

COMMENTARY ON THE  
UNIDROIT PRINCIPLES  
OF INTERNATIONAL  
COMMERCIAL  
CONTRACTS (PICC)

*Edited by*

STEFAN VOGENAUER AND  
JAN KLEINHEISTERKAMP

OXFORD  
UNIVERSITY PRESS

OXFORD

UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.  
It furthers the University's objective of excellence in research, scholarship,  
and education by publishing worldwide in

Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi  
Kuala Lumpur Madrid Melbourne Mexico City Nairobi  
New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece  
Guatemala Hungary Italy Japan Poland Portugal Singapore  
South Korea Switzerland Thailand Turkey Ukraine Vietnam

Oxford is a registered trade mark of Oxford University Press  
in the UK and in certain other countries

Published in the United States  
by Oxford University Press Inc., New York

© Oxford University Press, 2009

The moral rights of the authors have been asserted  
Database right Oxford University Press (maker)

Crown copyright material is reproduced under Class Licence  
Number C01P0000148 with the permission of OPSI  
and the Queen's Printer for Scotland

First published 2009

All rights reserved. No part of this publication may be reproduced,  
stored in a retrieval system, or transmitted, in any form or by any means,  
without the prior permission in writing of Oxford University Press,  
or as expressly permitted by law, or under terms agreed with the appropriate  
reprographics rights organization. Enquiries concerning reproduction  
outside the scope of the above should be sent to the Rights Department,  
Oxford University Press, at the address above

You must not circulate this book in any other binding or cover  
and you must impose the same condition on any acquirer

British Library Cataloguing in Publication Data  
Data available

Library of Congress Cataloging in Publication Data  
Data available

Typeset by Ccpha Imaging Private Ltd, Bangalore, India  
Printed in Great Britain  
on acid-free paper by  
CPI Antony Rowe, Chippenham

ISBN 978-0-19-929175-5

1 3 5 7 9 10 8 6 4 2

PREAMBLE II  
THE USE OF THE PICC IN ARBITRATION

Selected bibliography

- Berger, Klaus-Peter, 'International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts' (1998) 46 Am J Comp L 129–150
- Bonell, Michael Joachim, 'UNIDROIT Principles and the Lex Mercatoria' in TE Carbonneau (ed), *Lex Mercatoria and Arbitration* (1998) 249–255
- Derains, Yves, 'The Role of the UNIDROIT Principles in International Commercial Arbitration (1): A European Perspective' [2002] ICC Int'l Ct Arb Bull, Special suppl 9–19
- Dessemontet, François, '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 Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 159–168
- Farnsworth, E Allan, 'The Role of the UNIDROIT Principles in International Commercial Arbitration (2): A US Perspective on Their Aims and Application' [2002] ICC Int'l Ct Arb Bull, Special suppl 21–28
- Kliuchkovskiy, Markiy, 'Applicability of UNIDROIT Principles of International Commercial Contracts in Courts and Arbitration Tribunals' [2007] 1 Dispute Resolution International 199–217
- Lalive, Pierre, '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 77–83
- Marella, Fabrizio, 'Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts' (2003) 36 Vand J Transnat'l L 1137–1188
- Meyer, Olaf, *Principles of Contract Law und nationales Vertragsrecht: Chancen und Wege für eine Internationalisierung der Rechtsanwendung* (2007)
- Oser, David, *The UNIDROIT Principles of International Commercial Contracts: A Governing Law?* (2008)
- Scherer, Matthias, 'The Recognition of Transnational Substantive Rules by Courts in Arbitral Matters' in P Pinsolle et al (eds), *Towards A Uniform International Arbitration Law?* (2005) 91–121
- Schnyder, Anton K, and Pascal 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) 395–411
- Seraglini, Christophe, 'Du bon usage des principes Unidroit dans l'arbitrage international' [1993] *Rev arb* 1101–1166
- van Houtte, Hans, 'The UNIDROIT Principles of International Commercial Contracts' (1995) 11 *Arb Int'l* 373–390

I. Application of the PICC as the <i>lex contractus</i>	1–7	1. Use of the PICC to interpret or supplement international uniform law	44, 45
1. Parties' agreement on their contract being governed by the PICC	8	2. Use of the PICC to interpret or supplement the applicable domestic law	46
(a) Choice of law clause in favour of the PICC	9	(a) Use of the PICC by arbitrators to supplement or interpret domestic law	47–51
(b) Choice of law clause referring to both the PICC and a domestic law	10–13	(b) Use of the PICC to 'interpret' or 'supplement' the applicable domestic law	52–57
(c) Choice of law clause referring to the terms of the contract supplemented by the PICC	14	III. Use of the PICC by arbitral tribunals in situations not dealt with in the Preamble	58–63
2. References to general principles of law, <i>lex mercatoria</i> , or usages	15	IV. The role of the PICC where arbitrators decide <i>ex aequo et bono</i>	64–66
(a) Clauses in favour of 'general principles of law, the <i>lex mercatoria</i> or the like'	16–20	V. Challenge and enforcement of an arbitral award based on the PICC rather than on a domestic law	67–69
(b) Clauses in favour of 'usages' or 'international trade usages'	21–23	1. Reliance on the PICC in the absence of a choice of law clause is not a ground for annulment or denial of enforcement <i>per se</i>	70
3. Application of the PICC when the parties have not chosen any law to govern their contract	24	(a) Challenge of awards	71–75
(a) The PICC as the <i>lex contractus</i> where there is no choice of law	25–30	(b) Recognition and enforcement of arbitral awards	76–82
(b) The PICC as the <i>lex contractus</i> where there is a negative choice of law	31–36	2. Application of the PICC and due process	83
(c) The PICC as the <i>lex contractus</i> in case of simultaneous designation of two or more domestic laws	37, 38	VI. Application of the PICC to arbitration agreements	84–90
4. Choice of law other than the PICC	39–42		
II. Use of the PICC to supplement or interpret the <i>lex contractus</i>	43		

