apply the law which it determines to be appropriate’ (the previous version of this rule referred to ‘the law determined by the conflict of laws rules which [the arbitral tribunal] considers applicable’). See also G Saumier, ‘Designating the UNIDROIT Principles in International Dispute Resolution’ [2012] ULR 533, 538–539; E Brödermann, ‘The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice—The Experience of a German Lawyer’ [2011] ULR 589, 593–594.

¹⁰ J Münch in G Lüke, T Rauscher, and P Wax (eds), *Münchener Kommentar Zivilprozessordnung* (4th edn, 2013) § 1051 paras 59–60; W Voit in HJ Musielak (ed), *Musielak Zivilprozessordnung Kommentar* (10th edn, 2013) § 1051 para 7; KH Schwab and G Walter (eds), *Schiedsgerichtsbarkeit* (7th edn, 2005) 451–453; K Lionnet and A Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit* (3rd edn, 2005) 380–383. See also G Cordero Moss, ‘Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties?’ (2005) 1 Stockholm Int’l Arbitration Review 1, 20. In Arbitral Award 2006, ICC case no 13450 (2014) 141 Clunet 193 (excerpts), the arbitral tribunal applied the CISG together with the PICC based on Art 28(2) of the UNCITRAL Model Law.

legislation is found in Australia.¹¹ Many authors outside Germany, in contrast, have argued that even where the *lex arbitri* directs an arbitral tribunal to apply the ‘law’ of a state, the parties’ reference to arbitration rules that authorize the arbitral tribunal to apply ‘rules of law’ (even without a choice of law) might override this direction and allow the arbitrators to apply the PICC.¹² Restrictions of the *lex arbitri* always prevail over the Preamble’s **self-declared scope of application** of the PICC as the *lex contractus*.¹³ On the other hand, although it does not bind arbitrators,¹⁴ this self-declared scope of application often has a significant influence on adjudicators when deciding whether to apply the PICC.¹⁵

Even where the *lex arbitri* leaves parties free to choose the PICC as the ‘rules of law’ applicable to the contract, this does not permit a derogation from relevant **mandatory rules** (Art 1.4).¹⁶ Thus, the Swiss Federal Tribunal ruled that any set of rules issued by private bodies (FIFA in the case at hand) may be chosen by the parties but do not oust the application of mandatory statutes of limitation.¹⁷ An arbitral award may be annulled, and its enforcement precluded, if the arbitral tribunal fails to apply these mandatory rules. Many mandatory rules are considered part of **public policy** (*ordre public*) in the country of the seat of the arbitration or in jurisdictions where a party seeks to enforce the award (see paras 71–83 below).¹⁸ If even one of the parties raises the issue, the arbitral tribunal has to determine whether there are mandatory provisions of this sort applicable to the dispute. The determination of the mandatory nature of a provision is one of the most delicate issues in international arbitration,¹⁹ and a topic which exceeds the scope of this Commentary.

As the **PICC are not an exhaustive set of rules**,²⁰ an arbitral tribunal may have to determine which rules or domestic laws apply to issues not covered by the PICC.²¹ Where there is no choice by the parties (see paras 24–38 below), tribunals follow the standard procedure of direct determination if possible and appropriate, or indirect determination by applying the relevant conflict of laws rules (see para 2 above).

¹¹ L. Nottage, ‘Afterthoughts: International Commercial Contracts and Arbitration’ (2010) 17 Aust ILJ 197, 201.

¹² Gaillard (n 6 above) 376 and Fouchard et al (n 1 above) 866 and 878–879; L Radicati di Brozolo (n 3 above) 282.

¹³ Even where the *lex arbitri* does not allow the arbitral tribunal to apply the PICC as the *lex contractus*, the PICC can still be used as a means to interpret or supplement the applicable law: see paras 43–57 below.

¹⁴ See above, Preamble I paras 10–11, 30–32; see para 59 below.

¹⁵ (2003) Study L—Misc 25, para 598 (Komarov).

¹⁶ See above, Preamble I para 44.

¹⁷ DFT 20 December 2005 (4C.1/2005), ASA Bull 4/2006, 742.

¹⁸ A Redfern et al, *Law and Practice of International Commercial Arbitration* (5th edn, 2009) paras 3.101–3.103.

¹⁹ D Hochstrasser, ‘Choice of Law and “Foreign” Mandatory Rules in International Arbitration’ (1994) 11 J Int’l Arb 57; C Seraglini, *Lois de police et justice arbitrale internationale* (2001); M Blessing, *Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts* (1999); GA Bermann and L Mistelis (eds), *Mandatory Rules in International Arbitration* (2011); L Radicati di Brozolo, ‘Arbitration and Mandatory Rules’ (2012) 23 Am Rev Int’l Arb 49.

²⁰ The PICC do not cover, eg, the question of termination for cause which is fundamental in Germany and Switzerland (see F Dessemondet, ‘The Unidroit Principles and the Long Term Contracts’ (2012) 26 Dir comm int 873) or the capacity or authority of parties (JDM Lew, ‘The UNIDROIT Principles as Lex Contractus Chosen by the Parties and Without an Explicit Choice-of-Law Clause: The Perspective of Counsel’ [2002] ICC Int’l Ct Arb Bull, Special suppl 86, 91).

²¹ See above, Preamble I para 51, and also Arbitral Award 2002, ICC case no 11018, cited in E Jolivet, ‘L’harmonisation du droit OHADA des contrats: l’influence des Principes d’UNIDROIT en matière de pratique contractuelle et d’arbitrage’ [2008] ULR 127, 143 n 39: after having decided to apply the *lex mercatoria* as expressed in the PICC, the tribunal noted that the PICC do not address the effects of illegality and referred to French law cumulatively; see also Brödermann (n 9 above) 592: in addition to the PICC, ‘the law applicable to other issues not covered by the Principles, such as company law, would apply’.

- 7 Assuming that the *lex arbitri* in principle accepts the ability of an arbitral tribunal to apply **the PICC, they are available** (according to the self-proclaimed scope of application stated in the Preamble) **in the following circumstances**:²² where the parties have agreed that their contract should be governed by them (see paras 8–14 below); where the parties have agreed that their contract should be governed by general principles of law or the like (see paras 15–23 below); and where the parties have not chosen any law to govern their contract (see paras 24–38 below). Whether the PICC can be applied by arbitrators where the parties have chosen another system of law is subject to debate (see paras 39–42 below).

1. Agreement of the parties on their contract being governed by the PICC

- 8 Subject to the applicable mandatory provisions of domestic law,²³ any **choice** by the parties of the law or rules of law applicable to their contract **is usually binding** upon the arbitral tribunal.²⁴ An agreement between the parties may be expressed by way of a choice of law clause in their contract, by way of an agreement at the outset of the proceedings, or even during the course of the proceedings:²⁵ for instance, by relying without reservation on certain provisions of a given law. A choice of law clause may refer exclusively to the PICC (see para 9 below); refer to both the PICC and a domestic law (see paras 10–13 below); or refer to the terms of the contracts and the PICC (see para 14 below).

(a) Choice of law clause in favour of the PICC

- 9 Parties may have specifically agreed on a choice of law clause in favour of the PICC.²⁶ They may even have excluded the application of all or some national laws. Where the *lex arbitri* allows parties to resort to ‘rules of law’ (as opposed to municipal laws), the dispute may be settled on the basis of the PICC alone²⁷ because the PICC are commonly characterized as ‘rules of law’ for the purpose of provisions authorizing the application of such rules.²⁸ Even countries such as Brazil, where the choice of law in favour of non-state law ‘is still taboo’ before

²² On the application of ‘principles’ in general, see P Tercier, ‘Schiedsgerichtsbarkeit und “Principles”’ [2010] ZEuP 229, 237.

²³ Radicati di Brozolo (n 3 above) 282; L da Gama e Souza Jr, ‘Prospects for the Unidroit Principles in Brazil’ [2011] ULR 613, 627–628.

²⁴ Art 28(1) of the UNCITRAL Model Law; Art 42(1) of the ICSID Convention; Art 21(1) of the ICC Rules; Art 33(1) of the Swiss Rules.

²⁵ Brödermann (n 9 above) 590–592.

²⁶ P Bernardini, ‘Principi UNIDROIT e arbitro internazionale’ (2012) 26 Dir comm int 907; Lew (n 20 above) 91; Commission on Commercial Law and Practice of the ICC, *Study on lex mercatoria/General Principles of Law as the Applicable Law in International Commercial Contracts—Presentation of the Fourth Draft* (October 2013) 14–15. Eg in Arbitral Award 30 November 2006, Centro de Arbitraje de México (CAM), Unilex, the contract expressly referred to the UNIDROIT Principles as the law governing the substance of any potential disputes.

²⁷ Or any other set of transnational norms for that matter: see also KP Berger, ‘International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts’ (1998) 46 Am J Comp L 129, 147; P Lalive, ‘The UNIDROIT Principles as Lex Contractus, With or Without an Explicit or Tacit Choice of Law: An Arbitrator’s Perspective’ [2002] ICC Int’l Ct Arb Bull, Special suppl 77, 79; M Scherer, ‘The Recognition of Transnational Substantive Rules by Courts in Arbitral Matters’ in P Pinsolle et al (eds), *Towards A Uniform International Arbitration Law?* (2005) 91, 94–95; A Belohlavek, ‘Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict-of-Laws Rules and the Applicability of the Rome Convention, Rome I Regulation and Other EU Law Standards in International Arbitration’ [2010] Czech Yearbook of Int’l Law 25, 30–31.

²⁸ eg Redfern et al (n 18 above) para 3.197 n 253; S Besson and N Thommesen, ‘Art 33 Swiss Rules’ in T Zuberbühler et al (eds), *Swiss Rules of International Arbitration: Commentary* (2nd edn, 2013) paras 22–24; J Fry, S Greenberg, and F Mazza, *The Secretariat’s Guide to ICC Arbitration* (2012) para 3-761; C Brunner,

national courts, authorize the designation of the PICC in the context of international arbitration.²⁹ However, it is true that the choice of the PICC by the parties in the contract remains exceptional³⁰ and, in order to facilitate their designation, UNIDROIT has prepared 'Model Clauses for Use of the UNIDROIT Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice'.³¹ It is doubtful whether this will substantially increase the number of direct designations of the PICC by parties to commercial contracts. If properly made, a **choice by the parties** to apply the PICC to the merits of their dispute **will regularly be implemented by arbitral tribunals** (in contrast to municipal courts),³² whether that choice is expressed in a contract or in the course of arbitration proceedings.³³ The agreement between the parties may be explicit or implicit.³⁴ Arbitral tribunals may also encourage parties to consider the application of the PICC in the dispute.³⁵ If the parties restrict the application of the PICC to specific circumstances, the arbitral tribunal should not rely on the PICC outside the framework set by the parties.³⁶ It has been argued that Art 3(1) of the Rome I Regulation (which requires the choice of a national law) might block the application of the PICC in ad hoc arbitration proceedings seated in the EU.³⁷ However, the Rome I Regulation does not apply to arbitration (Art 1(2)(e) of the Regulation).³⁸

Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration (2008) 24–25.

²⁹ da Gama e Souza Jr (n 23 above) 640–1.

³⁰ Saumier (n 9 above) 539; P Mayer, 'The Role of the UNIDROIT Principles in ICC Arbitration Practice' [2002] ICC Int'l Ct Arb Bull, Special suppl 105, 116; Fry, Greenberg, and Mazza (n 28 above) para 3-761 identify seven instances where a contract that was submitted to ICC arbitration between 2007 and 2011 referred to the PICC.

³¹ (2013) Study L—MC Doc 1 Rev. See above, Introduction to this Commentary para 58 and Preamble I para 54.

³² See above, Preamble I paras 7, 59.

³³ Arbitral Award 1 December 1996, Camera Arbitrale Nazionale e Internazionale di Milano case no A-1795/51, Unilex: the PICC were applied and Off Cmt cited by the tribunal after the parties had agreed that the dispute would be settled in conformity with the PICC (tempered by recourse to equity); Arbitral Award 2009, Permanent Court of Arbitration, Unilex: a European company and an international governmental organization expressly chose the PICC as the law governing a licensing agreement and the tribunal implemented that choice; Arbitral Award 2002, ICC case no 11739 (in A Crivellaro, 'Principi UNIDROIT e arbitrati internazionali: Tra naturale propensione a farne uso e limitata autonomia nel determinare il diritto applicabile' (2012) 26 Dir comm int 917, 924): the parties agreed on the PICC as the applicable law supplemented when necessary by Italian law, and the tribunal decided all the issues by reference to the PICC.

³⁴ Arbitral Award 2002, ICC case no 11601, cited in Jolivet (n 21 above) 133: since the contract was silent as to the applicable law and both parties referred to provisions of the PICC, the arbitral tribunal applied the PICC; see also Arbitral Award 2003, ICC case no 11265, cited in Jolivet (n 21 above) 133–134: the contract was silent as to the applicable law but specified that any dispute should be settled according to the ICC Rules. The claimant invoked the CISG supplemented by the PICC and the respondent opposed the application of the CISG but not that of a-national principles and rules. The arbitral tribunal applied the PICC.

³⁵ Arbitral Award 2003, ICC case no 12097, cited in Jolivet (n 21 above) 135 n 22: the English version of the contract was silent as to the applicable law, whereas the Russian version made reference to 'legislation of Sweden and generally accepted standards of international trade'. During the preparatory meeting, the sole arbitrator indicated that the CISG was part of Swedish law and that he intended to apply the CISG supplemented by 'general principles of law' such as the PICC. In their respective submissions both parties made reference to the PICC and the sole arbitrator applied the CISG and the PICC.

³⁶ Arbitral Award 2002, ICC case no 10865, cited in Jolivet (n 21 above) 131: in a dispute between a company in Turkmenistan and a Swiss company the arbitral tribunal decided that 'confronted with the possible conflicts and contradictions of the formulation of Article [X] of the Contract, the Parties have authorized and asked the arbitral tribunal, in case of discrepancy between the laws of Turkmenistan and Switzerland, to have regard to the general principles of law and, in particular, to the UNIDROIT Principles of International Commercial Contracts'. However, the tribunal applied the PICC to the issue of *force majeure* without pointing out the discrepancies between the two domestic laws.

³⁷ P Mankowski, 'Rom I-VO und Schiedsverfahren' [2011] RIW 30.

³⁸ Brödermann (n 9 above) 593–604.

(b) Choice of law clause referring to both the PICC and a domestic law

- 10 Parties may also include a choice of law clause in their contract **combining** a reference to both the PICC and a domestic law. The official footnote to the Preamble suggests the following language: ‘This contract shall be governed by the UNIDROIT Principles (2010) [except as to Articles . . .], supplemented when necessary by the law of [jurisdiction X]’. If the parties disagree on the proper construction of this clause, the arbitral tribunal must determine its meaning in accordance with the applicable rules of contract interpretation.³⁹ The reference can be cumulative (where the arbitral tribunal is meant to decide in accordance with both the domestic law and the PICC),⁴⁰ alternative (where a decision in accordance with either one is admissible), or exclusive (where there are distinct scopes of application of the PICC and of the domestic law, eg if the latter is meant to apply to a breach of contract and the former to the amount of compensation for that breach).
- 11 Where there is a **conflict between the PICC and the selected domestic law** due to an overlapping application, a tribunal may have to determine the hierarchy the parties had in mind. The parties may have elected the PICC as *lex specialis*⁴¹ or may have derogated from the PICC in favour of domestic law in accordance with Art 1.5.⁴² They may also have chosen to apply domestic law to issues not covered by the PICC, as recommended by the Official Comment.⁴³ In any event, the mandatory provisions of domestic law will prevail (Art 1.4).
- 12 **Parties may restrict the application** of the PICC merely to interpret or supplement the domestic law applicable to the merits (see paras 46–57 below).⁴⁴ Importantly, even without an explicit agreement to this effect, the arbitrator may rely on the PICC to interpret or supplement domestic law. As a matter of fact, this use of the PICC is contemplated in paragraph 6 of the Preamble.
- 13 Problems of **interpretation** may arise over clauses restricting the application of the PICC. Unless the restriction is accompanied by a choice of law for the restricted issues to which the PICC may not apply, it is possible that sloppy drafting rather than a genuine wish to limit the scope of the PICC led to the restrictive language. Normally, it can indeed be assumed that parties intend to apply the substantive provisions of the chosen law in a

³⁹ See below, Introduction to Chapter 4 of the PICC para 4.

⁴⁰ Arbitral Award 2004, ICC case no 11880, Unilex: an international guarantee contract contained a choice of law clause, according to which ‘[t]he arbitrators shall apply the principles of UNIDROIT and the laws of Italy as to all matters not expressly covered by this Guaranty’. The sole arbitrator applied the PICC not only because the relevant rules of contract interpretation of Italian law do not substantially differ from them but also because the PICC ‘represent, at least as far as [contract interpretation] is concerned, a kind of summary of the generally commonly accepted principles on interpretation developed in the Western countries and deriving from the main civil law codes and case law in the international trade’; see also Brödermann (n 9 above) 594–595, reporting a Hong Kong International Arbitration Centre (HKIAC) arbitration in which the contract was governed by the PICC but the arbitral tribunal had to apply the law of Hong Kong ‘[s]hould it become necessary to rely in addition on a national law’. The parties also agreed that if the domestic law referred to did not recognize third party rights (the issue was not then covered by the PICC), German law was to be applied instead.

⁴¹ M Kliuchkovskiy, ‘Applicability of UNIDROIT Principles of International Commercial Contracts in Courts and Arbitration Tribunals’ (2007) 1 *Dispute Resolution Int’l* 199, 201.

⁴² C Seraglini, ‘Du bon usage des principes Unidroit dans l’arbitrage international’ [2003] *Rev arb* 1101, 1109.

⁴³ Off Cmt 4a to Preamble, p 3, and MJ Bonell, ‘UNIDROIT Principles and the Lex Mercatoria’ in TE Carbonneau (ed), *Lex Mercatoria and Arbitration* (1998) 249, 254; see above, Preamble I para 52 and see also para 30 below.

