PREAMBLE II

THE USE OF THE PICC IN ARBITRATION

Selected bibliography


Berardo, Jean-Paul, 'Principios de Unidroit (y de la Unión Europea) y su influencia en el derecho internacional' in MP Fetter and A Martinez (eds), Principios de derecho contractual español y principios de Unidroit sobre contratos comerciales internacionales (2009) 294-304


Bernardini, Piero, 'Principi UNIDROIT e arbitrati internazionali: Tra naturale propensione alla codificazione e limitata autonomia nel determinare il diritto applicabile' (2012) 26 Dir comm int 935-939

Berger, Emmanuel, 'La jurisprudence arbitrale de la CCI et la lex mercatoria' [2002] Cahiers de l’arbitrage 253-268

Bonell, Michael Joachim, 'UNIDROIT Principles and the Lex Mercatoria' in TE Carbonneau (eds), Codification of Contracts in Transnational Contract and Dispute Resolution Practice [2013] ULR 473-489


Bockstiegel, Karl Hein, 'The Application of the UNIDROIT Principles to Contracts involving States or Inter-Governmental Organizations' [2002] ICC Int’l Arb Bull, Special suppl 51-56


Cordero Moso, Giuditta, 'Can an Arbitral Tribunal Darego the Choice of Law Made by the Parties?' (2005) 1 Stockholm International Arbitration Review 1-21

Cordero Moso, Giuditta and Daniel Behn, 'The Relevance of the UNIDROIT Principles in Investment Arbitration' [2014] ULR 578-608


Crimiasso, Antonio, 'Principi UNIDROIT e arbitri interazionali: Tra naturale propensione a farne uso e limitata autonomia nel determinare il diritto applicabile' (2012) 26 Dir comm int 917-934


SCHERER
The UNIDROIT Principles of International Commercial Contracts (PICC) are particularly relevant in the context of international arbitration. Adhered to by the parties, the PICC serves as a foundational legal framework in international arbitration agreements. It offers a harmonized set of rules that can complement national laws, thereby ensuring predictability and fairness in resolving disputes.

The PICC are observed in a context where the parties have not chosen any specific law to govern their contract. This context can arise in situations where the arbitration agreement is silent on the matter, or the parties specifically select the PICC as their governing law. The PICC's design aims to fill the gap in national legal systems by providing a set of principles that can be applied in cases of conflict.

In arbitration, the PICC may be applied in the following ways:

1. **Application of the PICC as the Governing Law:** When the parties in an arbitration agreement choose the PICC as the governing law, the court or arbitral tribunal will apply the relevant PICC provisions to determine the outcome of the dispute.

2. **Use of the PICC to Interpret or Supplement the Applicable Law:** When the parties have chosen a national law as the governing law, the PICC can be used to interpret or supplement this law. This may be particularly useful when the national law is silent or unclear on certain aspects of the contract.

3. **Application of the PICC when the Parties Have Not Chosen Any Law:** In cases where there is no explicit choice of law, the PICC can be applied to fill the legal vacuum by providing a set of principles to govern the contract.

4. **Choice of Law Clauses Referencing the Terms of the Contract:** Where a choice of law clause refers to the terms of the contract, the PICC can be used to interpret these terms, especially when the applicable national law does not provide clear guidance.

5. **Clauses in Favor of General Principles of Law:** The PICC can be used to support or supplement clauses that refer to general principles of law, ensuring consistency with broader legal objectives.

6. **Clauses Favoring usages or International Trade Usages:** The PICC can be used to address issues governed by usages or international trade usages, providing a unified approach to resolving disputes.

7. **Application in the Event of a Negative Choice of Law:** Where the parties have made a negative choice of law, the PICC can still be applied to determine the applicable law.

8. **Application of the PICC in Cases of Simultaneous Choice:** When there is a simultaneous choice of multiple laws, the PICC can facilitate the determination of the applicable law in these complex scenarios.

9. **Application to the Determination of the Law Applicable to the Substance of a Dispute:** The PICC are observed in the context of determining the applicable law in specific disputes, providing a basis for resolving the case in line with international principles.