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

- 1 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.<sup>1</sup> It will, however, determine the *lex arbitri*, ie the law at the place of arbitration governing the procedural aspects of international arbitration.<sup>2</sup> 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*).<sup>3</sup> 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,<sup>4</sup> as the *lex contractus* depends not on the self-declared scope of application of the PICC, but rather on the *lex arbitri* governing the arbitration.

Where arbitrators are not acting as *amiables compositeurs*,<sup>5</sup> they are in principle bound to apply a given municipal law unless the *lex arbitri* allows the application of private rules. Certain laws entitle, and may even require, arbitrators to apply 'rules of law' instead of (or in addition to) a particular domestic law.<sup>6</sup> 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.<sup>7</sup>

Arbitrators' entitlement to apply 'rules of law' may be stated explicitly in the *lex arbitri*.<sup>8</sup> 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

<sup>1</sup> 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.

<sup>2</sup> eg in England the UK Arbitration Act 1996; in Switzerland Chapter 12 of the Bundesgesetz über das internationale Privatrecht (1987 Conflict of Laws Act – English translation at ([www.umbricht.ch/pdf/SwissPIL.pdf](http://www.umbricht.ch/pdf/SwissPIL.pdf))); in France Arts 1498–1507 NCPC.

<sup>3</sup> Fouchard et al (n 1 above) 875–876; Poudret and Besson (n 1 above) 586–589.

<sup>4</sup> See above, Preamble I para 85.

<sup>5</sup> See para 64 below.

<sup>6</sup> E Gaillard, 'Du bon usage du droit comparé dans l'arbitrage international' [2005] Rev arb 375, 376.

<sup>7</sup> (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); also see above, Preamble I para 46. 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.

<sup>8</sup> eg Art 1496 NCPC; Art 187 of the 1987 Swiss Conflict of Laws Act (n 2 above); s 46(1)(b) UK 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).

'rules of law' rather than 'laws' only.<sup>9</sup> Art 28(2) of the UNCITRAL Model Law (as well as the national laws based on it, such as § 1051 of the 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. German authors overwhelmingly interpret § 1051 of the Code as precluding arbitrators sitting in Germany to apply 'rules of law' to the merits of a dispute, unless they are explicitly empowered by the parties.<sup>10</sup> Many foreign authors, in contrast, have argued that even where the *lex arbitri* directs a 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.<sup>11</sup> It is only in such cases of permissiveness of the *lex arbitri* that the Preamble's self-declared scope of application of the PICC as the *lex contractus* has some effect.<sup>12</sup> Although it does not bind arbitrators,<sup>13</sup> this self-declared scope of application of the PICC often has a significant influence on adjudicators when deciding whether to apply the PICC.<sup>14</sup>

- 5 Even where the *lex arbitri* leaves parties free to choose the PICC as the 'rules of law' applicable to the contract, this does not allow a derogation from the relevant mandatory rules (Art 1.4).<sup>15</sup> An arbitral award can be annulled, and its enforcement precluded, if the arbitral tribunal fails to apply these mandatory rules. Mandatory rules are often considered part of public policy (*ordre public*) in the country of the seat of the arbitration or in jurisdictions where a party tries to enforce the award (see paras 71–83 below).<sup>16</sup> At least if one party 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,<sup>17</sup> and that topic which exceeds the scope of this Commentary.
- 6 As the PICC are not an exhaustive set of rules, an arbitral tribunal may have to determine which rules or domestic laws apply to issues not covered by the PICC.<sup>18</sup> Where there is no

<sup>9</sup> eg Art 17 of the ICC Rules; Art 14 of the LCIA Rules; Art 33 of the Swiss Rules. See also First Partial Arbitral Award June 1995, ICC case no 7110, (1999) 10(2) ICC Int'l Ct Arb Bulletin 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 Article 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 33(1) of the UNCITRAL Arbitration Rules referring to 'the law designated by the Parties' and 'the law determined by the conflict of laws rules which [the arbitral tribunal] considers applicable'.

<sup>10</sup> KH Schwab and G Walter, *Schiedsgerichtsbarkeit* (7th edn, 2005) 451–453; K Lionnet and A Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit* (3rd edn, 2005) 380–383; H Raeschke-Kessler and KP Berger, *Recht und Praxis des Schiedsverfahrens* (3rd edn, 1999) 174; O Sandrock, 'Procedural Aspects of the New German Arbitration Act' (1998) 14 Arb Int'l 33, 39; Bernardini (n 7 above) 65.

<sup>11</sup> Gaillard (n 6 above) 376 and Fouchard et al (n 1 above) 866 and 878–879.

<sup>12</sup> 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.