⁴⁴ For an illustration, see Arbitral Award 21 April 1997, Ad hoc arbitration (Paris), Unilex.

broad manner rather than restrictively.⁴⁵ This sound rule also applies in cases where the parties have chosen the PICC.

(c) *Choice of law clause referring to the terms of the contract supplemented by the PICC*

Parties may also decide, by means of a choice of law, that their dispute should be settled in conformity with the terms of their contract **supplemented** by the PICC.⁴⁶ In this event, the terms of the contract, together with the PICC, form the 'rules of law' applicable to the relationship between the parties. Parties can also incorporate the PICC into the contract as terms of it while opting for a national law as the applicable law.⁴⁷

2. References to general principles of law, *lex mercatoria*, or usages

International commercial contracts sometimes contain a choice of law clause in favour of 'general principles of law', 'the *lex mercatoria*', 'general principles of transnational law', or similar expressions (see paras 16–20 below). Moreover, contract clauses on occasion refer to 'usages' (see paras 21–23 below).

(a) *Clauses in favour of 'general principles of law, the *lex mercatoria* or the like'*

According to paragraph 3 of the Preamble, the PICC 'may be applied when the **parties have agreed** that their contract should be governed by general principles of law, the *lex mercatoria* or the like'. Since the definition of these notions is far from settled in law or practice,⁴⁸ it is not surprising that the PICC opted for a remarkably wide and imprecise open-ended term ('or the like') in an attempt to catch all clauses contained in international commercial contracts that may refer to non-national sources. In view of this vagueness, the Official Comment suggests that 'in order to avoid, or at least reduce considerably, the uncertainty accompanying the use of such rather vague concepts, it might be advisable, in order to define their contents, to have recourse to a systematic and well-defined set of rules, such as the PICC'.⁴⁹

If parties did not heed this advice but referred to 'the *lex mercatoria* or the like' without reference to the PICC, the situation is less clear. Even if the PICC undoubtedly form 'a systematic and well-defined set of rules', they do not necessarily reflect general principles of law.⁵⁰ 'In fact, the drafters' aim was not to choose the solutions which prevail in most

⁴⁵ Besson and Thommesen (n 28 above) Art 33 para 11.

⁴⁶ Arbitral Award December 1996 (Paris), ICC case no 8331 (1998) 125 Clunet 1041 (excerpts), Unilex: the parties agreed that the arbitral tribunal would apply relevant agreements between the parties and, to the extent that the arbitral tribunal found it necessary and appropriate, the 1994 edition of the PICC.

⁴⁷ Off Cmt to Art 1.4, p 13; O Lando, 'Principles of Contract Law as the Law Applicable and as Incorporation' in T Borić et al (eds), *Öffnung und Wandel—Die internationale Dimension des Rechts II: Festschrift für Willibald Posch* (2011) 393, 408; see also B Zeller, 'The Unidroit Principles of Contract Law: Is there Room for Their Inclusion into Domestic Contracts?' (2006) 26 J L & Com 115, 123–126.

⁴⁸ Brunner (n 28 above) 9–11; see also J-P Béraudo, 'Principios de Unidroit (y de la Unión Europea) y su influencia en el derecho internacional' in MP Ferrer and A Martínez (eds), *Principios de derecho contractual europeo y principios de Unidroit sobre contratos comerciales internacionales* (2009) 294, 295.

⁴⁹ Off Cmt 4b to Preamble, p 4; see also Commission on Commercial Law and Practice of the ICC (n 26 above) 13–14; it may be noted, however, that in Arbitral Award 2004, ICC case no 13012 (cited in Jolivet, n 21 above, 138–139), the logic was inverted: the PICC were applied in the light of two elements of the *lex mercatoria* (good faith and *pacta sunt servanda*) instead of applying the PICC to specify the content of the *lex mercatoria*.

⁵⁰ eg Bonell (n 43 above) 254; J Crawford and A Sinclair, 'The UNIDROIT Principles and their Application to State Contracts' [2002] ICC Int'l Ct Arb Bull, Special suppl 57; see also above, Preamble I paras 78–81. In

legal systems, but to select those which had the most persuasive value and/or appeared to be particularly well-suited for cross-border transactions'.⁵¹ **Arbitral tribunals must assess** on a case-by-case basis **whether** a specific provision in the PICC reflects the **common core** of current global contract law.⁵² In practice, what the parties meant by referring to abstract concepts is rarely obvious; it is a fair assumption that many of the drafters of these types of clause would themselves be at a loss to explain what they understood precisely by these notions. On the other hand, what the parties intended to exclude is often clearer. Usually, one or more of the following concerns are instrumental in the insertion of this language. First, the parties wish to escape the vagaries of local law, whether real or imaginary, and increase the predictability of the proceedings and outcome of any dispute. Secondly, they wish to raise the contract from a domestic to an international level, and to ensure that it is governed by rules that reflect an international approach rather than a local or parochial one. Thirdly, they cannot agree, for whatever reason, on the application of a particular national law.

- 18 Since the choice of the '*lex mercatoria*' or of 'general principles' by the parties does not amount to a choice of particular rules, the application of the PICC to the parties' relationship may be justified⁵³ as an expression or **evidence of transnational law**.⁵⁴ This is confirmed by abundant case law.⁵⁵ Arbitrators dislike working in a

practice, though, arbitral tribunals often equate *lex mercatoria*, general principles, and the PICC: eg Arbitral Award March 1998 (Rome), ICC case no 9029 (1999) 10(2) ICC Int'l Ct Arb Bull 88, Unilex; Arbitral Awards January 1999 and March 2000, ICC case no 9875 (2001) 12(2) ICC Int'l Ct Arb Bull 95, 96–98, Unilex; Arbitral Award 2001, ICC case no 10422 (2003) 130 Clunet 1142 (excerpts) 1145; Arbitral Award 1995, LCIA, Unilex: the contract contained a choice of law clause in favour of 'Anglo-Saxon principles of law'; and in the absence of any further clarification, the tribunal applied the PICC. In *Polis Fondi Immobiliari di Banche Popolare SGRpA v International Fund For Agricultural Development (IFAD)*, Arbitral Award 17 December 2010, PCA Case no 2010-8, Unilex, the choice of law clause determined that the agreement was to be interpreted, among others, according to the 'recognized principles of international commercial law'. The tribunal considered that the PICC 'may indeed be regarded as indicative of recognized principles in the field of international commercial law' (at [151]).

⁵¹ Commission on Commercial Law and Practice of the ICC (n 26 above) 11. See also the reference to Art 3.2.7(1) on gross disparity and Arts 6.2.1–6.2.3 on hardship, *ibid* at 12–13, to illustrate 'the gap between the Unidroit Principles and . . . rules or general principles'.

⁵² See above, Preamble I para 4; Piers and Erauw (n 3 above) 454; Arbitral Award April 1997 (Paris), ICC case no 8264 (1999) 10(2) ICC Int'l Ct Arb Bull 62, 65, Unilex: faced with a choice of law clause in favour of Algerian law, general principles of law, and international trade usages, the tribunal found that Art 7.4.3 PICC embodied rules 'largely accepted throughout the world in legal systems and the practice of international contracts'; the ICACRF found that Art 7.4.9 PICC reflected 'generally accepted international commercial practice' (Arbitral Award 13 May 2008, case no 13/2007, Unilex) and that Art 9.2.1(a) embodied 'widely used international commercial practice' (Arbitral Award no 14/2008, 19 December 2008, Unilex). The ICACRF also referred to the principle of good faith, contained in Art 1.7, as 'one of the basic principles of international trade' (Arbitral Award 8 February 2008, case no 18/2007, Unilex) and to Arts 2.1.1, 4.1, 4.2, and 4.3 as setting forth 'customs effective now in international trade' (Arbitral Award 22 December 2008, case no 83/2008, Unilex).

⁵³ For a precedent where the PICC were applied because no specific other rules were designated by the contractual choice of general principles, see Arbitral Award February 1999 (Paris), ICC case no 9474 (2001) 12(2) ICC Int'l Ct Arb Bull 60, Unilex: the parties agreed that the arbitral tribunal should apply 'the general standards and rules of international contracts'; the tribunal noted that such 'general standards and rules' could not be found in any specific international instrument and applied various national and international instruments including the CISG, the UCC, and the PICC.

⁵⁴ Off Cmt 4b to Preamble, p 4; F Dessemontet, 'L'utilisation des Principes UNIDROIT dans le cadre de la pratique contractuelle et de l'activité arbitrale: L'exemple de la Suisse' in E Cashin and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 159, 160.

⁵⁵ Lew (n 20 above) 89–90.

vacuum⁵⁶ and, when faced with choice of law clauses referring the dispute to general principles (or the like), they appreciate being able to decide on the basis of a tangible set of rules such as the PICC,⁵⁷ while sticking to general principles or the *lex mercatoria* for matters not covered by the PICC.⁵⁸ For some, even a vague reference to general principles warrants the application of the PICC if the parties did not make any other choice of law.⁵⁹

The same solution applies when a reference to general principles, the *lex mercatoria*, or the like is **combined with a choice of a domestic law**.⁶⁰ An arbitral tribunal may consider that the PICC should be applicable as part of the general principles mentioned in the clause.⁶¹ Parties may even specifically choose to combine the PICC and a domestic law, either in a choice of law clause in their contract⁶² or during the course of the proceedings.⁶³

However, a contract referring to 'general principles' without mentioning the PICC should also be scrutinized as possibly evidencing a **negative choice** excluding the PICC. Just as the parties may have discussed and discarded the application of a given national law, they may have discarded the PICC as a manifestation of general principles of international

⁵⁶ Arbitral Award 2003, ICC case no 11265, cited in Jolivet (n 21 above) 142: the tribunal expressed its preference for the PICC rather than the vague and loose principles of the *lex mercatoria*. See also Arbitral Award 2003, ICC case no 11575, Unilex: the tribunal decided to apply the PICC rather than other a-national principles and rules in view of the fact that they are much more precise than the *lex mercatoria* and other similarly 'vague and heteroclitic' principles and rules.

⁵⁷ First Partial Award, ICC case no 7110 (n 9 above); Second Partial Award April 1998, ICC case no 7110 (1999) 10(2) ICC Int'l Ct Arb Bull 58, Unilex: the contract contained a choice of law clause in favour of 'laws or rules of natural justice'. The tribunal found that the PICC formed the *lex contractus*, based on their being 'the central component' of such rules. In the subsequent setting-aside proceedings in the Netherlands, the applicant alleged that the tribunal, by invoking 'on its own motion Article 7.4.3(3) of the UNIDROIT Principles, had exceeded the scope of its mandate'; however, the Dutch Court of First Instance dismissed the request, confirming the finding of the tribunal (*BAE Systems plc, UK v Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran*, Rechtbank 's-Gravenhage (Netherlands), 11 May 2011, Unilex; Arbitral Award 2003, ICC case no 12123, Unilex: the contract provided that the law applicable to the substance of the dispute was 'European Law'. Although the parties later agreed to apply French law, the tribunal found that the notion of 'European law' may have a significant meaning and reflect 'a sort of amalgam of fundamental principles to which the major European systems aspire, eg those which are at the basis of projects for a European Civil Code, those of UNIDROIT, those to be found in international Conventions of uniform law, those of the *lex mercatoria*, and so forth'. See also (1991) Study L—Doc 50, p 5; Berger (n 27 above) 143.

⁵⁸ (1994) PC—Misc 19, p 10 (Lando).

⁵⁹ Dessemontet (n 54 above) 160: 'where the parties have not made an express choice of law... the arbitrator shall base its decision on the assumed intention of the parties. But the choice of arbitration as a means of resolving disputes often calls for the application of a neutral law. Reference to general principles in the body of the contract might be an indication of the parties' intention to apply the Principles to their contract.'

⁶⁰ eg Swiss Federal Tribunal, 14 June 2000, ASA Bull 3/2000, 582, 592: contracts relating to the construction of the metro network in Athens (Greece) contained a choice of law clause to the effect that the contract was to be 'read, construed and implemented in conformity with Swiss law and international usages in force with regard to Joint-Ventures' ('lu, interprété, mis [sic] en œuvre: conformément au droit suisse et aux usages internationaux en vigueur quant aux Joint Ventures'); TPI Bruxelles 8 March 2007 [2007] Rev arb 303: setting aside two arbitral awards whose underlying contract stated that the arbitrators 'shall apply the *lex mercatoria* and in addition where necessary the appropriate law'; the arbitrators had applied EU competition law, but improperly.

⁶¹ Arbitral Award, ICC case no 8264 (n 52 above): the choice of law clause was in favour of Algerian law, general principles of law, and international trade usages; the tribunal applied Art 7.4.3 PICC on the issue of the loss of profit (*perte d'une chance*) because the PICC 'embody... rules largely accepted throughout the world in legal systems and the practice of international contracts'.

⁶² For views in favour of such clauses, see (1994) PC—Misc 19, p 13 (especially Drobnič).

⁶³ Arbitral Award March 2000, ICC case no 10114 (2001) 12(2) ICC Int'l Ct Arb Bull 100, 101–102, Unilex: there was no choice of law clause; the parties jointly expressed the opinion that Chinese law should be applied to the merits, together with 'international practices, especially the UNIDROIT Principles'.

or transnational law.⁶⁴ In such rare events, an arbitral tribunal should determine the relevant general principles without resorting to the PICC, although it may eventually conclude that these general principles are also reflected in the PICC. However, a negative choice should not be assumed lightly.

(b) Clauses in favour of 'usages' or 'international trade usages'

- 21 Usages are not mentioned in the Preamble. Indeed, they should be **distinguished from general principles of law**,⁶⁵ as evidenced by their separate treatment in Art 1.9. A usage is merely a prevailing practice established among parties to a contract or actors in the same industry. Usages are part of the contract insofar as it must be assumed that the parties agreed to comply with usages in their own trade;⁶⁶ as such, usages normally prevail over the PICC.⁶⁷
- 22 It is possible that certain usages have the same content as a general principle. Nonetheless, they will still only **apply as terms of the contract, not as rules of law**. References to 'usages' in arbitration agreements or arbitration rules (such as Art 33(3) of the Swiss Rules and Art 21(2) of the ICC Rules) therefore should not be interpreted as directions to apply the PICC.⁶⁸ The better approach, even if not systematically adopted in case law,⁶⁹ is to

⁶⁴ Bernardini (n 7 above) 65; *Joseph Charles Lemire v Ukraine*, Decision on Jurisdiction and Liability (n 4 above) para 109: 'The UNIDROIT Principles are neither treaty, nor compilation of usages, nor standard terms of contract. They are in fact a manifestation of transnational law'; see also Arbitral Award 30 October 2009, ICACRF case no 100, Unilex: 'a document adopted by an authoritative intergovernmental organization and reflecting the most common approaches of the majority of national legal systems in regulating problems of international commercial transactions'.

⁶⁵ E Gaillard, 'La distinction des principes généraux du droit et des usages du commerce international' in *Études offertes à Pierre Bellet* (1991) 203; Poudret and Besson (n 1 above) 591–594.

⁶⁶ See below, Art 1.9 paras 10–20.

⁶⁷ (1991) Study L—Doc 50, pp 18–19; (1992) Study L—Doc 51, pp 19–21.

⁶⁸ eg Arbitral Award, ICC case no 9029 (n 50 above) 90: the tribunal was requested to 'engage the "Principles of International Commercial Contracts" drawn up by Unidroit, as an authoritative source of knowledge of international trade usages'; it ruled that 'although the UNIDROIT Principles constitute a set of rules theoretically appropriate to prefigure the *lex mercatoria* should they be brought into line with international commercial practice, at present there is no necessary connection between the individual Principles and the rules of the *lex mercatoria*, so that recourse to the Principles is not... the same as recourse to an actually existing international commercial usage'; see also Arbitral Award 2003, case no 11256, cited in Jolivet (n 21 above) 144 n 41: in a dispute governed by the ICC Rules, the respondent referred to the PICC and the tribunal accepted the claimant's objection that the PICC are not generally used in the truck assembly industry. It established that the PICC 'propose reasonable solutions to meet the needs of international trade in the light of the experience of some of the major legal systems but do not generally reflect the trade usages referred to in Article 17(2) of the ICC Rules of Arbitration' (now Art 21(2)); see also Arbitral Award 2004, ICC case no 12446, cited in Jolivet (n 21 above) 145 n 44: the governing law was Japanese law, which allows parties to agree on the application of 'trade customs' that do not contravene Japanese public order. The tribunal excluded the applicability of the PICC on the basis that they do not represent 'trade customs or usages [practised] by worldwide business people or by Japanese business people'; cf G Aksen, 'The Law Applicable in International Arbitration: Relevance of Reference to Trade Usages' (1996) 7 International Congress & Convention Association Series 471, 476, which equates the PICC with trade usages.

⁶⁹ Arbitral Award November 1996 (Paris), ICC case no 8502 (1999) 10(2) ICC Int'l Ct Arb Bull 72, 73, Unilex: the contract contained no express choice of law clause but made repeated references to international trade usages, including the INCOTERMS 1990; the tribunal found that the dispute was to be resolved on the basis of the contract, supplemented by the CISG and the PICC 'as evidencing admitted practices under international trade law'. See also Arbitral Award, ICC case no 8501 (2001) 128 Clunet 1164, 1165 (explicitly referring to Art 13(3) of the ICC Rules); Arbitral Award 30 April 2001, Ad hoc arbitration (San José, Costa Rica): the contract established that any dispute should be resolved 'on the basis of good faith and fair usages and with regard to the most sound commercial practices and friendly terms'; the arbitral tribunal applied the PICC defined as 'the central component of the general rules and principles regulating international contractual obligations and enjoying wide international consensus'; Arbitral Award 2003, ICC case no 12040, cited

scrutinize whether the parties intended in fact to refer to general principles or to the PICC when using the term ‘usage’.⁷⁰

If the finding is negative, an arbitral tribunal may nevertheless analyse the actual practice in the relevant field to determine whether the PICC, when invoked by one of the parties, might nonetheless qualify as a trade usage. In practice, arbitral tribunals often deny that this is the case, and therefore decline to apply the relevant provisions of the PICC.⁷¹ 23

3. Application of the PICC when the parties have not chosen any law to govern their contract

According to paragraph 4 of the Preamble, the PICC ‘may be applied when the parties have not chosen any law to govern their contract’. A **distinction** should be made between situations where the parties merely refrain from designating a system of law (see paras 25–30 below) and those where their silence can be construed as the exclusion of a particular system of law (see paras 31–36 below). The simultaneous designation of several domestic laws may also amount, in practice, to the absence of a choice of law clause (see paras 37–38 below). 24

(a) *The PICC as the lex contractus where there is no choice of law*

Most arbitration laws and arbitration rules leave arbitral tribunals with a broad discretion when determining the rules of law where there is no express choice of law clause by the parties.⁷² However, not all grant the same **degree of discretion**.⁷³ For example, under the ICC Rules, an arbitral tribunal may apply ‘the rules of law which it determines to be *appropriate*’.⁷⁴ The Swiss Rules of International Arbitration appear to restrict the discretion of the arbitral tribunal by requiring it to apply ‘the rules of law with which 25

in Jolivet (n 21 above) 142 n 36: according to the choice of law clause, ‘international trade usages’ were applicable to the merits and the arbitral tribunal decided to apply the PICC pointing out that they ‘may provide a more precise set of rules’.

⁷⁰ Fouchard et al (n 1 above) 807.

⁷¹ Arbitral Award July 1997 (Paris), ICC case no 8873 (1998) 125 Clunet 1017, (1999) 10(2) ICC Int’l Ct Arb Bull 78, Unilex, and in F Marella, ‘Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts’ (2003) 36 Vand J Transnat’l L 1137, 1180: the claimant argued that hardship clauses were common in international practice and that the PICC contained a provision relating to hardship; the tribunal declared that ‘it is thus excluded that provisions on Hardship contained in the PICC are trade usages. On the contrary, they do not correspond... to current practices of business in international trade.’

⁷² Bernardini (n 26 above) 907–908.

⁷³ Brunner (n 28 above) 43–45.

⁷⁴ Art 21(1) of the ICC Rules (emphasis added). Eg in Arbitral Award, undated, ICC case no 13009 (2012) XXXVIYB Comm Arb 70, in the absence of the choice of law, the tribunal seated in The Hague decided in its preliminary award that the PICC would be applied to the merits. The parties subsequently made their submissions based on the PICC; Art 22(3) of the LCIA Rules: ‘If and to the extent that the Arbitral Tribunal determines that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate’. See also Art 35(1) of the UNCITRAL Arbitration Rules (restricting the arbitrators’ discretion to laws, to the exclusion of rules of law; for an example where an ICSID tribunal relied on the PICC, in addition to the applicable Congolese law, see Arbitral Award 29 July 2008, ICSID case no ARB 05/21 *African Holding Co et al v Congo*, available at <http://icsid.worldbank.org>, relying on Arts 1.2 (contracts need not necessarily be in writing) and 7.1.1 (non-performance). In Arbitral Award 2006, ICC case no 13450 (2014) 141 Clunet 193 (excerpts), 194 the contract contained a partial choice of law in favour of a uniform set of rules (INCOTERMS and UCP 500). The arbitral tribunal determined that the procedural law at the seat of the arbitration (Singapore) as well as the applicable ICC Rules (1998) authorized the application of ‘rules of law’. Given that the parties had already opted for such rules of law by referring to the UCP and INCOTERMS, the arbitral tribunal, after having heard the parties, applied the CISG together with the PICC.

the dispute has the *closest connection*.⁷⁵ Arguably, this is more restrictive, since the law with the closest connection may not be the most appropriate one, for example if it invalidates the contract.⁷⁶ Moreover, the closest connection test, which is a technical conception of traditional conflict of laws rules, will almost invariably lead to the application of some national law instead of a non-national rule of law.⁷⁷ Other arbitration laws and arbitration rules provide that where the parties have not agreed on the applicable law ‘the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable’.⁷⁸ In such cases, the arbitral tribunal has flexibility in choosing the conflict of law rules but has limited discretion in deciding the applicable law.

- 26 Where both the *lex arbitri* and the applicable rules of arbitration grant an arbitral tribunal discretion to apply the ‘rules of law’ of its choosing, the arbitrators are free to apply the PICC. For some authors, arbitrators should only apply transnational rules if the parties explicitly agree to do so. Others advocate that arbitral tribunals should consider national laws and transnational rules to be on a same footing when making a default determination of the governing law.⁷⁹ A more radical stance is that the very nature of international arbitration calls for the application of neutral international norms such as the PICC whenever the parties refrain from making an express choice of law: using **neutral norms** such as the PICC may be an excellent way to ‘meet the parties’ legitimate expectations’.⁸⁰ As a result, they see the application of the PICC where there is no choice of law clause as almost automatic. Yet it is doubtful whether the drafters of the PICC intended to go that far.⁸¹ Even if the PICC may be applied theoretically, the arbitral tribunal should be reluctant to do so spontaneously.⁸² Not even their drafters were minded to give *carte blanche* to arbitrators to apply the PICC each time a contract lacked a choice of law clause. As a rule, the Official Comment expects the arbitral tribunal to turn primarily to a particular domestic law.⁸³ Two instances are identified in which, exceptionally, the PICC—rather than a domestic law—may be applied in the absence of a choice of law clause. First, if the contract presents connecting factors with many countries, none of which show a sufficiently close connection to justify the application of one specific domestic law. The PICC may then be the

⁷⁵ Art 33(1) of the Swiss Rules (emphasis added).

⁷⁶ Besson and Thommesen (n 28 above) Art 33 para 21.

⁷⁷ See above, Preamble I para 82; ICC case no 12193 (2009) 1 Int’l J Arab Arbitration 449: where there was no choice of law clause, the respondent asked the tribunal to ‘apply the general principles of Law, particularly those resulting from the UNIDROIT principles, also called the *lex mercatoria*’. The tribunal decided ‘the application of the *lex mercatoria* is not motivated in the case where there exist, similarly to the current affair, tight links between the contract and a determined national Law (i.e., Lebanese law in this case)’. It further stated ‘the general tendency will still lean towards choosing the rule of conflict of Laws in favor of the application of place of distribution’; see Arbitral Award 2004, ICC case no 12701, cited in Jolivet (n 21 above) 137: the silence of the parties as to the applicable law is not enough to exclude the application of any domestic law.

⁷⁸ s 46(3) English Arbitration Act 1996; see also Art 33(1) of the UNCITRAL Arbitration Rules (in the 1976 version).

⁷⁹ Radicati di Brozolo (n 3 above) 283.

⁸⁰ Y Derains, ‘The Role of the UNIDROIT Principles in International Commercial Arbitration (1): A European Perspective’ [2002] ICC Int’l Ct Arb Bull, Special suppl 9, 14.

⁸¹ eg (2003) Study L—Misc 25, para 605 (Date-Bah).

⁸² Besson and Thommesen (n 28 above) Art 33 para 26; E Gaillard, ‘General Principles of Law in International Commercial Arbitration—Challenging The Myths’ (2011) 5 World Arbitration & Mediation Review 161, 166: ‘the recognition of this discretion to the arbitrators does not make the applicability of general principles of law automatic in all cases in which the parties have remained silent as to the applicable law. Simply, it is an option given to the arbitrators which they may or may not use in light of the circumstances of the case’.

⁸³ Off Cmt 4c to Preamble, pp 4–5; see above, Preamble I para 9.

most appropriate set of substantive rules.⁸⁴ Secondly, the PICC may be applied if it can be inferred from the circumstances that the parties wished to exclude the application of any domestic law (see paras 31–36 below).⁸⁵

In practice, arbitral tribunals tend to be quite liberal, although some arbitrators have taken the view that the PICC cannot be applied as *lex contractus* at all.⁸⁶ They may choose to apply the PICC as ‘a neutral law or default law in case of an absence of a choice of law’.⁸⁷ Indeed, the PICC are the most comprehensive and regularly updated statement of internationally recognized legal rules applicable to international commercial contracts. This solution is acceptable as long as international arbitrators consider it with the necessary caution not to extend the scope of application of the PICC beyond that for which they were drafted.

One specific situation should be mentioned by way of illustration: it is sometimes suggested that arbitrators should avoid designating a law that would lead them to declare the contract null and void or otherwise frustrate the will of the parties.⁸⁸ There may be circumstances where the arbitrators find overwhelming policy considerations in favour of affirming the validity of the contract despite its being flawed under the otherwise applicable national law.⁸⁹ These must remain exceptional.⁹⁰ Still, once the arbitrators find that the law which would be applicable under the usual, relevant choice of law rules (eg the law with which the contract has the most connections) is unacceptable in the context of an international transaction,⁹¹ they might wish to refer the contract to the PICC if the PICC allow them not to annul the contract and to reach another acceptable solution. Indeed, they might be more inclined to disregard the otherwise applicable law if they can then turn to non-national rules of law rather than to another domestic law.

In any case, the tribunal must hear the parties on the possible application of the PICC and eventually invite them to make their submissions on that basis so that they are not surprised.⁹² The award would otherwise be in violation of the parties’ fundamental right

⁸⁴ Off Cmt 4c to Preamble, p 5; Arbitral Award, ICC case no 9875 (n 50 above): the contract had connections with both Japanese and French law; the tribunal applied the *lex mercatoria* as the *lex contractus*, and in particular the PICC; Arbitral Award 2004, ICC case no 13012, cited in Jolivet (n 21 above) 137–138: none of the connecting factors with French law or with the law of the State of Illinois was satisfactory. The tribunal decided to apply general principles of law and the *lex mercatoria* and in particular the PICC; see also Arbitral Award 29 March 2005, Stockholm Chamber of Commerce case no 126/2003, 88: the tribunal referred to Art 7.9 PICC as ‘an appropriate basis for determining the interest’.

⁸⁵ Off Cmt 4c to Preamble, p 5.

⁸⁶ Arbitral Award, ICC case no 9419 (n 7 above); see also G Born, *International Commercial Arbitration* (2nd edn, 2014) 2662: ‘it is unclear whether arbitral tribunals are permitted to apply a non-national legal system (at least in the absence of a choice-of-law agreement selecting such a system) and, if they do so, whether this will produce a valid award’.

⁸⁷ *Marella* (n 71 above) 1156–1157: the PICC (with the *lex mercatoria*) ‘may now be considered as a sort of default law’; 1158: the PICC applied as the *lex contractus* ‘in at least 12 ICC cases out of a total of 38 awards making reference to the Principles (collected between May 1994 and December 31, 2000)’. See also Arbitral Award, Stockholm Chamber of Commerce case no 117/1999 (2002) SAR 59, and Redfern et al (n 18 above) para 3.186.

⁸⁸ eg Fouchard et al (n 1 above) 876.

⁸⁹ Arbitral Award September 1996 (Paris), ICC case no 8540, *Unilex*, cited in Fouchard et al (n 1 above) 876 n 59: ‘in view of the parties’ intention... we are of the opinion that this tribunal cannot designate as the proper law a system of law under which the [agreement] would be found a legal nullity or under which the [agreement’s] key obligation would be found to be unenforceable’.

⁹⁰ A Sayed, ‘La présomption de validité des contrats dans l’arbitrage international’ [2002] ASA Bull 623.

⁹¹ KP Berger, *International Economic Arbitration* (1993) 509–510.

⁹² In a case reported by F Dessemontet, ‘The Application of Soft Law, Halakha and Sharia by International Arbitral Tribunals’ (2012) 23 Am Rev Int’l Arb 545, 552–553, the choice of law clause was unclear. The arbitral tribunal sitting in Switzerland suggested to the parties (Spanish and Belgian, respectively) to apply the

to present their case (see para 83 below). Likewise, an arbitral tribunal should respect any subsequent choice of law by the parties—such as where they coincide in basing their legal submissions (without reservations) on the same domestic law.

- 30 Finally, an arbitral tribunal faced with no choice of law by the parties might, as a compromise, **combine the PICC with a domestic law or other sources of law**. The Official Comment and the official footnote to the Preamble explicitly encourage parties to choose the PICC to apply in conjunction with a domestic law to supplement issues not covered by them.⁹³ Likewise, an arbitral tribunal might wish to apply the PICC together with international uniform law, domestic law, or international trade usages.⁹⁴

(b) *The PICC as the lex contractus where there is a negative choice of law*

- 31 Arbitrators may be faced with contracts containing an explicit negative choice, where the parties expressly exclude some or all national laws. In such a case, the parties may be deemed to have made a negative choice to submit their relationship (and disputes) to a transnational legal system.⁹⁵ Agreements calling for the application of a ‘neutral’ system of law might also warrant the application of a transnational legal system. In these situations, the PICC may be applied as the *lex contractus*.⁹⁶
- 32 Some arbitral tribunals have even regarded a **choice of law clause designating international law** as a negative choice of law and applied the PICC as the *lex contractus*.⁹⁷ Yet

PICC as a subsidiary source of law. The parties then based their pleadings on the PICC. The tribunal reached its decision by applying the PICC and some general principles codified under both Belgian law and Spanish law. The award was confirmed by the Swiss Federal Tribunal (4P.167/2002). The application of the PICC was not challenged; Arbitral Award 2004, ICC case no 12889, Unilex; Arbitral Award 31 January 2003, Arbitration Court of the Lausanne Chamber of Commerce, Unilex. In Arbitral Award 2006, ICC case no 13450 (2014) 141 Clunet 193 (excerpts), 194 the arbitral tribunal invited the parties to consider the application of the CISG supplemented by the PICC.

⁹³ Off Cmt 4a to Preamble, p 3; Arbitral Award, Stockholm Chamber of Commerce case no 117/1999 (n 87 above), also in L Mistelis, ‘The UNIDROIT Principles Applied as “Most Appropriate Rules of Law” in a Swedish Arbitral Award’ [2003] ULR 631. See para 12 above; see also above, Preamble I para 52.

⁹⁴ Arbitral Award March 1998 (Zurich), ICC case no 9117 (1999) 10(2) ICC Int’l Ct Arb Bull 96, 98: there was no choice of law clause; the tribunal applied the terms of the contracts, the CISG, and ‘usages of trade’; it then applied the PICC as evidence of these usages. See also Arbitral Award August 1999, ICC case no 9759 (2001) 12(2) ICC Int’l Ct Arb Bull 84, 87, Unilex: the tribunal relied on rules of interpretation in Arts 1.6 and 4.5 PICC when determining whether the parties had agreed on an arbitration clause; see also the Partial Arbitral Award 2002, ICC case no 11601, cited in Jolivet (n 21 above) 143: the contract was silent as to the applicable law and the arbitral tribunal based its decision on the PICC but applied French law as an additional source of law.

⁹⁵ eg Mistelis (n 93 above) 637–639; Lalive (n 27 above) 82–83; E Schäfer et al, *L’arbitrage de la Chambre de commerce internationale en pratique* (2002) 107.

⁹⁶ Arbitral Award, ICC case no 10422 (n 50 above): the contract was in favour of ‘a neutral legislation as agreed by the parties’, but there was no agreement between the parties on such neutral legislation; the tribunal applied ‘rules and principles generally recognised in international trade (*lex mercatoria*) and in particular the UNIDROIT Principles, since they seem to be a faithful transposition of rules admitted to be applicable to international contracts between traders engaged in international trade’.

⁹⁷ First Partial Arbitral Award 6 January 2003, ICC case no 12111, Unilex: clause relating to the applicable rules of law simply stated that ‘the present contract is governed by international law’; see also Final Award, undated, ICC case no 14581 (2012) XXXVII YB Comm Arb 62: the arbitration clause provided for arbitration in Switzerland which would ‘proceed in accordance with international law; the tribunal, noting that ‘[b]oth Parties have invoked the UNIDROIT Principles as internationally recognized principles of law’, applied the PICC.

each case should be examined separately to determine whether the parties did not intend to submit their contract to public international law, even though the possibility of doing so is far from being settled.⁹⁸

In most cases, a contract will not explicitly exclude a law, but merely be silent. The Official Comment rightly points out that **silence** on this issue can be construed as a negative choice of law only 'exceptionally'.⁹⁹ Ultimately, it is for the arbitrators to determine the agreement of the parties at the relevant time; that is, at the time they entered into the contract. The lack of choice may result from a mere oversight, or it may appear to be evident that one or both parties preferred not to raise the issue. 33

On the other hand, where the parties did indeed discuss a number of laws but could not agree on any of them, their disagreement may well be interpreted as a **negative choice of law** (or of certain laws). Where an arbitral tribunal is satisfied that the parties intended to exclude the application of certain national laws, it should apply another law—a neutral law, and ideally one that still has a reasonable connection to the contract. If no such laws exist, and if the *lex arbitri* allows reliance on rules of law, the tribunal may then resort to the PICC. 34

Where an arbitration involves a **state**, arbitral tribunals more willingly admit the existence of a negative choice of law and prefer to rely on the PICC rather than on a domestic law.¹⁰⁰ The Official Comment accepts that this scenario may warrant the application of non-national principles.¹⁰¹ 35

Although no decision illustrating this approach appears to be available, it is conceivable that probing the reasons for the absence of a choice of law provision may reveal a **negative choice of law excluding the PICC**. The parties may indeed have intended to exclude not only certain domestic laws, but also certain transnational rules. If the evidentiary proceedings show that the parties discussed the *lex mercatoria*, general principles, or the PICC, but then could not agree on them, the arbitral tribunal must respect this choice. 36

(c) *The PICC as the lex contractus in the case of simultaneous designation of two or more domestic laws*

Parties can simultaneously designate two or more domestic laws neutralizing each other. Depending on the circumstances, this may be construed as a negative choice of law, 37

⁹⁸ Redfern et al (n 18 above) para 3.137: private parties should be allowed to submit their contractual relationship to international law; cf P Daillier et al, *Droit international public* (7th edn, 2002) 1096.