<sup>13</sup> See above, Preamble I paras 10–11, 29; see para 59 below.

<sup>14</sup> (2003) Study L – Misc 25, para 598 (Komarov).

<sup>15</sup> See above, Preamble I para 39.

<sup>16</sup> A Redfern et al, *Law and Practice of International Commercial Arbitration* (4th edn, 2004) para 2-37.

<sup>17</sup> 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); H Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration* (1992).

<sup>18</sup> See above, Preamble I para 44.

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).

Assuming that the *lex arbitri* in principle accepts an arbitral tribunal's ability to apply the PICC, they are available (according to the self-proclaimed scope of application stated in the Preamble) in the following circumstances: 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). 7

### 1. Parties' agreement on their contract being governed by the PICC

Subject to the applicable mandatory provisions of domestic law, any choice by the parties of the law or rules of law applicable to their contract is usually binding upon the arbitral tribunal.<sup>19</sup> 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: 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 to the terms of the contracts and the PICC (see para 14 below). 8

(a) **Choice of law clause in favour of the PICC.** Parties may have specifically agreed on a choice of law clause in favour of the PICC. They may have even 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 alone<sup>20</sup> because the PICC are commonly characterized as 'rules of law' for the purpose of provisions authorizing the application of such rules.<sup>21</sup> In practice, arbitral tribunals (in contrast to municipal courts)<sup>22</sup> regularly implement a choice by parties to apply the PICC to the merits of their dispute, whether such choice is expressed in a contract or in arbitration proceedings.<sup>23</sup> 9

<sup>19</sup> Art 28 of the UNCITRAL Model Law; Art 42(1) of the ICSID Convention; Art 17(1) of the ICC Rules; Art 33(1) of the Swiss Rules.

<sup>20</sup> 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.

<sup>21</sup> eg Redfern et al (n 16 above) para 2-72 n 6; S Besson, 'Commentary on Arts 31–33 Swiss Rules' in T Zuberbühler et al (eds), *Swiss Rules of International Arbitration: Commentary* (2005) Art 33 paras 22–24; A Reiner and W Jahnel, 'Die ICC-Schiedsordnung' in RA Schütze (ed), *Institutionelle Schiedsgerichtsbarkeit* (2006) 90–91.

<sup>22</sup> See above, Preamble I paras 7 and 45–47.

<sup>23</sup> 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).

- 10 (b) **Choice of law clause referring to both the PICC and a domestic law.** 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 (2004) [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.<sup>24</sup> The reference can be cumulative (where the arbitral tribunal is meant to decide in accordance with both the domestic law and the PICC), 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: for example, 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*,<sup>25</sup> or may have derogated from the PICC in favour of domestic law in accordance with Art 1.5.<sup>26</sup> They may also have chosen to apply domestic law to issues not covered by the PICC, as recommended by the Official Comment.<sup>27</sup> In any event, the mandatory provisions of domestic law will prevail (Art 1.4).
- 12 Parties may restrict the application of the PICC to merely interpret or supplement the domestic law applicable to the merits (see paras 46–57 below).<sup>28</sup> 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 broad manner rather than restrictively.<sup>29</sup> This sound rule also applies in cases where the parties have chosen the PICC.
- 14 (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

---

<sup>24</sup> See below, Introduction to Chapter 4 of the PICC para 4.

<sup>25</sup> M Kliuchkovskiy, ‘Applicability of UNIDROIT Principles of International Commercial Contracts in Courts and Arbitration Tribunals’ [2007] 1 *Dispute Resolution International* 199, 201.

<sup>26</sup> C Seraglini, ‘Du bon usage des principes Unidroit dans l’arbitrage international’ [2003] *Rev arb* 1101, 1109.

<sup>27</sup> 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 40 and see also para 30 below.

<sup>28</sup> For an illustration see Arbitral Award 21 April 1997 (Paris), *Ad hoc arbitration*, Unilex.

<sup>29</sup> S Besson (n 21 above) Art 33 para 11.

be settled in conformity with the terms of their contract supplemented by the PICC.<sup>30</sup> 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.

## 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 other similar expressions (see paras 16–20 below). Moreover, contract clauses on occasion refer to 'usages' (see paras 21–23 below). 15

(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, 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'.<sup>31</sup> 16

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.<sup>32</sup> **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.**<sup>33</sup> 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 clauses 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 want to escape the vagaries of local law, 17

<sup>30</sup> 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.

<sup>31</sup> Off Cmt 4b to Preamble, p 4.

<sup>32</sup> eg Bonell (n 27 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 8 and 63. In 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.

<sup>33</sup> See above, Preamble I para 4; 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'.

whether real or imaginary, and increase the predictability of the proceedings and outcome of any dispute. Second, they want 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. Third, they could not 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 justified<sup>34</sup> as an expression or evidence of transnational law.<sup>35</sup> This is confirmed by abundant case law. Arbitrators dislike working in a vacuum 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,<sup>36</sup> while sticking to general principles or the *lex mercatoria* for matters not covered by the PICC.<sup>37</sup> For some, even a vague reference to general principles warrants the application of the PICC if the parties have made no other choice of law.<sup>38</sup>
- 19 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.<sup>39</sup> An arbitral tribunal may consider that the PICC should be applicable as part of the general principles mentioned in the clause.<sup>40</sup>

---

<sup>34</sup> 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.