⁹⁹ Off Cmt 4c to Preamble, p 5; Berger (n 27 above) 146; see ICC Award 15 September 2008, ICC case no 15089, Unilex: the tribunal decided to apply the PICC in conformity with Art 17 of the ICC Arbitration Rules (now Art 21). The contract did not contain a choice of law clause. The tribunal considered that there had been a 'negative choice' regarding the domestic laws of the parties and that there was no objective connecting factor the tribunal could use to determine the applicable law.

¹⁰⁰ Arbitral Award 5 June 1996 (Paris), ICC case no 7375 (1996) 11 Mealey's Int'l Arbitration Report A1-A69, Unilex, and in E Jolivet, 'La jurisprudence arbitrale de la CCI et la *lex mercatoria*' [2002] Cahiers de l'arbitrage 253, 255–256: the majority of the arbitrators said that the absence of a choice of law clause was a result of the parties' wish for smooth negotiations and should be interpreted as an implicit clause not to submit the contract to any of the national laws of the contracting parties; the majority also said it was more appropriate to apply general principles of law (including the PICC) where a state is a party to the contract, since sovereigns are usually reluctant to submit to the laws of another state and the parties would probably have chosen to submit their contract to these principles if the issue had been addressed during the negotiations.

¹⁰¹ Off Cmt 4c to Preamble, p 5.

potentially leading to the application of the PICC.¹⁰² The solution is in line with the principle of effective interpretation which is prevalent in international arbitration.¹⁰³

- 38 The simultaneous designation need not result in the inoperability of the choice, provided that the scope of application of each domestic law is clearly distinguishable. Parties may provide for a split choice of law (*dépeçage*) whereby certain matters are governed by a specific law whilst others are subject to another law. In ICC case no 9479, the parties had explicitly selected a domestic law (New York) as applicable only to the issue of the validity of their contract. The arbitral tribunal found that the parties had not agreed on any domestic law to apply to other issues relating to the substance of their contract. The tribunal decided to apply the terms of the contract, supplemented by the PICC, as an ‘accurate representation . . . of [the] usages of international trade’—and it could have also legitimately decided to apply the PICC as the *lex contractus*.¹⁰⁴ The parties may also expressly opt for the application of only some of the provisions of the PICC to one of the issues raised by their dispute.¹⁰⁵

4. Choice of law other than the PICC

- 39 The Preamble does not foresee the application of the PICC as the *lex contractus* where parties agree on a specific choice of law clause in favour of a domestic law or an international instrument. The silence of the Preamble in that respect is not surprising: as mentioned above, under virtually all arbitration laws and rules, an **arbitral tribunal is bound by any choice of law** made by the parties. In that regard, it is well accepted that a common reference to the same law in the submissions of the parties amounts to a choice of law,¹⁰⁶ at least if no qualification or reservation is made. Hence, where the parties have specifically selected a domestic law or any other set of rules, the arbitral tribunal should normally not apply the PICC as the *lex contractus*.¹⁰⁷ The tribunal may, however, decide to rely on the PICC as a means to interpret or supplement the applicable law (see paras 46–57 below).
- 40 It is conceivable that, in some limited situations, an arbitral tribunal may consider that certain provisions in the applicable law do not fit the context of international commercial contracts.¹⁰⁸ The tribunal may then be inclined to **disregard inappropriate or parochial**

¹⁰² Arbitral Award 5 November 2002, ICACRF case no 11/2002, Unilex: the relevant contract contained three choice of law clauses—one in favour of Russian law, one in favour of German law, and one in favour of the ‘general principles of *lex mercatoria*’; the tribunal found that the reference to both German and Russian laws was tantamount to an absence of any choice of domestic law and decided to apply the PICC as an expression of the general principles of *lex mercatoria*.

¹⁰³ Fouchard et al (n 1 above) 825–826.

¹⁰⁴ Arbitral Award February 1999, ICC case no 9479 (2001) 12(2) ICC Int’l Ct Arb Bull 67.

¹⁰⁵ Arbitral Award no 126/90, cited in (1994) PC—Misc 19, p 19 (Maskow): the PICC were used for the issue of hardship only.

¹⁰⁶ Besson and Thommesen (n 28 above) Art 33 para 7.

¹⁰⁷ Radicati di Brozolo (n 3 above) 282–283.

¹⁰⁸ P Galizzi and V Sartorelli, ‘I principi Unidroit 2010: verso un diritto “globale” dei contratti commerciali internazionali, Roma 17–18 febbraio 2012—I principi Unidroit nella pratica dell’arbitrato internazionale’ (2012) 26 Dir comm int 935; Arbitral Award 23 January 2008, Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce case no T-9/07, Unilex: the parties agreed that Serbian law governed the merits of the dispute. The tribunal considered that ‘absent the adequate provisions of the substantive law chosen by the parties, both the Principles and UNCITRAL Model Law on the International Transfer of Funds can provide more up-to-date and modern solutions for the dispute at hand’ and that it ‘strongly support[ed] the application of the abovementioned Principles in this dispute—as *lex mercatoria*’. The tribunal applied the PICC, among others, as an expression of commercial practice and trade usages, as well as the law

provisions if the solution reached under that law would not meet the expectations of either party, or would lead to a result which the parties did not contemplate and that would clearly frustrate their agreement.¹⁰⁹

In some cases, it might be **difficult** for an arbitral tribunal or the parties **to determine the content of the provisions of the applicable law**.¹¹⁰ The use of the PICC as a substitute for domestic law in such cases was explicitly mentioned in the Preamble of the 1994 edition of the PICC. It has disappeared from the Preamble, but not from the scope of the 2004 or 2010 editions of the PICC, as mentioned in the section of the Official Comment dealing with 'other possible uses of the PICC'.¹¹¹ The scenario on the minds of the drafters was one where **establishing the content of the applicable law proves impossible or excessively burdensome**.¹¹²

A **high threshold** must be applied in this respect, as nowadays most domestic laws are either codified or otherwise easily available.¹¹³ Where parties have made an explicit choice of law, arbitral **tribunals should avoid indulging in improper shortcuts** and the PICC should only be used as a complementary set of rules, not as the *lex contractus*.¹¹⁴ A party should not be too easily allowed to rely on the PICC, since the duty of the parties to argue their case in fact and in law implies instructing a counsel familiar with the applicable law or capable of procuring advice through other advisors.¹¹⁵ However, fundamental and repeated legal amendments and lack of relevant authorities may lead to a high degree of uncertainty about the current state of the applicable law, and the parties' legitimate expectations in this. If that is the case, reliance on the PICC may be warranted.¹¹⁶

of the Republic of Serbia. The tribunal 'decided to interpret these principles in regard to the present dispute, to apply them and to arbitrate in accordance with their contents and aims' as there 'was no reason . . . to keep avoiding their application'; see also Arbitral Award 2004, ICC case no 13152, cited in Jolivet (n 21 above) 143: on the basis that the PICC allow the application of 'a just and reasonable' rate of interest, the tribunal applied Art 7.4.9 disregarding the *lex contractus*; Commission on Commercial Law and Practice of the ICC (n 26 above) 21 refers to the possibility of 'correcting' or 'integrating' inadequate domestic laws through the reference to general principles, the PICC, trade usages, but only to the extent that this is admissible under the applicable domestic law.

¹⁰⁹ Arbitral Award, ICC case no 7528 (1997) XXII YB Comm Arb 125, 131: the tribunal held that both parties had agreed not to apply mandatory provisions of French law to their relationship, and that this intent should be upheld 'given the international character of their contract'; cf Fouchard et al (n 1 above) 797: case of mandatory provisions of law.

¹¹⁰ See above Preamble I paras 100–103.

¹¹¹ Off Cmt 8 to Preamble, p 6.

¹¹² (1992) Study L—Doc 51, p 6.

¹¹³ (1994) PC—Misc 19, pp 23–24 (especially Bonell: 'the very last resort').

¹¹⁴ PM Patocchi and X Favre-Bulle, 'Les Principes UNIDROIT relatifs aux contrats du commerce international: une introduction' [1998] Sem jud 569, 602: 'the arbitrators' right to apply non-national rules [is] . . . in our view much more far-reaching where the parties have not made an express choice of law. Indeed, any choice of law made by the parties must be respected; it shall bind the arbitrators with much more force than any other contractual provision'. For the use of the PICC as a complementary set of rules, see paras 43–57 below.

¹¹⁵ In that sense, in a dispute where the parties agreed to the application of Romanian law, the claimant referred to the PICC in its post-hearing brief to support its assertion. The arbitral tribunal invited the parties to take a position on some articles of the PICC which could be relevant for the dispute. Since the respondent 'did not oppose the application of UNIDROIT Principles referred to by [the claimant], the Arbitral Tribunal note[d] that both parties consent[ed] to their application': Arbitral Award 2002, ICC case no 11174, cited in Jolivet (n 21 above) 132.

¹¹⁶ H Kronke, 'Principles Based Law and Rule Based Law: The Relevance of Legislative Strategies for International Commercial Arbitration' in H Kronke and K Thorn (eds), *Grenzen überwinden, Prinzipien bewahren—Festschrift für Bernd von Hoffmann zum 70. Geburtstag* (2011) 1002, 1004.

II. Use of the PICC to supplement or interpret the *lex contractus*

- 43 If an arbitral tribunal finds that the PICC may not be relied upon as the applicable ‘rules of law’, they may nevertheless be used to complement the law found to be applicable. This, as indicated by paragraph 5 of the Preamble, may be either the provisions of international uniform instruments (see paras 44–45 below) or a specific domestic law (see paras 46–57 below). In theory, the **complementary function of the PICC** is no different in arbitration than in state courts, so the relevant observations made on this topic earlier in this Commentary¹¹⁷ are also pertinent in the context of arbitration. In practice, arbitral tribunals rely much more frequently on the PICC for complementing the applicable law than do state courts.¹¹⁸ However, in recent years the number of domestic courts using the PICC to supplement or interpret the applicable law has considerably increased.¹¹⁹ The following paragraphs examine the existing arbitral case law on the subject and address the few issues specific to this use of the PICC in the context of international arbitration.

1. Use of the PICC to interpret or supplement international uniform law

- 44 Art 7(2) CISG provides that questions ‘concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the [applicable domestic law]’.¹²⁰ The reference to ‘general principles’ in the CISG has been relied upon by arbitral tribunals to apply the PICC.¹²¹ For instance, in several ICC cases, arbitral tribunals relied on Art 7.4.9(2) PICC to determine the **interest rate** applicable to the amount awarded in damages,¹²² an issue which is not addressed in the CISG. Other

¹¹⁷ See above, Preamble I paras 108–142.

¹¹⁸ E Finazzi Agrò, ‘The Impact of the UNIDROIT Principles in International Dispute Resolution in Figures’ [2011] ULR 719; Mdp Perales Viscasillas, ‘Principios de UNIDROIT y PDCE en el arbitraje internacional’ in MP Ferrer and A Martínez (eds), *Principios de derecho contractual europeo y principios de Unidroit sobre contratos comerciales internacionales* (2009) 157, 162.

¹¹⁹ For extensive references, see above, Preamble I paras 108–142; the Hague Principles on Choice of Law in International Commercial Contracts that allow the designation of non-state law in a choice of law clause ‘whether in an arbitral or judicial context’ (Draft Commentary on the Draft Hague Principles on Choice of Law in International Contracts, Art 3(3), available at www.hcch.net/upload/wop/princ_com.pdf) will certainly favour the use of the PICC by state courts (‘The parties may choose the law of a State but also have the freedom to choose generally accepted non-State rules of law, particularly recognised principles of contract law and uniform law, unless the law of the forum provides otherwise’); see Saumier (n 9 above) 540–544.

¹²⁰ See the discussion in Off Cmt 5 to Preamble, pp 5–6.

¹²¹ Brunner (n 28 above) 41–43; Arbitral Award 2002, ICC case no 11638, cited in Jolivet (n 21 above) 148 n 49: the dispute was governed by the CISG and the tribunal applied the PICC to the matters governed by the Convention but not expressly settled by it referring to Art 7(2) CISG. It also relied on the PICC to cover the matters not addressed by the CISG. See also Partial Arbitral Award 2004, ICC case no 12460, cited in Jolivet (n 21 above) 139 n 31: the contract was governed by the CISG whose gaps were filled by the general principles underlying the Convention. The tribunal determined that such general principles were contained and developed in the PICC; see also *Scafom International BV v Lorraine Tubes sas*, Belgian Supreme Court, 19 June 2009, Unilex. In Arbitral Award 2006, ICC case no 13436 (2014) 141 Clunet 189 (excerpts), the parties had chosen the CISG supplemented by the PICC. The arbitral tribunal implemented this choice of law and refused to apply the law at the place of arbitration (Beijing) to supplement the CISG.

¹²² Arbitral Award December 1997 (Paris), ICC case no 8817 (2000) XXVIII YB Comm Arb, 354, 357, Unilex: the CISG was applicable to the merits; the tribunal decided to apply the CISG together with ‘its general principles, as presently elaborated in the UNIDROIT Principles of International Commercial Contracts’; Arbitral Award December 1996 (Zurich), ICC case no 8769 (1999) 10(2) ICC Int’l Ct Arb Bull 75, Unilex: French law and the CISG were applicable; on the issue of the interest rate, the tribunal noted that the CISG did not provide for a particular interest rate and applied Art 7.4.9 PICC. See also KP Berger, ‘The Lex

areas in which the PICC may usefully complement the CISG include the definition of notions such as the general duty to act in **good faith** (Art 1.7 PICC)¹²³ and the general principle according to which a **monetary obligation is to be performed at the obligee's place of business** (Art 6.1.6 PICC),¹²⁴ the transfer of obligation (Art 9.2.1 PICC),¹²⁵ the calculation of losses (Art 7.4.2),¹²⁶ and contribution to the harm by the aggrieved party (Art 7.4.7).¹²⁷ Further topics include performance of non-monetary obligations (Art 7.2.2) and proof of harm by current price (Art 7.4.6).¹²⁸ It has been argued that the PICC cannot be used to interpret or supplement the CISG as the latter was adopted first ('chronological argument') and also because the PICC may be relevant for international commercial contracts but do not contain the general principles mentioned in Art 7(2) CISG.¹²⁹ Other authors consider that the general principles governing the PICC 'do not necessarily equate to those of CISG, which is crafted for less relational cross-border sales of goods'.¹³⁰ The provisions of the PICC have a broader scope of application than those contained in the CISG. Therefore, courts from jurisdictions adopting a 'formal reasoning approach' (reflected in the CISG) would have difficulties in applying the PICC to interpret in a broader way the national legislation incorporating the CISG.¹³¹ In line with the awards mentioned above, others have suggested that the PICC reflect international trade rules that can therefore be applied to interpret or supplement international uniform law such as the CISG. Finally, as a compromise, it may be possible to use the PICC 'to supplement CISG only as they help in clarifying or supporting already existing general principles underlying the Convention'.¹³² As a first step, arbitral tribunals will have to ensure that the issue at hand is covered by the CISG at all. Using the PICC to solve questions not included in the CISG would amount to applying them together with the CISG 'as a sort of *lex mercatoria*, even when CISG is not applicable at all'.¹³³ As a second step, the tribunal must show that the relevant provision of the PICC may be considered as an expression of a general principle underlying the CISG.

The PICC have also been used to interpret or supplement other instruments of international uniform law, including the **Uniform Law on the Formation of Contracts for the International Sale of Goods** of 1 July 1964 (ULF),¹³⁴ the **Principles of European**

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Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts' (1997) 28 *Law & Policy in Int'l Business* 943; *Arbitral Award 1995* (Basle), ICC case no 8128, cited in Berger (n 27 above) 134–137, Unilex; *Arbitral Award 2004*, ICC case no 12460, Unilex.

¹²³ AS Komarov, 'Reference to the UNIDROIT Principles in International Commercial Arbitration Practice in the Russian Federation' [2011] *ULR* 657, 660; *Arbitral Award 2008*, ICACRF case no 18/2007, Unilex, 'failed to act in accordance with one of the basic principles of international trade, i.e. the principle of good faith as laid down in general terms in Article 1.7 of the UNIDROIT Principles and Articles 7 and 8 of the CISG'; see also *Arbitral Award 19 March 2007*, Internationales Schiedsgericht der Wirtschaftskammer Österreich, Unilex.

¹²⁴ MJ Bonell, 'The UNIDROIT Principles as a Means of Interpreting and Supplementing International Uniform Law' [2002] *ICC Int'l Ct Arb Bull*, Special suppl 29, 30.

¹²⁵ *Arbitral Award 2008*, ICACRF case no 14/2008, cited in Komarov (n 123 above) 666–667.

¹²⁶ *Arbitral Award 2003*, ICC case no 11849, Unilex.

¹²⁷ *Arbitral Award 2003*, ICACRF case no 97/2002, Unilex.

¹²⁸ See the discussion in Piers and Erauw (n 3 above) 469.

¹²⁹ A Veneziano, 'UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court' [2010] *ULR* 137, 140–141.

¹³⁰ Nottage (n 11 above) 200. ¹³¹ Nottage (n 11 above) 200.

¹³² Veneziano (n 129 above) 140–141.

¹³³ MJ Bonell, *An International Restatement of Contract Law* (3rd edn, 2009) 330.

¹³⁴ *Arbitral Award January 1999* (Paris), ICC case no 8547 (2001) 12(2) *ICC Int'l Ct Arb Bull* 57, 58, Unilex: the choice of law clause was in favour of the ULF; the tribunal applied the PICC 'as supplementary rules' by virtue of its powers under Art 17(1) (now Art 21(1)) of the ICC Rules.

Contract Law of 1998 and 2002, or the UNCITRAL Model Law on International Credit Transfers of 1992.¹³⁵

2. Use of the PICC to interpret or supplement the applicable domestic law

46 The PICC can be used to complement the applicable domestic law in certain situations (see paras 47–51 below) and in several different ways (see paras 52–57 below).¹³⁶

(a) Use of the PICC by arbitrators to supplement or interpret domestic law

47 Where arbitral tribunals operate under a law or arbitration rules that do not afford the possibility of applying ‘rules of law’, they are obliged to apply ‘a law’ to the contract. In order to escape such an obligation, they might first choose a domestic law, and then rely on the PICC to ‘supplement’ or ‘interpret’ such law.

48 Even if the relevant law and arbitration rules allow it to apply ‘rules of law’, the arbitral tribunal might wish to apply a domestic law and use the PICC merely as a means of supplementing or interpreting the applicable domestic law. This would be especially useful where the contract has **connections with a number of domestic laws** and the arbitral tribunal would like to account for such diversity.¹³⁷

¹³⁵ Arbitral Award 23 January 2008, Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce case no T-9/07, Unilex: the tribunal considered that the PICC and the UNCITRAL Model Law on the International Transfer of Funds ‘may be used for interpreting and complementing the international unified rules’. It interpreted and applied four instruments of international uniform law together; eg when determining the claimant’s right to damages, it referred to Art 74 CISG, Arts 9:501 and 9:502 PECL, Arts 7.4.1 and 7.4.4 PICC, and Arts 262(1)(2) and 266 of the 1978 Serbian Law on Contracts and Torts. The tribunal also referred to Art 78 CISG, Arts 277(1) and 279(2) of the 1978 Serbian Law on Contracts and Torts, Art 9:508 PECL, Art 7.4.9 PICC, and Art 2 (2)(m) of the UNCITRAL Model Law on International Credit Transfers in granting the claimant the right to interest.

¹³⁶ See above, Preamble I paras 108–142.

¹³⁷ Arbitral Award, ICC case no 8540 (n 89 above): there was no choice of law clause in the contract; the tribunal found that the law of New York was applicable to the merits of the case, but also found that ‘in an international commercial transaction such as this contract between . . . and . . ., where the Parties have not indicated the applicable law and where there are many disparate connections to many different municipal systems of law, we are of the opinion that international arbitrators are fully justified to turn to general principles of law’, including the PICC. However, having determined that the law applicable was the law of New York, the tribunal did not ‘apply’ the PICC as such and decided that it would ‘compare’ the conclusion it would reach under New York law with the decision it would have reached under general principles evidenced by the PICC. See also Arbitral Award June 1996 (Rome), ICC case no 5835 (1999) 10(2) ICC Int’l Ct Arb Bull 34, Unilex: the respondent argued that both Kuwaiti and Italian laws should be applied; the tribunal found Kuwaiti law applicable to the merits, but decided that ‘to the extent necessary, principles generally applicable in international commerce are applicable to the merits of the dispute’; the tribunal confirmed solutions found in Kuwaiti law by reference to the relevant provisions of the PICC. See also Arbitral Award, undated, ICC case no 12745 (2010) XXXV YB Comm Arb 40: the tribunal decided that the law applicable to the share purchase agreement should be French law; the CISG did not apply because of the object of transaction (shares); the agreement was invalid under French law, and the tribunal also ‘note[d] that a similar mechanism is enshrined in the UNIDROIT Principles Clause 9.3.4’. See also Arbitral Award, undated, ICC case no 12112 (2009) XXXIV YB Comm Arb 77: the tribunal decided that the law of respondent (a state party) was applicable to the substance; finding that the state party failed to perform its obligations under the joint venture agreement, the tribunal determined that *force majeure* did not excuse respondent’s non-performance and referred to Arts 6.1.14–6.1.17 of the 1994 edition of the PICC to rule that ‘the national public partner has a strict legal duty to check that performance will be possible at the promised time, taking also into consideration the social climate that the foreign partner cannot estimate properly; if it has not made the necessary verification, it must bear all consequences towards its foreign contractual partner’.

In this respect, it usually does not matter to the arbitral tribunal whether the **domestic law is applicable** to the contract by virtue of an agreement between the parties (eg an express choice of law clause or an agreement at the outset of the arbitral proceedings) or because the arbitrators have selected it as the law applicable to the merits where there is no express choice by the parties. The parties may even agree during the proceedings that the PICC be applied as a complement to the otherwise applicable domestic law.¹³⁸

However, it should be noted that some (rare) arbitral awards have denied the possibility for an arbitral tribunal to take into account the PICC and other transnational legal norms where faced with a valid, express choice of a domestic law by the parties.¹³⁹

Finally, the arbitration rules of most arbitration institutions (as well as some national laws) permit—and even require—the arbitral tribunal to take into account **usages**, even where the parties have selected the law applicable to their contract.¹⁴⁰ Arbitral tribunals sometimes consider that the PICC can be ‘taken into account’ as part of the **applicable trade usages**.¹⁴¹ This is questionable, since usages must be distinguished from transnational principles (see para 22 above).

(b) Use of the PICC to ‘interpret’ or ‘supplement’ the applicable domestic law

It is not entirely clear from the terms of the Preamble what the drafters had in mind when they stated that the PICC may be used to ‘supplement’ domestic law. There is clearly some **overlap** with the use of the PICC as a *substitute* for domestic law, which is discussed above (see paras 40–42 above). This is supported by the Illustrations in the Official Comment, namely where the arbitral tribunal cannot find a proper solution under the

¹³⁸ Arbitral Award 5 May 1997 (Paris), ICC case no 7365 [1999] ULR 796, Unilex: the choice of law clause was in favour of Iranian law; the parties agreed at the outset of the proceedings to apply ‘general principles of international law’ to supplement or complement Iranian law; in determining these ‘general principles of international law’ the tribunal declared itself to be ‘guided’ by the PICC.

¹³⁹ Arbitral Award, ICC case no 9029 (n 50 above) 90: ‘where the parties have expressly and precisely identified the law applicable to [their] relationship . . . as a domestic law, the possibility of putting before judges rules that do not belong in the national system of rules to which the . . . parties referred to is precluded’; see also Arbitral Award 2011, ICC case no 16398, cited in in Gama (n 23 above) 652–653: one of the parties referred to Arts 4.1 and 4.3 PICC as an expression of the general principles of international law but the arbitral tribunal sitting in Sao Paolo applied only the law of Brazil.

¹⁴⁰ Art 21(2) of the ICC Rules; Art 33(3) of the Swiss Rules. Arbitral Award May 1999, ICC case no 9753 (2001) 12(2) ICC Int’l Ct Arb Bull 82, Unilex. Czech law provided that account must be taken of the ‘business practice’ in the particular field of the contract; the tribunal found no special usages in the particular field of business, but held that ‘general principles of business practices have importance too’ and applied these general principles by making reference to the PICC. See also Arbitral Award December 1998 (Paris), ICC case no 9593, Unilex; Arbitral Award, ICC case no 9419 (n 7 above) 107: Ivorian law was applicable to the merits; Art 1135 of the Ivorian Cc provided that parties are bound by equity, custom and the law; in the context of an international transaction ‘the custom to be taken into consideration by the . . . tribunal within the framework of Article 1135 . . . is to be found within the usages of international trade’; accordingly, the tribunal made reference to Art 5.3 (now Art 5.1.3) PICC.

¹⁴¹ Arbitral Award October 2000, ICC case no 10022 (2001) 12(2) ICC Int’l Ct Arb Bull 100, Unilex: Lithuanian law was applicable to the merits; the tribunal ruled that the PICC were applicable as part of ‘the relevant trade usages’ mentioned in Art 17 (now Art 21(2)) of the ICC Rules. See also Arbitral Award 22 December 2008, ICACRF case no 83/2008, Unilex: Russian law applied. The tribunal ‘takes into account the customs effective now in international trade, which are set forth in Articles 2.1.1, 4.1, 4.2, 4.3 of the UNIDROIT Principles of International Commercial Contracts of 2004’ and supported a valid modification of the contract which was in accordance with Russian law.

selected domestic law either because it does not address the issue¹⁴² or because it leads to a number of equally valid options.¹⁴³

53 Where the **domestic law itself refers to general principles** as a source of law or a source of assistance for the interpretation of its provisions, the PICC—to the extent that they qualify as general principles—become a means to interpret rather than simply supplement the domestic law.¹⁴⁴ The same applies where the contract expressly calls for the application of the PICC as a means to interpret the designated domestic law.

54 Some provisions of the **law applicable to a contract might be unclear or unfit** in an international context where they have been designed mostly for use in domestic situations.¹⁴⁵ Interpreting these provisions in the light of transnational norms like the PICC can prove useful.¹⁴⁶ The assertion that arbitral tribunals should necessarily interpret or supplement

¹⁴² Off Cmt 6 to Preamble, p 6; Arbitral Award December 2001, ICC case no 11295 [2005] ICC Int'l Ct Arb Bull, Special suppl 88, 88–89, Unilex: 'in international arbitration, when the domestic law(s) to be applied to the dispute, does (do) not provide any specific solutions to settle the point of law involved, the arbitral tribunal may subsidiarily apply international law instruments'; accordingly, the PICC 'may also be applied to the dispute' to supplement Polish law; but there was no relevant rule in the PICC *in casu*. See also Dessemontet (n 54 above) 161: tribunals faced with gaps in Swiss law regarding the determination of damage resorted to Section 7.4 of the PICC to calculate the damage in specific situations not covered by the applicable Swiss provisions. See also Arbitral Award 9 April 2008, ICACRF case no 64, Unilex: 'the arbitral tribunal, having found no specific regulation in applicable Russian civil law dealing with a claim for specific performance of an obligation to deliver the requested documentation... applied Article 7.2.2 of the UNIDROIT Principles to confirm the right of Claimant to require from Respondent the handing over of the requested documentation'; the same tribunal applied Art 7.4.8 PICC on mitigation of harm for the same reason: Arbitral Award 2 June 2009, ICACRF case no 148, Unilex.

¹⁴³ Arbitral Award 1995, Ad hoc arbitration (Auckland) [1999] ULR 166, 166–167, Unilex: the law of New Zealand on the point to be decided was 'in a somewhat unsettled state'; the tribunal sought confirmation on a comparative basis and made reference to the PICC for that purpose, claiming that 'there could be no more definitive contemporary international statement governing the interpretation of contractual terms than in the PICC'. See also Arbitral Award October 2001, ICC case no 9078 [2005] ICC Int'l Ct Arb Bull, Special suppl 73, Unilex: German law was said to be unclear as to whether damages for lost opportunities could be awarded; the tribunal conducted a comparative analysis between various national legal systems and the PICC in order to arrive at an internationally acceptable solution. See also Arbitral Award 2006, Internationales Schiedsgericht der Wirtschaftskammer Österreich case no SCH-4921, Unilex: the contract referred to Austrian law including the CISG as applicable to the merits. The sole arbitrator applied Austrian law to the issue of assignment; in doing so, he also referred to 'internationally accepted principles as laid down in Articles 9.1.10(1) and 9.1.13(2) of the UNIDROIT Principles'; Arbitral Award 2003, ICACRF case no 134/2002, Unilex.

¹⁴⁴ Brunner (n 28 above) 32.

¹⁴⁵ H Gabriel, 'The UNIDROIT Principles of International Commercial Contracts: An American Perspective on the Principles and Their Use' [2012] ULR 507, 512–513 n 20.

¹⁴⁶ See the discussion in Off Cmt 6 to Preamble, p 6; Berger (n 27 above) 133: 'an internationally useful interpretation of the applicable domestic law'; Arbitral Award September 1996 (Zurich), ICC case no 8486 (1999) XXIVa YB Comm Arb 162, Unilex: the contract was between parties from Turkey and the Netherlands, with Dutch law applicable to the merits; the tribunal applied the proposition made by a Dutch authority that in an international context, provisions of domestic law (particularly on hardship and *force majeure*) should be interpreted in accordance with the PICC rather than domestic legal doctrine; the tribunal held that '[a]ccording to Art 3:12 BW, "Dutch common opinion of law" is the determining factor in the first place; it is replaced by the common opinion in international contract law when the provision is applied in an international context'. See also Arbitral Award September 1998, ICC case no 8908 (1999) 10(2) ICC Int'l Ct Arb Bull 83, 84–86, Unilex: the choice of law clause was in favour of Italian law; there were difficulties in interpretation of a provision of the Italian Cc; the tribunal reviewed several methods for the interpretation of Italian law, including the PICC; it noted that 'the rules relating to interpretation and good faith contained in the UNIDROIT Principles... are in all events a useful reference framework for applying and judging a contract of an international nature'; see also *German Athlete v Deutscher Leichtathletikverband*, German Sports Arbitration Court, 17 December 2009, Unilex: it was controversial whether the *contra proferentem* rule applied with respect to the rules for the nomination of the German Olympic team and the tribunal found that it should, 'since this was the approach prevailing at international level as demonstrated by Article 4.6 of the UNIDROIT Principles' (see below, Art 4.6 para 6).

the domestic law selected by the parties to govern their contract having recourse to general principles of the national legal system instead of the PICC does not appear to be right: the particularities of complex international contracts and the reasonable expectations of the parties that the arbitral tribunal will take into consideration the international character of the transaction, suggest that it is convenient to resort to the PICC.¹⁴⁷ However, the use of the PICC requires a real ambiguity or gap in the law chosen by the parties. They cannot be used to circumvent the choice of the applicable law.¹⁴⁸ A need for interpretation can arise if a **contract is drafted in a language which is not an official language in the state the law of which governs the contract**. In an arbitration seated in Switzerland, the contract used the English term 'material breach'. Given that English is not a Swiss national language, the **term was unknown**. The arbitral tribunal relied on Art 25 of the CISG ('fundamental breach') and Art 7.3.1 PICC to construe the term, even though the parties had excluded the application of the CISG. The losing party challenged the award arguing that the arbitral tribunal had acted beyond its jurisdiction in relying on the CISG and the PICC, and that such reliance on international principles to interpret the term violated their choice of law clause. However, the Swiss Federal Tribunal confirmed the award.¹⁴⁹

'Supplementing' or 'complementing' domestic laws can also be understood as a direction to add strength to the provisions of the applicable domestic law by showing that such provisions reflect a wider transnational consensus. Abundant case law shows that **arbitrators refer to the PICC to validate a decision reached under the domestic law** selected by the parties.¹⁵⁰ Arbitral tribunals may do so either on their own initiative or when required

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¹⁴⁷ Brunner (n 28 above) 38 (referring to general contract principles).

¹⁴⁸ Brunner (n 28 above) 38–39; Crivellaro (n 33 above) 929–930.

¹⁴⁹ DFT 16 December 2009 (4A_240/2009), ASA Bull 2/2011, 457. The Federal Tribunal held that the arbitral tribunal had been right in applying the concept of 'fundamental breach' as it applies in the CISG and the PICC to interpret the meaning of a term that was not known under Swiss law. This was not a violation of the parties' choice of law clause but merely an issue of contractual interpretation. The arbitrators had examined what two internationally active corporations could or should have understood when using the term 'material breach' in a contract. Further, the Federal Tribunal ruled that parties who are involved in international commerce and fail to define a given term in their contract have to reckon with the application of the PICC and the CISG to construe the said term. See also the critical note by J Kleinheisterkamp, 'The Review of Arbitrator's Interpretation of International Contracts—Transnational Law as a Dangerous Short-Cut' ASA Bull 2/2011, 474.

¹⁵⁰ Arbitral Award July 2001, ICC case no 11051 [2005] ICC Int'l Ct Arb Bull, Special suppl 86–87, Unilex: the parties had agreed that their dispute should be resolved in accordance with Italian law; the tribunal applied the relevant provisions of Italian law but noted that 'such solution [as provided for by Italian law] is consistent with the relevant custom of international trade, of which the PICC are an expression'. See also the awards cited by Derains (n 80 above) 14–17; Arbitral Award April 1998 (Paris), ICC case no 8223 (1999) 10(2) ICC Int'l Ct Arb Bull 58, 60, Unilex: French law was applicable on the merits; the tribunal mentioned Art 2.19 (now Art 2.1.19) PICC in support of its decision. See also Arbitral Award October 1998 (Geneva), ICC case no 9333 (1999) 10(2) ICC Int'l Ct Arb Bull 102, 104, Unilex: Swiss law was applicable to the merits; the tribunal mentioned that the result attained by application of Swiss law was in conformity with 'usages of international trade', as expressed, inter alia, by the PICC; Arbitral Award 2003, ICC case no 12174, cited in Jolivet (n 21 above) 136 n 24, where the arbitral tribunal referred to the applicable Turkish law but also referred to the PICC to support its decision that the arbitral proceedings were of an international nature; Arbitral Award 30 December 1998, Ad hoc arbitration (Uruguay), Unilex; Arbitral Award 1 June 2003, Arbitration Centre of the Costa Rican Chamber of Commerce, Unilex: basing its decision on Costa Rican law, the tribunal also referred to the PICC 'not as a source of law not agreed upon or invoked by the parties, but instead for their doctrinal value'. See also Arbitral Award 21 December 2005, Ad hoc arbitration (Brazil), Unilex; Arbitral Award 4 April 2003, ICACRF case no 134/2002, Unilex where it was held that the CISG and Russian law were applicable: as to the issue of the penalty, which was considered as manifestly excessive, the tribunal preferred to invoke the general principle of 'proportionality and conformability with the negative consequences of the breach of the obligations to the sum of the penalty claimed', which is the basis of the CISG and certain Russian law provisions; moreover, the principle is also expressed in Art 7.4.13 PICC, which the tribunal defined as 'a code of the

by the applicable domestic law or arbitration rules to consider general principles (of which the PICC are used as an expression).