<sup>35</sup> 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 Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 159, 160.

<sup>36</sup> 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. See also (1991) Study L – Doc 50, p 5; Berger (n 20 above) 143.

<sup>37</sup> (1994) PC – Misc 19, p 10 (Lando).

<sup>38</sup> Dessemontet (n 35 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.'

<sup>39</sup> eg DFT 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.

<sup>40</sup> Arbitral Award, ICC case no 8264 (n 33 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'.

Parties may even specifically choose to combine the PICC and a domestic law, either in a choice of law clause in their contract<sup>41</sup> or during the course of the proceedings.<sup>42</sup>

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 or transnational law.<sup>43</sup> 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. 20

(b) Clauses in favour of 'usages' or 'international trade usages'. Usages are not mentioned in the Preamble. Indeed, they should be **distinguished from general principles of law**,<sup>44</sup> 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 it was the parties' agreement to comply with usages in their own trade;<sup>45</sup> as such, usages normally prevail over the PICC.<sup>46</sup> 21

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 of the Swiss Rules and Art 17 of the ICC Rules) therefore should not be interpreted as directions to apply the PICC.<sup>47</sup> The better approach, even if not systematically adopted in case law,<sup>48</sup> is to scrutinize whether 22

<sup>41</sup> For views in favour of such clauses, see (1994) PC – Misc 19, p 13 (especially Drobnič).

<sup>42</sup> 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'.

<sup>43</sup> Bernardini (n 7 above) 65.

<sup>44</sup> E Gaillard, 'La distinction des principes généraux du droit et des usages du commerce international' in *Etudes offertes à Pierre Bellet* (1991) 203; Poudret and Besson (n 1 above) 591–594.

<sup>45</sup> See below, Art 1.9 paras 10–20.

<sup>46</sup> (1991) Study L – Doc 50, pp 18–19; (1992) Study L – Doc 51, pp 19–21.

<sup>47</sup> eg Arbitral Award, ICC case no 9029 (n 32 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'; 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.

<sup>48</sup> 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).

the parties intended in fact to refer to general principles or to the PICC when using the term 'usage'.<sup>49</sup>

- 23 If the finding is negative, an arbitral tribunal may nevertheless analyse the actual practice in the relevant field to determine whether the PICC invoked by one of the parties could nonetheless qualify as a trade usage. In practice, arbitral tribunals often deny this type of qualification and therefore decline to apply the relevant provisions of the PICC.<sup>50</sup>

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

- 24 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).
- 25 (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. However, not all grant the same **degree of discretion**. For example, under the ICC Rules, an arbitral tribunal may apply 'the rules of law which it determines to be *appropriate*'.<sup>51</sup> The Swiss Rules appear to restrict the arbitral tribunal's discretion by requiring it to apply 'the rules of law with which the dispute has the *closest connection*'.<sup>52</sup> Arguably, this is more restrictive, since the law with the closest connection may not be the most appropriate one.<sup>53</sup> 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.<sup>54</sup>
- 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, the very nature of international arbitration calls for the application of neutral international norms such as the PICC whenever the parties refrain from

---

<sup>49</sup> Fouchard et al (n 1 above) 807.

<sup>50</sup> Arbitral Award July 1997 (Paris), ICC case no 8873, (1998) 125 *Clunet* 1017–1024, (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.'

<sup>51</sup> Art 17(1) of the ICC Rules (emphasis added). 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 Company 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).

<sup>52</sup> Art 33(1) of the Swiss Rules (emphasis added).

<sup>53</sup> Besson (n 21 above) Art 33 para 21.

<sup>54</sup> See above, Preamble I para 69.

making an express choice of law: using **neutral norms** such as the PICC may be an excellent way to 'meet the parties' legitimate expectations'.<sup>55</sup> 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.<sup>56</sup> Even if the PICC may be applied theoretically, the arbitral tribunal should be reluctant to do so spontaneously.<sup>57</sup> 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.<sup>58</sup> Two instances are identified in which, exceptionally, the PICC—rather than a domestic law—could be applied in the absence of a choice of law clause. First, if the contract presents connecting factors with many countries, none of which may show a sufficiently close connection to justify the application of one specific domestic law. The PICC may then be the most appropriate set of substantive rules.<sup>59</sup> Second, the PICC may be applied if it can be inferred from the circumstances that the parties wanted to exclude the application of any domestic law (see paras 31–36 below).<sup>60</sup>

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.<sup>61</sup> They may choose to apply the PICC as 'a neutral law or default law in case of an absence of a choice of law'.<sup>62</sup> 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 what they were drafted for. 27

One specific situation should be mentioned by way of illustration: it is sometimes considered 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.<sup>63</sup> There may be circumstances where the arbitrators find overwhelming policy considerations in favour of affirming the validity of the contract despite it being flawed under the otherwise applicable 28

<sup>55</sup> 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.

<sup>56</sup> eg (2003) Study L – Misc 25, para 605 (Date-Bah).

<sup>57</sup> Besson (n 21 above) Art 33 para 26.

<sup>58</sup> Off Cmt 4c to Preamble, pp 4–5; see above, Preamble I para 9.

<sup>59</sup> Off Cmt 4c to Preamble, p 5; Arbitral Award, ICC case no 9875 (n 32 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.