- 56 There are numerous **examples** of arbitral awards containing obiter dicta to the effect that a particular solution in domestic law reflects a transnational consensus evidenced by the PICC. Thus, arbitral tribunals have used the PICC to support national provisions regarding rules of interpretation,¹⁵¹ modification of contracts,¹⁵² the principles of good faith,¹⁵³ nominalism,¹⁵⁴ price determinability,¹⁵⁵ quantification of losses,¹⁵⁶ loss of profit,¹⁵⁷ mitigation of damages,¹⁵⁸ hardship,¹⁵⁹ the right to terminate a

well-established rules of international trade reflecting the approaches of the principal legal systems'; Arbitral Award 28 November 2002, Camera Arbitrale Nazionale e Internazionale di Milano, Unilex; see also O Meyer, *Principles of Contract Law und nationales Vertragsrecht: Chancen und Wege für eine Internationalisierung der Rechtsanwendung* (2007) 211–228; Veneziano (n 129 above) 149.

¹⁵¹ Arbitral Award August 2000, ICC case no 9651 (2001) 12(2) ICC Int'l Ct Arb Bull 76, 79, Unilex: the issue was the application of Swiss law to the interpretation of a choice of law clause; the tribunal noted that Chapter 4 of the PICC provided for similar rules of interpretation; Arbitral Award October 2000, ICC case no 10335 (2001) 12(2) ICC Int'l Ct Arb Bull 102, 104, Unilex: the tribunal relied on Arts 1.7, 1.8, and Chapter 4 of the PICC to support a rule of interpretation found in Greek law. In the context of court proceedings, see above, Preamble I paras 134–140.

¹⁵² Arbitral Award 22 December 2008, ICACRF case no 83/2008, Unilex: the arbitral tribunal applied the Civil Code of the Russian Federation, according to which a contract modification must be made in writing. It concluded that the formal requirement had been complied with and supported its finding with reference to 'Articles 2.1.1, 4.1, 4.2, 4.3 of the UNIDROIT Principles of International Commercial Contracts of 2004... according to which a contract may be concluded by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement [and] the agreement shall be interpreted according to the common intention of the parties'.

¹⁵³ Arbitral Award, ICC case no 9753 (n 140 above) 83: Czech law applicable to the merits; the tribunal found support in Arts 1.3 and 1.7 PICC; Arbitral Award December 2000 (Barranquilla, Colombia), ICC case no 10346 (2001) 12(2) ICC Int'l Ct Arb Bull 106, 108, 111–112, Unilex; Arbitral Award March 2008, Chamber of National and International Arbitration of Milan, Unilex: Italian law was applicable to the merits of the case; the arbitral tribunal referred to Art 5.1.3 PICC to confirm that the claimant was under a duty to co-operate with the defendant; in the context of court proceedings, see above, Preamble I para 136.

¹⁵⁴ Arbitral Award July 1995 (Brussels), ICC case no 8240 (1999) 10(2) ICC Int'l Ct Arb Bull 60, 62, Unilex: the choice of law clause was in favour of Swiss law; the arbitral tribunal applied Swiss law to the merits of the case, but added that the principle of monetary nominalism, which it had found to be established 'in Swiss court decisions and doctrinal writings' was 'a general principle of transnational law... laid down... also in Art 6.1.9(3) of the UNIDROIT Principles'.

¹⁵⁵ Arbitral Award September 1999, ICC case no 7819 (2001) 12(2) ICC Int'l Ct Arb Bull 56, 57, Unilex: Brazilian law was applicable to the merits; the tribunal noted that Art 55 CISG and Art 5.7 (now Art 5.1.7) PICC provided for similar solutions on the issue of the determinability of price.

¹⁵⁶ Arbitral Award June 2001, ICC case no 9950 [2005] ICC Int'l Ct Arb Bull, Special suppl 77, 78, Unilex: Egyptian law was applicable to the contract; the tribunal applied Egyptian law, Swiss law, and the PICC; it concluded that it had discretion in assessing the damages; Arbitral Award March 2008, Chamber of National and International Arbitration of Milan (n 153 above): the tribunal applied Art 1226 Italian Cc and mentioned Art 7.4.3 PICC to determine that arbitral tribunals only have discretion to assess the amount of damages if loss has been proved.

¹⁵⁷ Arbitral Award, ICC case no 10346 (n 153 above) 115.

¹⁵⁸ Arbitral Award March 1999, ICC case no 9594 (2001) 12(2) ICC Int'l Ct Arb Bull 73, Unilex: the choice of law clause was in favour of English law; the tribunal applied English law to the merits of the dispute but also noted (regarding one of the legal issues at hand) that a 'similar standard has been established internationally, primarily in the UNIDROIT Principles of International Commercial Contracts (1994)', before citing Art 7.4.8(1) PICC.

¹⁵⁹ Arbitral Award December 2001, ICC case no 9994 [2005] ICC Int'l Ct Arb Bull, Special suppl 79, 79–80, Unilex: the tribunal found that French law was applicable to the merits, but nonetheless mentioned the PICC (Arts 6.2.2 and 6.2.3), noting that the principle it had found in French law (basing the notion of hardship on the principle of good faith) 'is also prevailing in international commercial law'; see Arbitral Award 21 December 2005, Ad hoc arbitration (Brazil), Unilex; see also Arbitral Award 9 February 2009, Conciliation and Arbitration Chamber of the Foundation Getúlio Vargas case no 1/2008, Unilex: in support of its decision, the arbitral

contract,¹⁶⁰ and error and fraud.¹⁶¹ It has been said that this use of the PICC has an ‘educational purpose’ to the extent that ‘it reassures any party that may have been opposed to the application of the municipal law applied... and it promotes the UNIDROIT Principles as a body of rules whose role is naturally to apply to international contracts’.¹⁶² The PICC have also been used to support decisions of tribunals on the agreement of the parties regarding the law applicable to the contract,¹⁶³ and even on whether a valid, binding contract existed.¹⁶⁴

However, the **relevance**, or at least the significance, of the application of the PICC in such instances should **not be overstated**. Ultimately, arbitrators apply the relevant domestic law, not the PICC. The PICC are referred to merely in order to render their decision more acceptable to the parties.¹⁶⁵ Yet, in the context of international arbitration, this may prove important and very useful in order to ‘meet the legitimate expectations of the parties’.¹⁶⁶ Parties themselves try to add strength to their submissions by stating that the PICC provide for a solution similar to that reached under the applicable *lex contractus*.¹⁶⁷ 57

III. Use of the PICC by arbitral tribunals in situations not dealt with in the Preamble

With respect to the 1994 edition of the PICC, there remained **doubt as to whether the enumeration** of potential uses of the PICC in the Preamble was **exhaustive**.¹⁶⁸ The question was not without practical relevance to the extent that, prior to their 2004 amendment, the PICC did not foresee their use in interpreting or supplementing domestic law. 58

tribunal referred to Art 6.2.1 PICC, establishing that ‘the fact that the performance of the contract becomes more onerous for one of the parties does not suffice to assume that there is “hardship”’.

¹⁶⁰ Arbitral Award March 2008, Chamber of National and International Arbitration of Milan (n 153 above): the arbitral tribunal based itself on Italian law and also referred to Art 1.8 PICC, as ‘a confirmation of the same principles at international level’, to determine if the defendant was prevented by estoppel from terminating the contract after continuing the business relationship despite the other party’s breach.

¹⁶¹ Arbitral Award 2002, ICC case no 10930, cited in Jolivet (n 21 above) 141: the law of Romania applied but the tribunal referred to English law and to Arts 3.4, 3.5, and 3.8 PICC to support its finding regarding mistake and fraud under the applicable domestic law.

¹⁶² Mayer (n 30 above) 11.

¹⁶³ Arbitral Award, ICC case no 9459, cited in Jolivet (n 100 above) 259: the tribunal found that none of the potentially relevant domestic laws (French, Belgian, and Spanish) allowed it to infer an implicit expression of the will of the parties from their silence; it declared that this view was supported by the PICC and therefore constituted an international consensus.

¹⁶⁴ Arbitral Award June 2001, ICC case no 11227 [2005] ICC Int’l Ct Arb Bull, Special suppl 87, Unilex: there was a dispute as to whether a ‘memorandum of understanding’ was a valid, binding contract; the tribunal supported its appreciation of Portuguese law by reference to Arts 2.11 and 2.14 of the 1994 edition of the PICC (now Arts 2.1.11 and 2.1.14).

¹⁶⁵ Patocchi and Favre-Bulle (n 114 above) 600.

¹⁶⁶ Derains (n 80 above) 14.

¹⁶⁷ Arbitral Award March 2002, ICC case no 11375 [2005] ICC Int’l Ct Arb Bull, Special suppl 90, Unilex: an arbitration was brought against a state; the respondent’s witness relied on the PICC to support his view that the parties had an implied obligation of good faith. See also Arbitral Award April 2001, ICC case no 10578 [2005] ICC Int’l Ct Arb Bull, Special suppl 84, 85, Unilex: claims were based on Swedish law; the claimant ‘also invites the...tribunal to make reference to general principles of international trade law such as the UNIDROIT Principles’. See also Arbitral Award 4 June 2004, International Centre for Settlement of Investment Disputes case no ARB/02/5 (www.investmentclaims.com/decisions/PSEG-Turkey-Jurisdiction-4Jun2004.pdf) at [75].

¹⁶⁸ eg AK Schnyder and P Grolimund, ‘“Opting in” oder “Opting out”? Anwendung der UNIDROIT Principles of International Commercial Contracts in schiedsgerichtlichen Verfahren’ in I Schwenzer and G Hager (eds), *Festschrift für Peter Schlechtriem zum 70. Geburtstag* (2003) 395, 400.

In one ICC arbitration, the tribunal even refused to apply the PICC to that end because this sort of use had not been identified in the Preamble.¹⁶⁹ Other arbitral tribunals did not adopt such a formalistic approach and applied the PICC whenever they were of the view that the applicable *lex arbitri* and arbitration rules authorized the choice. Indeed, this was one of the main applications of the PICC in practice: as early as 1998, Professor Berger reported that arbitrators relied on the PICC to fill gaps in applicable domestic laws or to interpret these laws. He acknowledged that this approach was not provided for in the Preamble, but considered that ‘it is nothing but a natural addition to the non-exhaustive list of options contained therein’.¹⁷⁰

- 59 The Official Comment to the 2004 and 2010 editions of the PICC specify that **the list** set out in the Preamble **is not exhaustive**.¹⁷¹ In addition, it points out two possible applications not mentioned in the Preamble: the PICC may be used for the purpose of contract drafting¹⁷² and as the *lex contractus* where the content of the otherwise applicable law could not (or not easily) be established. As discussed in para 42 above, certain authorities might be—and maybe are too far—ahead of the PICC by using them as the proper law of contract even where there are no particular difficulties in establishing the applicable law and its content.
- 60 Further possible applications are not specifically mentioned in the Preamble or in the Official Comment. For instance, arbitral tribunals may choose not to apply a domestic law; they may apply the terms of the contract only, particularly if the contract contains no choice of law clause and has connections with various systems of law. However, the terms of the contract alone will often not provide a complete set of rules to address all issues arising under the contract. The PICC may therefore provide **a set of ‘backup provisions’**.¹⁷³
- 61 As the PICC have been drafted for use in commercial contracts, it will normally not be appropriate to use them for **claims against states or their organs** based on constitutional rights¹⁷⁴ or public international law. The primary sources of public international law in this context are treaties, customary international law, general principles of (public international) law, and precedents of tribunals deciding claims involving states.¹⁷⁵ It is for this

¹⁶⁹ Arbitral Award, ICC case no 8873 (n 71 above). ¹⁷⁰ Berger (n 27 above) 133.

¹⁷¹ Off Cmt 8 to Preamble, pp 6–7; see also above, Preamble I para 1.

¹⁷² See above, Preamble I paras 168–173.

¹⁷³ eg Arbitral Award 27 September 1996 (Paris), ICC case no 8261, Unilex: the contract contained no choice of law clause because both parties had insisted on choosing their own national law; the tribunal applied terms of the contract, supplemented by general principles of trade as embodied in the *lex mercatoria*; the PICC were used as evidence of the *lex mercatoria* and other transnational standards. See also Arbitral Award 28 July 2000 (Geneva), ICC case no 9797, ASA Bull 3/2000, 514, 520, Unilex: the sole arbitrator applied the terms of the contract; he ruled that under Art 17(1) (now Art 21(1)) of the ICC Rules appropriate rules were ‘the general principles of law and the general principles of equity commonly accepted by the legal systems of most countries’ and that ‘the UNIDROIT Principles are a reliable source of international commercial law in international arbitration’ for they ‘contain in essence a restatement of those “*principes directeurs*” that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice’; ultimately, most issues in the dispute were decided on the basis of the PICC. On this award, see also MJ Bonell, ‘A “Global” Arbitration Decided on the Basis of the UNIDROIT Principles: *In re Andersen Consulting Business Unit Member Firms v Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative*’ (2001) 17 Arb Int’l 249.

¹⁷⁴ The Swiss Federal Tribunal (DFT 7 January 2008, 5A_560/2007) found that Art 1.7 PICC was not a proper basis for a claim that the state had not acted in good faith. The state’s duty to act in good faith was embodied in the constitution, not in the PICC, which aimed at governing relationships between private parties, not the conduct of the state or its organs.

¹⁷⁵ See Art 38(1) of the Statute of the International Court of Justice of 26 June 1945; CH Schreuer, *The ICSID Convention: A Commentary* (2001) 609–618. The general principles of public international law mentioned here

reason that in the many arbitrations brought under bilateral investment treaties, mostly under the ICSID Convention, the PICC were rarely invoked or applied by the arbitral tribunals.¹⁷⁶ Remedies are available under most investment protection treaties for breach of international law only, to the exclusion of mere contract violations. The United Nations Compensation Commission, a UN body sitting in Geneva and adjudicating war reparation claims after the first Gulf War, referred to the PICC as an expression of general principles, relating to *force majeure* issues amongst other things.¹⁷⁷

However, **if a state participates**—and is sued as a participant—in international commerce, it is possible to rely on pure commercial law, which may include the PICC.¹⁷⁸ In addition, while drawing from different sources, the general principles developed in the domain of public international law and those derived from international commercial law often cover similar issues and lead to broadly **similar solutions** (on issues like the interpretation of treaties or contracts, non-performance,¹⁷⁹ compensation in case of breach of treaty obligations

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should not be confused with the general principles of (private) law mentioned in paras 15–20 above, even if they often have a similar substance (eg the principle of *pacta sunt servanda*).

¹⁷⁶ A certain number of more recent awards have referred to the PICC, however; cf P Bernardini, 'UNIDROIT Principles and International Investment Arbitration' [2014] ULR 561; G Cordero Moss and D Behn, 'The Relevance of the UNIDROIT Principles in Investment Arbitration' [2014] ULR 570. In *Joseph Charles Lemire v Ukraine*, ICSID case no ARB/06/18, Decision on Jurisdiction and Liability (n 4 above) the settlement agreement provided that the applicable law should be determined in accordance with Art 54 of the ICSID Additional Facility Arbitration Rules and '[g]iven the parties' implied negative choice of any municipal legal system, the Tribunal [found] that the most appropriate decision [was] to submit the Settlement Agreement to the rules of international law, and within these, to have particular regard to the UNIDROIT Principles' at [111] (emphasis added); see also *Joseph Charles Lemire v Ukraine*, ICSID case no ARB(AF)/98/1, Award, 18 September 2000; *PSEG Global Inc and others v Republic of Turkey*, ICSID case no ARB/02/5, Decision on Jurisdiction, 4 June 2004; *PSEG Global Inc and others v Republic of Turkey*, ICSID case no ARB/02/5, Award, 19 January 2007; *African Holding Co of America Inc and Société Africaine de Construction au Congo SARL v République démocratique du Congo*, ICSID case no ARB/05/21, Award and Dissenting Opinion, 23 July 2008; *Azurix Corp v Argentine Republic*, ICSID case no ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009; *Ioannis Kardassopoulos and others v Republic of Georgia*, ICSID case nos ARB/05/18 and ARB/07/15, Award, 3 March 2010; *Suez and others v Argentine Republic*, ICSID case no ARB/03/17, Decision on Liability and Separate Opinion, 30 July 2010; *Suez and others v Argentine Republic*, ICSID case no ARB/03/19, Decision on Liability and Separate Opinion, 30 July 2010; *Joseph Charles Lemire and others v Ukraine*, ICSID case no ARB/06/18, Award, 28 March 2011; *El Paso Energy International Co v Argentine Republic*, ICSID case no ARB/03/15, Award, 31 October 2011 (commented upon by AM Steingruber, 'El Paso v Argentine Republic: UNIDROIT Principles of International Commercial Contracts as a Reflection of "General Principles of Law Recognized by Civilized Nations" in the Context of an Investment Treaty Claim' [2013] ULR 509); *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID case no ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012; see also above, Preamble I para 29.

¹⁷⁷ United Nations Compensation Commission 18 December 1997, UN Doc S/AC.26/1997/6, nn 23, 27, 32.

¹⁷⁸ Arbitral Award, ICC case no 14108 (2011) XXXVI YB Comm Arb 135, 164: a US joint venture company concluded a production sharing agreement with state W which provided '[such agreement] shall be interpreted and applied in conformity with principles of law common to State W and the United States and in the absence of such common principles, then in conformity with the principles of law normally recognized by civilized nations in general, including those which have been applied by International Tribunals.' The tribunal considered that the PICC 'offer reasonable solutions to respond to the needs of the modern economy in light of the experience of some of the major legal systems' and decided to refer to them 'where appropriate, where no common principles between State W law and US law are established'. See also KH Böckstiegel, 'The Application of the UNIDROIT Principles to Contracts Involving States or Intergovernmental Organizations' [2002] ICC Int'l Ct Arb Bull, Special suppl 9, 51–56; W Ben Hamida, 'Les principes d'UNIDROIT et l'arbitrage transnational: L'expansion des principes d'UNIDROIT aux arbitrages opposant des États ou des organisations internationales à des personnes privées' (2012) 139 Clunet 1213, 1218–1225.

¹⁷⁹ *African Holding Co of America, Inc and Société Africaine de Construction au Congo SARL v République démocratique du Congo*, ICSID case no ARB/05/21, Decision on Jurisdiction and Admissibility (n 176 above) at [121]: the dispute concerned the alleged omission to pay a debt under a construction contract between the

or contractual obligations, and the impact of unforeseen events on the treaty or contract¹⁸⁰). It is therefore conceivable that the PICC may be applied or invoked in appropriate circumstances in the context of a public international law dispute.¹⁸¹ In fact, the PICC have been well received not only in arbitrations opposing private parties to states but also in arbitration proceedings involving private parties and international organizations.¹⁸²

63 Whatever the range of applications foreseen and unforeseen in the Preamble, a final **word of caution** should be added: even the most fervent proponents of the PICC do not suggest that the PICC should prevail over a particular meaning that the parties intended to give to a contractual clause. If the proper interpretation of a clause is contentious, the arbitral tribunal must establish the agreement of the parties through evidentiary proceedings. It cannot simply rely on how the PICC or indeed a given law would deal with a similar situation. The PICC are **not** designed to be a **shortcut for arbitral tribunals**

DRC and two US investors. The arbitral tribunal invoked Art 7.1.1 PICC to conclude that non-performance includes defective or late performance. In *Pac Rim Cayman LLC v Republic of El Salvador*, Decision on the Respondent's Jurisdictional Objections (n 176 above), the ICSID tribunal mentioned the decision above and the reference to Art 7.1.1 PICC to conclude that El Salvador's alleged violation of the Dominican Republic–Central America–US Free Trade Agreement occurred before the claimant's change of nationality by the respondent's constant failure to grant the mining permits and the concession (at [2.92]–[2.94]); *Joseph Charles Lemire v Ukraine*, ICSID case no ARB 06/18, Decision on Jurisdiction and Liability (n 4 above): the arbitral tribunal referred to Arts 1.8 and 5.1.4 PICC to reject the claimant's argument relating to the respondent's non-compliance with its obligations under the settlement agreement.

¹⁸⁰ *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic*, ICSID case no ARB/03/17, Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010, at [45]–[48]: the arbitrator rejected the majority's finding that the respondent violated fair and equitable treatment by compelling the Argentinean subsidiary to renegotiate the concession for water distribution during the 2001–2003 financial crisis. He invoked Arts 6.2.2 and 6.2.3 PICC as an expression of an 'obligation on the parties to negotiate an adaptation of the contract to the changed circumstances or the termination of the contract' (at [48]); see also *El Paso Energy International Co v Argentine Republic*, ICSID case no ARB/03/15, Award, 31 October 2011, where the tribunal referred to Arts 6.2.2, 7.1.6, and 7.1.7 PICC to conclude that the state of necessity may not be invoked as a ground for precluding wrongfulness 'if the State concerned has significantly contributed to creating that necessity' or 'has contributed to it' (at [623]–[624]).

¹⁸¹ See *Eureko BV v Poland*, Partial Award 19 August 2005, Ad hoc arbitration, Unilex: the Dutch–Polish Bilateral Investment Treaty provided that 'the tribunal shall decide on the basis of respect for the law, including ... the universally acknowledged rules and principles of international law'. In denying the claimant's assertion of exception of non-performance, the tribunal referred to Art 7.1.3 PICC as an 'example' which illustrates that such exception only applies to simultaneous performance of particular obligations. The tribunal went on to conclude that '[such] is exactly the case with Article 1 of the First Addendum'. See also *Chevron-Texaco v Ecuador*, Ad hoc arbitration (The Hague), 30 March 2010: the applicable law to the merits was US–Ecuador Bilateral Investment Treaty and any relevant provisions of other sources of international law (at [159]). The respondent cited the PICC to refute the claimants' assertion of damages for 'loss of chance'. The tribunal agreed with the respondent and stated that 'the 'loss of chance' principle does not have wide acceptance across legal systems such that it can be considered a 'general principle of law recognized by civilized nations' since the principle 'is applied in exceptional situations where there exists a harm whose existence cannot be disputed but which it is difficult to quantify, as noted in the commentary to the UNIDROIT Principles cited by the Respondent' (at [382]).

¹⁸² In an ad hoc arbitration under the UNCITRAL Arbitration Rules, cited in Böckstiegel (n 178 above) 54–55, opposing Canadian companies to the UN relating to a contract for the transport of UN personnel and military personnel on behalf of the UN, the arbitral tribunal applied the PICC. The contract did not contain any choice of law clause but the parties agreed on the application of 'generally accepted principles of international commercial law'. Taking into account the international context of the case, the PICC 'were considered to provide the more appropriate international guideline ... in defining the generally accepted principles of international commercial law under which it would interpret the contract'. In an ad hoc arbitration with its seat in New York between the UN and a European company concerning a contract for the supply of goods in connection with a peacekeeping operation in Africa, the contract was silent as to the applicable law but the parties agreed to the application of the CISG and the PICC. The parties chose to settle their dispute (www.unilex.info/case.cfm?id=994); Ben Hamida (n 178 above) 1213–1242.

to avoid determining the agreement of the parties, **nor for parties** short of evidence for their particular interpretation of a contractual clause which, *post facto*, turns out to be advantageous to them in the context of the dispute. Once the intent of the parties is established, the arbitral tribunal may, on the other hand, have to determine whether the parties' arrangement is admissible in the light of mandatory provisions of the applicable law or the PICC (Art 1.5).

IV. The role of the PICC where arbitrators decide *ex aequo et bono*

Arbitral tribunals can be instructed to decide *ex aequo et bono*, as *amiables compositeurs*, or 'in equity'. There is no uniform definition of these terms or of the powers which the arbitrators exercise in these various functions.¹⁸³ The distinction (and the need for it) between arbitration *ex aequo et bono*, arbitration 'in equity' and *amiable composition* depends to a large degree on the nationality of the author making the distinction.¹⁸⁴ In practice, these notions are **often relied upon interchangeably** as authorizing arbitrators to render an award without being bound by the provisions of the applicable law. The lack of a definition on an international level is also illustrated by Art 21(3) of the ICC Rules which mentions '*amiable compositeur*' and '*ex aequo et bono*' without distinction.¹⁸⁵

The extent to which arbitrators are bound by the law (whether mandatory or non-mandatory provisions) and by the contract may itself differ depending on the national law.¹⁸⁶ Arbitrators should therefore inquire about the **existing rules on *amiable composition*** and decisions *ex aequo et bono at the place of arbitration*,¹⁸⁷ since these will be relevant to ensuring that the award cannot be set aside.¹⁸⁸ If arbitrators are authorized to deviate from the law (because both the *lex arbitri* and the parties permit them to do so), they are allowed to resort to the PICC 'as [an] autonomous standard'¹⁸⁹ and 'to the extent they find them to express or accord with equitable principles'.¹⁹⁰ The PICC can thus provide a useful source for arbitrators called upon to decide a dispute *ex aequo et bono*,¹⁹¹ although

¹⁸³ Poudret and Besson (n 1 above) 617–622.

¹⁸⁴ Fouchard et al (n 1 above) 836: 'the distinction between *amiable composition* and equity seems artificial'; cf Poudret and Besson (n 1 above) 619: 'we have sufficiently shown above, along with other scholars familiar with arbitration in equity, that the latter is not the same as *amiable composition*'.

¹⁸⁵ Art 21(3) of the ICC Rules.

¹⁸⁶ Fouchard et al (n 1 above) 837: arbitrators deciding as *amiable compositeurs* have the power 'not to restrict themselves to applying rules of law [but] not only to ignore rules of law altogether, but also to depart from them to the extent that their conception of equity requires'.

¹⁸⁷ In China, eg, arbitration *ex aequo et bono* or *amiable composition* are not allowed: 'Disputes shall be fairly and reasonably settled by arbitration on the basis of facts and in accordance with the relevant provisions of law' (Art 7 of the Arbitration Law of China).

¹⁸⁸ PA Karrer, 'Must an Arbitral Tribunal Really Ensure that its Award is Enforceable?' in G Aksen et al (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (2005) 429.

¹⁸⁹ H van Houtte, 'The UNIDROIT Principles of International Commercial Contracts' (1995) 11 *Arb Int'l* 373, 381. See also Tercier (n 22 above) 237.

¹⁹⁰ Lalive (n 27 above) 82; Berger (n 27 above) 147.

¹⁹¹ Arbitral Award December 1996 (Paris), ICC case no 8874 (1999) 10(2) *ICC Int'l Ct Arb Bull* 82, 83, Unilex: the tribunal decided the case 'according to the principles of equity' and applied directions of the PICC when determining the appropriate interest rate. See also Arbitral Award 24 February 2001, Arbitral Tribunal of the City of Panama, Unilex: the tribunal acted as *amiable compositeur*, taking into account trade usages and the PICC. In awarding damages, the tribunal referred to Arts 7.4.2 and 7.4.3 PICC.

the drafters of the PICC were not unanimously in favour of using the PICC for this purpose.¹⁹²

- 66 Where the parties agree that the tribunal ought to decide the dispute *ex aequo et bono*, but allow themselves to make submissions to the tribunal on the basis of specific provisions of the same domestic law, the application of the PICC may be problematic.¹⁹³ The parties arguably made a **valid choice** in favour of the law concerned,¹⁹⁴ at least if no qualification or reservation is made. Therefore, a decision by arbitrators to apply the PICC in that context would not be appropriate.

V. Challenge and enforcement of an arbitral award based on the PICC rather than on a domestic law

- 67 Arbitral awards are subject to review by state courts in annulment or enforcement proceedings. The grounds for **annulment** are set out in the *lex arbitri* at the place of arbitration. The prerequisites for the **enforcement** of an award, on the other hand, are determined by the law of the place where the enforcement is sought. In most countries, this is the New York Convention.¹⁹⁵
- 68 Most national arbitration laws, as well as the New York Convention, allow only very **narrow grounds** for annulment of or refusal to enforce arbitral awards. In essence, they are limited to violations of procedural or substantive public policy.¹⁹⁶ In order to offend public policy, an award—in both its result and effect—must be incompatible with fundamental principles of justice and morality, or must have been made in proceedings that disregard basic rules of due process.¹⁹⁷
- 69 Due to the **restrictive nature of public policy**, the reliance by an arbitral tribunal on the PICC rather than on a national law does not usually constitute a ground for annulment or refusal of enforcement *per se* (see paras 70–82 below). However, the use of the PICC may lead arbitrators to solutions or decisions that may be constitutive of one of the grounds for annulment or refusal of enforcement provided for in the *lex arbitri* (see para 83 below).

¹⁹² (1994) PC—Misc 19, p 26 (Bonell: the PICC are ‘an expression of *ratio scripta*, of fair rules of behaviour’; Lando: ‘someone asked to act as *amiable compositeur* would [not] be expected to use the [PICC, but rather] the most expedient solution’; Brazil: ‘under the Australian conception of *amiable compositeur*, award rendered on the basis of UNIDROIT Principles by *amiable compositeur* might be appealed to the court’).

¹⁹³ eg Arbitral Award 10 December 1997, Ad hoc arbitration (Buenos Aires) [1998] ULR 178, 178–179, Unilex: there was no choice of law clause in the contract; the parties asked the tribunal to act as *amiable compositeur*; the tribunal disregarded submissions made by both parties on the basis of Argentine law and applied the PICC to the merits of the dispute.

¹⁹⁴ Besson and Thommesen (n 28 above) Art 33 para 7.

¹⁹⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

¹⁹⁶ For the history and development, see J Kleinheisterkamp, ‘Recognition and Enforcement of Foreign Arbitral Awards’ in R Wolfrum et al (eds), *Max Planck Encyclopedia of Public International Law* (2008).

¹⁹⁷ International Law Association, *Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards* (2002): Rule 1(d) defines public policy as, *inter alia*, ‘fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned’. See also Poudret and Besson (n 1 above) 856–863 on enforcement proceedings and 736–769 on annulment proceedings.

1. Reliance on the PICC in the absence of a choice of law clause is not a ground for annulment or denial of enforcement per se

The issue of the validity of awards based on transnational rules alone, rather than on a national law, was addressed by state courts well before the promulgation of the PICC. 70

(a) Challenge of awards

An important distinction should be made between situations where the parties make a choice of law in favour of another set of rules (not the PICC) and where the parties either choose the PICC (whether directly or through wordings such as ‘general principles’) or fail to choose any law whatsoever. 71

Where the parties have chosen a domestic law (rather than the PICC or similar sets of rules), it raises the question of whether an award disregarding such a choice of law and applying another set of rules is enforceable. The answer is not specific to the PICC or even to transnational norms. The situation would be more or less the same where the arbitrators disregard a domestic law and apply another domestic law instead. 72

In some jurisdictions, an award disregarding the applicable law clause may be set aside or may not be recognized and enforced.¹⁹⁸ In others, such as Switzerland, arbitral awards will not be annulled on this ground since, in substance, the only ground to set aside an award is violation of public policy.¹⁹⁹ The application of the PICC, in lieu of the designated domestic law, would constitute a violation of public policy only if, as a result of applying the PICC, the outcome of the award is substantially different than it would have been under the otherwise applicable domestic law or violates a general principle of such domestic law (see para 78 below).²⁰⁰ It would seem to be even more difficult to challenge an award where the arbitrators have based their award on both the terms of the contract and the PICC.²⁰¹ 73

For situations where the parties have not chosen any law and the arbitrators decide to apply the PICC, a crucial case is *Norsolor v Pabalk Ticaret*, in which an ICC arbitral tribunal sitting in Vienna decided a dispute based on the terms of the contract and the *lex mercatoria* alone. The award was challenged and a lower Austrian court set it aside on the basis that the arbitrators should have determined the applicable law. The Austrian Supreme Court reversed the decision and held that the mere fact that the award was exclusively based on the *lex mercatoria* was not objectionable since the arbitrators had not acted *ultra vires* by applying a non-national legal system, nor had they acted as *amiables compositeurs* or violated mandatory rules of Austrian law.²⁰² The *Norsolor* solution has since been widely admitted in other jurisdictions. In Switzerland, the Federal Tribunal will not verify how 74

¹⁹⁸ Fouchard et al (n 1 above) 946; Cordero Moss (n 10 above) 14, 19. Germany: BGH 26 September 1985 (III ZR 16/84), RIW 1985, 970, 972.

¹⁹⁹ Art 190 of the 1987 Swiss Private International Law Act (n 2 above).

²⁰⁰ Besson and Thommesen (n 28 above) Art 33 para 15; Scherer (n 27 above) 99–100.

²⁰¹ For a related situation, see DFT 9 January 2007 (4P.96/2002), ASA Bull 3/2007, 560 at item 6.2: the choice of law clause was in favour of French law; the tribunal allegedly applied terms of the contracts only; the Swiss Federal Tribunal refused to set aside the award as an equity award, finding that the arbitral tribunal had applied French law and that ‘even if the arbitrators had decided the case based on the contract alone, rather than on French law, this would not amount to an equity award. Awarding a party what it is entitled to under the contract signed with the other party is not tantamount to an equity award’.

²⁰² OGH 18 November 1982 (8 Ob 520/82), (1984) XI YB Comm Arb 159; summary and further case law in L Craig et al, *International Chamber of Commerce Arbitration* (3rd edn, 2000) 334; see also Scherer (n 27 above).

the arbitrators determined or applied the applicable law unless the result of the award is contrary to international public policy.²⁰³ In France, the Cour de cassation has held that, where the parties have not made an express choice of law, arbitrators are entitled to rely on the ‘rules of international commerce’ and that it is not incumbent upon the annulment judge to ‘examine the conditions of the arbitrator’s determination and implementation of the selected rule of law’.²⁰⁴ In Germany, in contrast, such liberty on the part of the arbitrators is a ground for setting aside the award.²⁰⁵

75 In the light of these decisions, it seems even more difficult to challenge an award (or its enforceability) where the arbitrators have based their award on both the terms of the contract *and* the PICC.

(b) *Recognition and enforcement of awards*

76 The recognition and enforcement of foreign arbitral awards is also a matter which each state deals with individually. In those states which have acceded to the New York Convention, the merits of the award cannot generally be reviewed. The New York Convention contains an exhaustive list of grounds for refusal to enforce an award. In cases where the tribunal has failed to apply the law agreed by the parties, where it has applied a different law or system of rules, or where it has applied a system of rules in the absence of any law agreed by the parties, the following three grounds under the New York Convention may be relevant, in theory:

Article V(1)(c): The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

Article V(1)(d): The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

Article V(2)(b): The recognition or enforcement of the award would be contrary to the public policy of [the country where recognition and enforcement is sought].

77 Some authors advocate the view that **Art V(1)(c) of the New York Convention** can be invoked as an objection to enforcement where the tribunal fails to apply the rules of law chosen by the parties or acts as *amiable compositeur* or in equity without this having been agreed by the parties.²⁰⁶ However, the prevailing view is that this interpretation

²⁰³ Scherer (n 27 above) 115: ‘in the framework of a challenge of the arbitral award, the court will usually not, or not merely, examine whether the arbitrator has applied a foreign mandatory law or should have done so. Rather the court will assess, irrespective of the law applied, whether the result... is compatible with public policy’.

²⁰⁴ Cass civ 22 October 1991 (89-21528) [1992] Rev arb 457; Fouchard et al (n 1 above) 945–946.

²⁰⁵ See para 4 above.

²⁰⁶ U Haas, *Die Anerkennung und Vollstreckung ausländischer und internationaler Schiedssprüche* (1991) 194–195; AJ van den Berg et al, *Netherlands Arbitration Law* (1993) 165; F Vismara, ‘Aspetti dell’eccesso di potere degli arbitri nella Convenzione di New York del 1958’ (2002) 12 Riv arb 225; C Borrís and R Hennecke, ‘Article V’ in R Wolff (ed) *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Commentary* (2012) 321–323; see also M Bühler and M Cartier, ‘Commentary on Chapter 12 PILS, Article 194’ in M Arroyo (ed), *Arbitration in Switzerland: The Practitioner’s Guide* (2013) 315: ‘Where the arbitral tribunal acts as “*amiable compositeur*” without the parties’ authorization, this can be addressed under Art. V(1) (c) or under Art. V(1)(d). However, where the arbitral tribunal merely wrongly applies a different law from that

considerably stretches the text of Art V(1)(c).²⁰⁷ In relying on the PICC, arbitrators do not exceed the scope of their mission as envisaged by Art V(1)(c) of the New York Convention.²⁰⁸ Nor can they be blamed for deciding *infra petita* or having failed to determine the applicable law as confirmed, for instance, by decisions of the French courts.²⁰⁹ It therefore appears that a tribunal may refer to legal principles not specifically agreed by the parties and may also decide not to apply a specific national law in the absence of agreement between the parties. However, it is unclear whether an award which actually fails to apply a law that was agreed by the parties is enforceable.