<sup>60</sup> Off Cmt 4c to Preamble, p 5.

<sup>61</sup> Arbitral Award, ICC case no 9419 (n 7 above).

<sup>62</sup> Marella (n 50 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 16 above) para 2-66.

<sup>63</sup> eg Fouchard et al (n 1 above) 876.

national law.<sup>64</sup> These must remain exceptional.<sup>65</sup> Still, once the arbitrators find that the law which would be applicable under the usual, relevant choice of law rules (such as the law with which the contract has the most connections) is unacceptable in the context of an international transaction,<sup>66</sup> they might want to refer the contract to the PICC if the PICC allow them not to annul the contract and 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.

- 29 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. The award would otherwise be in violation of the **parties' fundamental right 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.<sup>67</sup> Likewise, an arbitral tribunal might want to apply the PICC together with international uniform law, domestic law or international trade usages.<sup>68</sup>
- 31 (b) **The PICC as the *lex contractus* where there is a negative choice of law**. 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.<sup>69</sup> 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*.<sup>70</sup>

---

<sup>64</sup> 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.'

<sup>65</sup> A Sayed, 'La présomption de validité des contrats dans l'arbitrage international' [2002] ASA Bull 623.

<sup>66</sup> KP Berger, *International Economic Arbitration* (1993) 509–510.

<sup>67</sup> Off Cmt 4a to Preamble, p 3; Arbitral Award, Stockholm Chamber of Commerce case no 117/1999 (n 62 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 45.

<sup>68</sup> 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.

<sup>69</sup> eg Mistelis (n 67 above) 637–639; Lalive (n 20 above) 82–83; E Schäfer et al, *L'arbitrage de la Chambre de commerce internationale en pratique* (2002) 107.

<sup>70</sup> Arbitral Award, ICC case no 10422 (n 32 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

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*.<sup>71</sup> Yet each case should be examined separately to determine whether the parties did not want to submit their contract to public international law, even though the possibility of doing so is far from being settled.<sup>72</sup> 32

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'**.<sup>73</sup> Ultimately, it is for the arbitrators to determine the agreement of the parties at the relevant time, ie 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.<sup>74</sup> The Official Comment accepts that this scenario may warrant the application of non-national principles.<sup>75</sup> 35

Although no decision illustrating this approach appears to be available, it is conceivable that arbitrators' probing about 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 36

---

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'.

<sup>71</sup> 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'.

<sup>72</sup> Redfern et al (n 16 above) para 2-46: private parties should be allowed to submit their contract relationship to international law; cf P Daillier et al, *Droit international public* (7th edn, 2002) 1096.

<sup>73</sup> Off Cmt 4c to Preamble, p 5; Berger (n 20 above) 146.

<sup>74</sup> Reiner and Jähnel (n 21 above) 91; Arbitral Award 5 June 1996 (Paris), ICC case no 7375, (1996) 11 Mealey's International 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 contracting parties' national law; 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.

<sup>75</sup> Off Cmt 4c to Preamble, p 5.

the PICC, but then could not agree on them, the arbitral tribunal must respect this choice.

- 37 (c) The PICC as the *lex contractus* in 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, potentially leading to the application of the PICC.<sup>76</sup> The solution is in line with the principle of effective interpretation which is prevalent in international arbitration.<sup>77</sup>
- 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*.<sup>78</sup> 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.<sup>79</sup>

#### 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 parties' submissions amounts to a choice of law;<sup>80</sup> 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*. 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).

---

<sup>76</sup> Arbitral Award 5 November 2002, International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation 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*.

<sup>77</sup> Fouchard et al (n 1 above) 825–826.

<sup>78</sup> Arbitral Award February 1999, ICC case no 9479, (2001) 12(2) ICC Int'l Ct Arb Bull 67.

<sup>79</sup> Arbitral Award no 126/90, cited in (1994) PC – Misc 19, p 19 (Maskow): the PICC were used for the issue of hardship only.

<sup>80</sup> Besson (n 21 above) Art 33 para 7.

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. The tribunal may then be inclined to disregard unsuitable or parochial 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.<sup>81</sup> 40

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.<sup>82</sup> 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 edition of the PICC, as mentioned in the section of the Official Comment dealing with 'other possible uses of the PICC'.<sup>83</sup> The scenario on the drafters' minds was one where establishing the content of the applicable law proves impossible or excessively burdensome.<sup>84</sup> 41

A high threshold must be applied in this respect, as nowadays most domestic laws are either codified or otherwise easily available.<sup>85</sup> 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*.<sup>86</sup> A party should not be too easily allowed to rely on the PICC, since the parties' duty 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. 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. 42

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

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 may be, as indicated by paragraph 5 of the Preamble, 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, which allows referring to the observations already made on this topic.<sup>87</sup> 43

<sup>81</sup> 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.

<sup>82</sup> See above, Preamble I, paras 85–88.

<sup>83</sup> Off Cmt 8 to Preamble, p 7.

<sup>84</sup> (1992) Study L – Doc 51, p 6.

<sup>85</sup> (1994) PC – Misc 19, pp 23–24 (especially Bonell: 'the very last resort').

<sup>86</sup> 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.

<sup>87</sup> See above, Preamble I paras 89–118.

In practice, however, arbitral tribunals rely much more frequently on the PICC for complementing the applicable law than state courts do. 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]’.<sup>88</sup> The reference to ‘general principles’ in the CISG has been relied upon by arbitral tribunals to apply the PICC. 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,<sup>89</sup> an issue which is not addressed in the CISG. Others 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) 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).<sup>90</sup>
- 45** 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)**.<sup>91</sup>

**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).<sup>92</sup>
- 47** (a) **Use of the PICC by arbitrators to supplement or interpret domestic law.** 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.

---

<sup>88</sup> See the discussion in Off Cmt 5 to Preamble, pp 5–6.

<sup>89</sup> 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 Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts’ (1997) 28 Law and Policy in International Business 943; Arbitral Award 1995 (Basle), ICC case no 8128, in Berger (n 20 above) 134–137, Unilex.

<sup>90</sup> 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.

<sup>91</sup> 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) of the ICC Rules.

<sup>92</sup> See above, Preamble I paras 105–111.

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.<sup>93</sup> 48

In that 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 (such as 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.<sup>94</sup> 49

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.<sup>95</sup> 50

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.<sup>96</sup> Arbitral tribunals sometimes 51

<sup>93</sup> Arbitral Award, ICC case no 8540 (n 64 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 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 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.

<sup>94</sup> 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.

<sup>95</sup> Arbitral Award, ICC case no 9029 (n 32 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'.

<sup>96</sup> Art 17(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 Civil Code 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.

consider that the PICC can be 'taken into account' as part of the applicable trade usages.<sup>97</sup> This is questionable, since usages must be distinguished from transnational principles (see para 22 above).

- 52 (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 could 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 selected domestic law either because it does not address the issue<sup>98</sup> or because it leads to a number of equally valid options.<sup>99</sup>
- 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. 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. Interpreting these provisions in the light of transnational norms like the PICC can prove useful.<sup>100</sup>

---

<sup>97</sup> 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 of the ICC Rules.

<sup>98</sup> 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 Dessementet (n 35 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.

<sup>99</sup> Arbitral Award 1995 (Auckland), Ad hoc arbitration, [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 attain an internationally acceptable solution.

<sup>100</sup> See the discussion in Off Cmt 6 to Preamble, p 6; Berger (n 20 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,

‘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.<sup>101</sup> Arbitral tribunals may do so either on their own initiative or when required by the applicable domestic law or arbitration rules to consider general principles (of which the PICC are used as an expression). 55

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,<sup>102</sup> the principles of good faith,<sup>103</sup> nominalism,<sup>104</sup> price determinability,<sup>105</sup> quantification of losses,<sup>106</sup> loss of profit,<sup>107</sup> mitigation of damages,<sup>108</sup> 56

Unilex: the choice of law clause was in favour of Italian law; there were difficulties on 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’.

<sup>101</sup> 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 55 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 is in conformity with ‘usages of international trade’, as expressed, *inter alia*, by the PICC; O Meyer, *Principles of Contract Law und nationales Verragsrecht: Chancen und Wege für eine Internationalisierung der Rechtsanwendung* (2007) 211–228.

<sup>102</sup> 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. See also 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 109–110.

<sup>103</sup> Arbitral Award, ICC case no 9753 (n 96 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. In the context of court proceedings, see above, Preamble I para 107.

<sup>104</sup> 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’.

<sup>105</sup> 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.

<sup>106</sup> 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 it had discretion in assessing the damages.

<sup>107</sup> Arbitral Award, ICC case no 10346 (n 103 above) 115.

<sup>108</sup> 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

and hardship.<sup>109</sup> The PICC have also been used to support tribunals' decisions about the agreement of the parties regarding the law applicable to the contract,<sup>110</sup> and even about whether a valid, binding contract existed.<sup>111</sup>

- 57 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.<sup>112</sup> Yet, in the context of international arbitration, this may prove important and very useful in order to 'meet the legitimate expectations of the parties'.<sup>113</sup> 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*.<sup>114</sup>

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

- 58 With respect to the 1994 edition of the PICC, there remained **doubt as to whether the Preamble's enumeration of potential uses of the PICC was exhaustive**.<sup>115</sup> 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. In one ICC arbitration, the tribunal even refused to apply the PICC to this end because this sort of use

---

but also noted (when 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.

<sup>109</sup> 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'.

<sup>110</sup> Arbitral Award, ICC case no 9459 in Jolivet (n 74 above) 259: the tribunal found that none of the potentially relevant domestic laws (French, Belgian and Spanish law) 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.

<sup>111</sup> 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.

<sup>112</sup> Patocchi and Favre-Bulle (n 86 above) 600.

<sup>113</sup> Derains (n 55 above) 14.

<sup>114</sup> 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 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](http://www.investmentclaims.com/decisions/PSEG-Turkey-Jurisdiction-4Jun2004.pdf)), para 75.

<sup>115</sup> 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.

had not been identified in the Preamble.<sup>116</sup> 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 or interpret applicable domestic laws. He acknowledged that the 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’.<sup>117</sup>

The Official Comment to the 2004 edition of the PICC now specifies that **the list set out in the Preamble is not exhaustive**.<sup>118</sup> In addition, it points out two possible applications not mentioned in the Preamble: the PICC may be used for the purpose of contract drafting<sup>119</sup> and as the *lex contractus* where the content of the otherwise applicable law could not (or not easily) be established. As discussed above, certain authorities might be—and maybe 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 (see para 42 above).