It is arguable that failing to apply the law agreed by the parties would not constitute a ground for resisting enforcement under Art V(1)(d) of the New York Convention. In a case before the Federal Court for the District of Columbia, the complaining party alleged that by failing to apply the ICC Rules correctly, the tribunal had violated the 'agreement of the parties' under Art V(1)(d) of the New York Convention. In a decision published in 1992, the court refused to vacate the award in question and determined that the scope of Art V(1)(d) was limited to cases where the procedural violation caused substantial prejudice to the party resisting enforcement.²¹⁰ Even though the facts in that case were quite specific, the decision indicates that a high threshold must be met for a procedural violation to justify refusal to enforce an award under the New York Convention.²¹¹ When the arbitral tribunal fails to apply the substantive law agreed by the parties, the arbitral procedure is not 'in accordance with the agreement of the parties' (Art V(1)(d)) because the parties' choice of law falls within the scope of their agreement on procedure.²¹² On the contrary, an alleged failure correctly to apply the procedural rules regarding the applicable substantive law agreed by the parties, in other words 'cases in which the tribunal wrongly applies conflict-of-law rules and thus applies the incorrect law to the merits', will normally not be sufficient: '[s]uch conflict-of-laws cases do not fall under the scope of Article V(1)(d) or the

chosen by the parties, this does not constitute an excess by the arbitrator of his authority within the meaning of Art. V(1)(c)'.

²⁰⁷ Poudret and Besson (n 1 above) 913. See also NC Port et al, 'Article V(1)(c)' in H Kronke et al (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2010) 272–273; M Azeredo da Silveira and L Lévy, 'Transgression of the Arbitrator's Authority: Article V(1)(c) of the New York Convention' in E Gaillard and D Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards—The New York Convention in Practice* (2008) 661–665.

²⁰⁸ *Ministry of Defense of Iran v Cubic Defense Systems*, 29 F Supp 1168 (SD Cal 1998), (1999) XXIV YB Comm Arb 875, 878, Unilex: rejecting the claim that references to the PICC (and other 'international and equitable principles') would fall under Art V(1)(c) by violating the scope of the arbitral tribunal's terms of reference; 'one of the issues presented to the [arbitral] tribunal was whether general principles of international law apply to this dispute. That [defendant] disagrees with the tribunal's response to the question posed by the parties is not a reason to find that the tribunal addressed issues beyond the scope of the Terms of Reference'; see also *Bank A v Bank B*, LG Hamburg 18 September 1997 (2000) XXV YB Comm Arb 710, 711: a German court decided that the application of *lex mercatoria* by the arbitral tribunal in the absence of a clear choice of law did not violate Art V(1)(c); see also Scherer (n 27 above) 99.

²⁰⁹ CA Paris, 10 June 2004 [2006] Rev arb 154, 160: 'the arbitrators have no obligation to designate the law applicable to the merits if they can make a decision on the basis of the terms of contract only, unless otherwise directed by the parties'.

²¹⁰ *Compagnie des Bauxites de Guinée v Hammermills Inc*, 1992 WL 122712 (DDC 1992) (1993) XVIII YB Comm Arb 566, 571.

²¹¹ Borris and Hennecke (n 206 above) 345–347; see also Bühler and Cartier (n 210 above) 316: 'merely minor departures from the agreed procedure should not lead to the refusal of the award's enforcement as long as such non-observance of the parties' intent or the *lex arbitri* by the arbitral tribunal remained without direct effect on its award and the parties were not deprived of the opportunity to present their case effectively'.

²¹² P Nacimiento, 'Article V(1)(d)' in H Kronke et al (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2010) 296.

Convention at all'.²¹³ However, the cases do not address the situation where, instead of, or in addition to applying the law agreed by the parties, the tribunal also refers to other legal principles (see para 77 above).

79 The violation of public policy (of the state where enforcement is sought) is a ground to refuse enforcement under **Art V(2)(b) of the New York Convention**. The application of the PICC instead of a national law will not generally be characterized as such a violation unless its application leads to a result that is contrary to public policy.²¹⁴ The New York Convention does not require that awards be rendered in application of a national law. For instance, the English Court of Appeal recognized an award made in Geneva, ruling that the parties, by choosing to arbitrate under the ICC Rules, had not confined their choice to a national system of law.²¹⁵ In that case, however, the parties had not agreed on the applicable law; so it is unclear what the position would be if a tribunal actually failed to apply the law agreed by the parties, whether or not it then applied other legal principles such as the PICC.

80 Most legal systems (as well as the PICC, see Art 1.4) espouse the rule that arbitral tribunals should take into account the relevant mandatory rules of laws other than those applicable to the dispute. However, a failure to apply mandatory provisions of domestic law does **not automatically** qualify as a **violation of public policy** that warrants the refusal of recognition and enforcement of the award. The enforcement of the award should not be denied merely because the arbitral tribunal failed to apply a mandatory provision, unless the provision formed part of the international or national public policy of the country in which enforcement of the award is sought.²¹⁶ Therefore, a violation or non-application of a mandatory provision of a domestic law is not necessarily tantamount to a violation of public policy.²¹⁷

81 In **practice**, however, it cannot be denied that an award that offends mandatory provisions of the law in force at the place of enforcement will often not be recognized or enforced in these jurisdictions. For instance, an award that is incompatible with EU competition law may be valid outside the EU, but will not be enforceable within the EU.²¹⁸

82 In summary, where parties have omitted to make an **express choice** in favour of a domestic law, the tribunal may omit to apply a national law altogether and may apply other legal principles such as the PICC. In these cases, provided that any mandatory rules of domestic law were taken into account by the tribunal, state courts are not usually entitled to annul or deny enforcement of the award, unless the award itself or the way in which the arbitral tribunal introduced the PICC was conducive to an independent violation of due process or of public policy. However, where the parties have made an express choice

²¹³ *Nacimiento* (n 212 above).

²¹⁴ *Derains* (n 80 above) 10: 'the cause of the refusal of enforcement is not the choice of one law rather than another, but the fact that it provides a solution contrary to the notion of public policy as defined by [the law of the place where enforcement is sought]'.

²¹⁵ *Deutsche Schachtbau- und Tiefbohrergesellschaft v Ras al Khaimah National Oil Co* [1987] 2 All ER 769, CA; *Craig et al* (n 202 above) 337.

²¹⁶ International Law Association (n 197 above) Rule 3a.

²¹⁷ This is certainly the case in Switzerland, see DFT 9 January 1995 (1997) XXII YB Comm Arb 789, 797: 'substantive public policy is not necessarily violated where the foreign provision is contrary to a mandatory provision of Swiss law'.

²¹⁸ In the related context of annulment proceedings, see ECJ Case C-126/97 *Eco-Swiss China Time v Benetton* [1999] ECR I-3055 [37]: arbitral awards can be set aside if they violate mandatory European competition law provisions; cf DFT 8 March 2006 (4P.278/2005), ASA Bull 2/2006, 363–366: competition law, whether EU or Swiss, is not part of the public policy of Switzerland (a non-EU country).

in favour of a domestic law, the tribunal may not apply other legal principles instead of the chosen law—although it may be entitled to refer to other systems of law or legal principles in addition to the applicable law chosen by the parties.

2. Application of the PICC and due process

While the application of the law is undoubtedly a prerogative of the tribunal (*jura novit curia*), the tribunal may not take the parties by surprise.²¹⁹ **The right of the parties to make their submissions in full** must be respected. Many states consider it to be a violation of this right if the tribunal decides the dispute based on legal arguments that were not submitted by the parties and could not possibly have been anticipated by them. A violation of the parties' right to be heard is typically a ground to set aside the award.²²⁰ It is also a ground not to enforce foreign awards under Art V(1)(b) of the New York Convention. Even if the arbitral tribunal is empowered to rely on general principles, trade usages, and the PICC, it should draw the parties' attention to these rules if they are, in the view of the arbitrators, the proper basis for their future award and have not been raised by the parties. An award relying in an unexpected manner on any kind of legal or contractual provisions may be annulled (or denied enforcement), even if the result (the decision) as such is not contrary to *substantive* public policy. The parties' right to be heard is an important part of due process and thus of *procedural* public policy.²²¹ 83

VI. Application of the PICC to arbitration agreements

The scope of application of the PICC is limited to 'international commercial contracts'. It is quite clear that the **drafters of the PICC did not have in mind forum selection clauses or arbitration agreements**.²²² Nevertheless, in practice, arbitral tribunals sometimes apply the PICC to arbitration clauses. 84

Ultimately, however, like any contractual agreement, the arbitration clause should be given the effect that the parties intended. Thus, whether the law applicable to the merits of the entire contract also applies to the arbitration clause is to be established by reference to the **agreement of the parties**. Whether such choice of law, which may embody the PICC, is admissible will in turn depend on the *lex arbitri*. 85

Special care needs to be taken in case the **PICC are applied to issues relevant to the jurisdiction of the arbitral tribunal**. Issues pertaining to the merits are often also relevant to the issue of jurisdiction: for example, the validity of the contract comprising the arbitration agreement, the validity of an assignment of the contract,²²³ and the interpretation of the intention of the parties to be bound.²²⁴ Applying the PICC or other non-national 86

²¹⁹ Crivellaro (n 33 above) 920–921.

²²⁰ Art 34(2)(a)(ii) of the UNCITRAL Model Law.

²²¹ In DFT 30 September 2003, 130 III 35, ASA Bull 3/2004, 574, an arbitral award was set aside because the arbitral tribunal had relied on a contractual provision and a legal doctrine that had not been advanced by either party.

²²² OffCmt 2 to Preamble, p 2: referring by way of illustration to 'trade transactions for the exchange of goods or services, investment and/or concession agreements and contracts for professional services'.

²²³ See below, Art 8.1 paras 5–10.

²²⁴ See also Arbitral Award 10 February 2005, Netherlands Arbitration Institute (2007) XXXII YB Comm Arb 95: the general conditions provided for the application of Dutch law and arbitration in Rotterdam in accordance with the NAI rules. The respondent objected to the jurisdiction of the tribunal on the ground that it had not approved either orally or in writing the arbitration clause contained in the general conditions of the seller. The tribunal sustained its jurisdiction holding that the failure of the respondent to object in a timely

rules to the arbitration agreement instead of a domestic law may therefore carry risks, since annulment courts are often reluctant to admit that the parties intended to submit their arbitration agreement to a law distinct from the law they selected as the law applicable to the main contract.

87 The situation would not be too dissimilar to the case of *Peterson Farms*, where the contract which formed the basis of the dispute contained a choice of law clause in favour of the laws of Arkansas. When deciding on jurisdiction, the arbitrators decided that this choice of law did not cover the arbitration clause. The arbitral tribunal applied to the arbitration clause the ‘group of companies’ doctrine expressed in the case law of ICC arbitration to assert jurisdiction over a non-signatory party; that is, de facto another set of transnational ‘norms’. The English courts set the award aside, finding that the arbitrators should have applied the law governing the merits (Arkansas law), which did not include the group of companies doctrine.²²⁵

88 An arbitral tribunal might be especially inclined to **apply the PICC to the arbitration agreement** where the PICC are supposed to apply to the main contract as the substantive law. However, the law governing the validity of the arbitration clause is not necessarily identical to the law applicable to the merits.

89 In some jurisdictions (eg England) there is a tendency to presume that the law applicable to the merits is also applicable to the arbitration agreement, especially where an agreement setting this out is contained in an arbitration clause within the contract.²²⁶ The more convincing solution is, however, that the **validity of the arbitration agreement ultimately depends on the law of the seat** of the arbitration, the *lex arbitri*. This *lex arbitri* often contains mandatory provisions regarding the validity and the scope of arbitration agreements. It may provide autonomous rules or foresee mechanisms to establish the rules applicable to the arbitration agreement. For example, if a contract is governed by English

manner amounted to implied acceptance (Arts 14, 15, 8, and 9(1) CISG). With reference to Art 7(2) CISG, the tribunal applied Arts 2.19 and 2.20 (now Arts 2.1.19 and 2.1.20) PICC and also Art 2:104(1) and (2) PECL to ‘answer the question whether explicit acceptance of a certain clause is necessary and... whether the accepting party had a reasonable possibility to know the content of the conditions’. The tribunal determined that the seller sent the confirmation of the orders by fax and by regular mail, therefore allowing the buyer to read the text of the general conditions. Consequently, the buyer was bound by the arbitration clause.

²²⁵ *Peterson Farms Inc v C&M Farming Ltd* [2004] All ER (D) 50, QB; see also J Leadley and L Williams, ‘*Peterson Farms: There Is No Group of Companies Doctrine in English Law*’ (2004) 7 Int’l ALR 111.

²²⁶ For English law, see *Sonatrach Petroleum Corp (BVI) v Ferrell International Ltd* [2002] 1 All ER (Comm) 627, QB and Redfern et al (n 18 above) para 3.10. *Svenska Petroleum Exploration AB v Lithuania* [2005] EWHC 2437 (Comm) [76]–[77] (‘In the absence of exceptional circumstances, the applicable law of an arbitration agreement is the same as the law governing the contract of which it forms a part’); *Sulamerica Cia Nacional de Seguros SA and Ors v Enesa Engenharia SA and Ors* [2012] EWCA Civ 638 [26] (in this case the court applied English law to the arbitration agreement, not the law applicable to the merits (Brazilian law), but stated that ‘[i]n the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties’ intention in relation to the agreement to arbitrate’); G Petrochilos, *Procedural Law in International Arbitration* (2004) 33 (‘The proper law of the agreement to arbitrate will, absent countervailing circumstances, follow the proper law of the (main) contract’); Redfern et al (n 18 above) para 3.12: ‘Since the arbitration clause is only one of many clauses in a contract, it might seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause’; for US law, see *Nissho Iwai Corp, et al (Japan) v M/V Joy Sea, etc, et al* (ED La 2002) (2002) XXVII YB Comm Arb 869, 873 and the references therein. *Motorola Credit Corp v Uzan*, 388 F 3d 39, 50–51 (2d Cir 2004) (‘where the parties have chosen the governing body of law, honoring their choice is necessary to ensure uniform interpretation and enforcement of that agreement and to avoid forum shopping... In short, if defendants wish to invoke the arbitration clauses in the agreements at issue, they must also accept the Swiss choice-of-law clauses that govern those agreements’).

substantive law and contains an arbitration clause referring to arbitration in Switzerland, the arbitration clause is governed not by English law but by the provisions of the Swiss *lex arbitri*.²²⁷ Similarly, if an arbitration has its seat in the USA and Swiss law is applicable to the merits, US courts will apply mandatory provisions of federal and state law in order to assess the validity of the arbitration agreement.²²⁸ Arbitral tribunals sitting in France assess the validity of the arbitration agreement on the basis of so-called autonomous international rules, but only because a rule in French case law directs them to do so.²²⁹

While the *lex arbitri* governs the validity of the arbitration agreement, the PICC can be used to interpret or support relevant provisions of the *lex arbitri* in line with the principles set out above regarding the interpretation of domestic law provisions (see paras 46–57 above). To this end, the PICC may be used by arbitrators to interpret arbitration clauses.²³⁰

²²⁷ For arbitration proceedings in Switzerland, see Art 178(2) of the 1987 Swiss Private International Law (n 2 above): there is a choice of three laws, as long as the arbitration clause conforms with one of them; see W Wenger, 'Article 178' in SV Berti et al (eds), *International Arbitration in Switzerland: An Introduction and Commentary on Articles 176–194 of the Swiss Private International Law Statute* (2000) 327, 340: there is 'no practical need' to apply transnational principles to the issue of the validity of the arbitration agreement because Art 178(2) already provides for three potentially applicable national laws.

²²⁸ eg the case law cited in Redfern et al (n 18 above) para 3.25.

²²⁹ The rule was developed by the CA Paris and ultimately confirmed in the *Dalico* decision of the Cour de cassation: Cass civ (1) 20 December 1993 (91-16828) [1994] Rev arb 116 obs H Gaudemet-Tallon. See also Fouchard et al (n 1 above) 228–236.

²³⁰ Arbitral Award 25 November 1994, Zurich Chamber of Commerce, ASA Bull 2/1996, 303, Unilex: the tribunal applied the rules for interpreting the arbitration clause—and for deciding whether the clause empowered the tribunal to hear the dispute—under applicable Swiss law, but also noted that its interpretation of Swiss law reflected a general worldwide consensus evidenced by a similar rule in the PICC. See also Final Award, undated, ICC case no 14581 (2012) XXXVII YB Comm Arb 62: the arbitration clause provided for arbitration in Switzerland which would 'proceed in accordance with international law'. The arbitral tribunal found that such choice of law 'must be understood as a choice of law on the merits, but it could in addition be understood as a choice of law also for the arbitration agreement', and it applied Swiss law and the PICC respectively, then the 'Common standards of Swiss law and international law (UNIDROIT Principles in this case)'; in ICC case no 11869 (2011) XXXVI YB Comm 47, 55 dealing with an ambiguous arbitration clause, the arbitral tribunal decided that English law was applicable to the interpretation of the arbitration agreement. In addition, it stated that '[p]articularly, for this task of avoiding voidness for uncertainty, recourse should be made to the specific principles of interpretation developed for international contracts, which can be found in Art. 4 UNIDROIT Principles'.