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**’.<sup>120</sup>

As the PICC have been drafted for use in commercial contracts, it will normally not be appropriate to use them for **claims based on public international law**. The primary sources of international law in this context are treaties, customary international law, general principles of (public international) law and precedents of tribunals deciding claims involving states.<sup>121</sup> It is for this reason that in the many arbitrations brought under bilateral

<sup>116</sup> Arbitral Award, ICC case no 8873 (n 50 above).

<sup>117</sup> Berger (n 20 above) 133.

<sup>118</sup> Off Cmt 8 to Preamble, p 7; see also above, Preamble I para 1.

<sup>119</sup> See above, Preamble I para 132.

<sup>120</sup> 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 norms. 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) 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.

<sup>121</sup> 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

investment treaties, mostly under the ICSID Convention, the PICC are rarely invoked or applied by the arbitral tribunals. 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.<sup>122</sup>

- 62 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. 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, compensation in case of breach of treaty obligations or contractual obligations, and the impact of unforeseen events on the treaty or contract). It is therefore conceivable that the PICC can be applied or invoked in appropriate circumstances in the context of a public international law dispute.
- 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 parties' agreement 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** to avoid determining the parties' agreement, **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 parties' intent is established, the arbitral tribunal may, on the other hand, have to determine whether the parties' arrangement is admissible in 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*

- 64 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.<sup>123</sup> 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.<sup>124</sup> In practice, they are often

---

mentioned here 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*).

<sup>122</sup> United Nations Compensation Commission 18 December 1997, UN-Doc S/AC.26/1997/6, nn 23, 27, and 32. For an ICSID precedent, see n 51 above.

<sup>123</sup> Poudret and Besson (n 1 above) 617–622.

<sup>124</sup> 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*'.

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 highlighted by Art 17(3) of the ICC Rules which mentions all three expressions without distinction.<sup>125</sup> What the three notions have in common is that arbitrators may not deviate from the law or the contract unless explicitly authorized to do so.<sup>126</sup>

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.<sup>127</sup> Arbitrators should therefore enquire about the existing rules on amiable composition and decisions *ex aequo et bono* at the place of arbitration, since these will be relevant to ensuring that the award cannot be set aside.<sup>128</sup> If arbitrators are authorized to deviate from the law (because both the *lex arbitri* and the parties entitle them to do so), they are entitled to resort to the PICC 'as [an] autonomous standard'<sup>129</sup> 'to the extent they find them to express or accord with equitable principles'.<sup>130</sup> The PICC can thus provide a useful source for arbitrators called upon to decide a dispute *ex aequo et bono*,<sup>131</sup> although the drafters of the PICC were not unanimously in favour of using the PICC for this purpose.<sup>132</sup> 65

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.<sup>133</sup> The parties arguably made a valid choice in favour of the law concerned,<sup>134</sup> 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. 66

<sup>125</sup> Art. 17(3) of the ICC Rules; Reiner and Jahnel (n 21 above) 92 and n 14.

<sup>126</sup> Bonell (n 7 above) 194–195: in some countries, such as Japan and China, even where the arbitrators are not formally acting as *amiables compositeurs*, they are expected to decide on the basis of 'fairness and common sense' and may decide to apply the PICC.

<sup>127</sup> 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'.

<sup>128</sup> 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.

<sup>129</sup> H van Houtte, 'The UNIDROIT Principles of International Commercial Contracts' (1995) 11 *Arb Int'l* 373, 381.

<sup>130</sup> Lalive (n 20 above) 82; Berger (n 20 above) 147.

<sup>131</sup> 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 the principles of equity' and applied directions of the PICC when determining the appropriate interest rate.

<sup>132</sup> (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').

<sup>133</sup> eg Arbitral Award 10 December 1997 (Buenos Aires), Ad hoc arbitration, [1998] *ULR* 178, 178–179, Unilex: there was no choice of law clause in the contract; the parties asked the tribunal to act as *amiables compositeurs*; the tribunal disregarded submissions made by both parties on the basis of Argentine law and applied the PICC to the merits of the dispute.

<sup>134</sup> Besson (n 21 above) Art 33 para 7.

## 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.<sup>135</sup>
- 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.<sup>136</sup> 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.<sup>137</sup>
- 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).
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*
- 70 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.
- 71 (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.
- 72 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.

---

<sup>135</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

<sup>136</sup> For 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* (forthcoming 2008).

<sup>137</sup> International Law Association, *Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards (2002, New Delhi)* ([www.ila-hq.org/lex/committees/index.cfm/cid/19](http://www.ila-hq.org/lex/committees/index.cfm/cid/19)): 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.

In many jurisdictions, an award disregarding the applicable law clause may be set aside or may not be recognized and enforced, such as in France<sup>138</sup> or Germany.<sup>139</sup> In others, such as Switzerland, the arbitral award usually escapes annulment even if the arbitrators disregard the parties' choice of law since, in substance, the only ground to set aside an award is violation of public policy.<sup>140</sup> 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).<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup> The *Norsolor* solution has since been widely admitted in other jurisdictions. In Switzerland, the Federal Court will not verify how the arbitrators determined or applied the applicable law unless the result of the award is contrary to international public policy.<sup>144</sup> 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'.<sup>145</sup> In Germany, in contrast, such liberty on the part of the arbitrators is a ground for setting the award aside.<sup>146</sup> 74

<sup>138</sup> Fouchard et al (n 1 above) 946; G Cordero Moss, 'Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties?' (2005) 1 Stockholm International Arbitration Review 1, 14 and 19.

<sup>139</sup> BGH 26 September 1985 (III ZR 16/84), [1985] RIW 970, 972, cited in R Geimer et al (eds), *Zöller – Zivilprozessordnung* (26th edn, 2007) § 1059 para 43.

<sup>140</sup> Art 190 of the 1987 Swiss Conflict of Laws Act (n 2 above).

<sup>141</sup> DFT 14 November 1990, 116/1990 II 634, cons 4a; P Lalive et al, *Le droit de l'arbitrage interne et international en Suisse* (1989) 431; Besson (n 21 above) Art 33 para 15; Scherer (n 20 above) 99–100.

<sup>142</sup> For a related situation see DFT 9 January 2007 (4P.96/2002), ASA Bull 3/2007, 560 cons 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 Court 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.'

<sup>143</sup> 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 20 above).

<sup>144</sup> *ibid* 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.'

<sup>145</sup> Cass civ 22 October 1991 (89-21528), [1992] Rev arb 457; Fouchard et al (n 1 above) 945–946.

<sup>146</sup> See para 4 above.

- 75 In 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.
- 76 (b) **Recognition and enforcement of arbitral awards.** The recognition and enforcement of foreign arbitral awards is also a matter 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 Certain 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 compositeurs* or in equity without this having been agreed by the parties.<sup>147</sup> However, the prevailing view is that this interpretation considerably stretches the text of Art V(1)(c).<sup>148</sup> 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.<sup>149</sup> 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.<sup>150</sup> It therefore appears that a

---

<sup>147</sup> U Haas, *Die Anerkennung und Vollstreckung ausländischer und internationaler Schiedssprüche* (1991) 194–195; AJ van den Berg et al, *Netherlands Arbitration Law* (1993) 165.

<sup>148</sup> Poudret and Besson (n 1 above) 913.

<sup>149</sup> *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 ICC 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 Scherer (n 20 above) 99.

<sup>150</sup> 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'.

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.<sup>151</sup> Even though the facts in that case were quite specific, the decision indicates that quite a high threshold must be met for a procedural violation to justify refusal to enforce an award under the New York Convention; an alleged failure to correctly apply the procedural rules regarding the applicable substantive law agreed by the parties will normally not be sufficient. However, the case does not address the situation where the tribunal fails to apply the law agreed by the parties altogether. Nor does it 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). 78

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 qualify *per se* as such a violation unless its application leads to a result that is contrary to public policy.<sup>152</sup> 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.<sup>153</sup> 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. 79

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 80

<sup>151</sup> *Compagnie des Bauxites de Guinée v Hammermills Inc*, 1992 WL 122712 (DDC 1992), (1993) XVIII YB Comm Arb 566, 571.

<sup>152</sup> Derains (n 55 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]'.

<sup>153</sup> *Deutsche Schachtbau- und Tiefbohrgesellschaft v Ras al Khaimah National Oil Company* [1987] 2 All ER 769, CA; Craig et al (n 143 above) 337.

enforcement of the award is sought.<sup>154</sup> Therefore, a violation or non-application of a mandatory provision of a domestic law is not necessarily tantamount to a violation of public policy.<sup>155</sup>

- 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.<sup>156</sup>
- 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 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

- 83 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. The parties' right 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 the award aside.<sup>157</sup> 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 arbitrators' view, 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.<sup>158</sup>

---

<sup>154</sup> International Law Association (n 137 above) Rule 3a.

<sup>155</sup> 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'.

<sup>156</sup> 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).

<sup>157</sup> Art 34(2)(a)(iv) UNCITRAL Model Law.

<sup>158</sup> In DFT 30 September 2003, 130/2004 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.

## 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.<sup>159</sup> 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.<sup>160</sup> 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,<sup>161</sup> and the interpretation of the parties’ intent to be bound. Applying the PICC or other non-national 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. 86

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, ie *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.<sup>162</sup> 87

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. 88

In some jurisdictions (such as 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 89

<sup>159</sup> Off Cmt 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’.

<sup>160</sup> Reiner and Jahnelt (n 21 above) 91.

<sup>161</sup> See below, Art 8.1 paras 5–10.

<sup>162</sup> *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.

setting this out is contained in an arbitration clause within the contract.<sup>163</sup> 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 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*.<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup>

- 90 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.<sup>167</sup>

---

<sup>163</sup> For English law see *Sonatrach Petroleum Corporation (BVI) v Ferrell International Limited* [2002] 1 All ER (Comm) 627, QB and Redfern et al (n 16 above) para 2-86. For US law, see *Nissho Iwai Corp, et al (Japan) v M/V. Joy Sea, etc, et al* (2002) XXVII YB Comm Arb 869, 873 and the references therein.

<sup>164</sup> For arbitration proceedings in Switzerland, see Art 178(2) of the 1987 Swiss Conflict of Laws Act (n 2 above): there is choice of three laws, so 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.

<sup>165</sup> eg the case law cited in Redfern et al (n 16 above) para 2-91.

<sup>166</sup> 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.

<sup>167</sup> 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.