In summary, the PICC offer a valuable resource in the arbitration process, particularly when national laws are insufficient or unclear. They provide a framework for resolving disputes in a way that is consistent with international standards and principles.
Where arbitrators are not acting as amiables compositoris, they are in principle bound to apply a given municipal law unless the parties' arbitration agreement allows the application of private rules. Certain laws permit, and may even require, arbitrators to apply 'rules of law' instead of (or in addition to) a particular domestic law. 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. 2

Arbitrators' freedom to apply 'rules of law' may be stated explicitly in the lex arbitri. If that is not the case, this power may be given implicitly as the lex arbitri allows parties to submit their dispute to private sets of arbitration rules that allow arbitrators to apply 'rules of law' rather than 'laws' only. 3

Article 28(1) of the UNCITRAL Model Law (as well as the national laws based on it, such as § 1051 German Code of Civil Procedure) allows parties to designate 'rules of law', while arbitral tribunals may only apply 'a law' where there is no choice of law by the parties (Art 28(2) of the UNCITRAL Model Law). German authors overwhelmingly interpret § 1051 of the Code as precluding arbitrators from applying 'rules of law' to the merits of a dispute, unless they are explicitly empowered by the parties. 4

3 Arbitrators' freedom to apply 'rules of law' may be stated explicitly in the lex arbitri. If that is not the case, this power may be given implicitly as the lex arbitri allows parties to submit their dispute to private sets of arbitration rules that allow arbitrators to apply 'rules of law' rather than 'laws' only. 3

4 Arbitrators' freedom to apply 'rules of law' may be stated explicitly in the lex arbitri. If that is not the case, this power may be given implicitly as the lex arbitri allows parties to submit their dispute to private sets of arbitration rules that allow arbitrators to apply 'rules of law' rather than 'laws' only. 3

5 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

6 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

7 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

8 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

9 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

10 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

11 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

12 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

13 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

14 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

15 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

16 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

17 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

18 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

19 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

20 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

21 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

22 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

23 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

24 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

25 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

26 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

27 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

28 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

29 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

30 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

31 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

32 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

33 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

34 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

35 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

36 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

37 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

38 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

39 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

40 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to

41 Legislation is found in Australia. Many authors outside Germany, in contrast, have argued that even where the PICC does not addresseffectsofillegalityand referred to
7 Assuming that the lex arbitri principle accepts the ability of an arbitral tribunal to apply the PICC, they are available (according to the self-proclaimed scope of application stated in the Preamble) in the following circumstances: where the parties have agreed that their contract should be governed by it (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); 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 arbiters where the parties have chosen another system of law is subject to debate (see paras 39–42 below).

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

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

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

9 Parties may have specifically agreed on a choice of law clause in favour of the PICC. They may even have excluded the application of all or some national laws. Where the lex arbitri allows parties to resort to 'rules of law' (as opposed to settled on the basis of the PICC alone because the PICC are commonly characterized as rules of law for the purpose of provisions authorizing the application of such rules.

Even countries such as Brazil, where the choice of law in favour of non-state law is 'still taboo' before the national courts, authorize the designation of the PICC in the context of international arbitration. However, it is true that the choice of the PICC by the parties in the contract remains exceptional and, in order to facilitate their designation, UNIDROIT has prepared ‘Model Clauses’ on the Use of the UNIDROIT Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice. It is doubtful whether this will substantially increase the number of direct designations of the PICC by parties to commercial contracts. If properly made, a choice by the parties to apply the PICC to the merits of their dispute will regularly be implemented by arbitral tribunals (in contrast to municipal courts) whether that choice is expressed in a contract or in the course of arbitration proceedings. The agreement between the parties may be explicit or implicit. Arbitral tribunals may encourage parties to consider the application of the PICC in the dispute. If the parties restrict the application of the PICC to specific circumstances, the arbitral tribunal should not rely on the PICC outside the framework set by the parties.

It has been argued that Art 3(1) of the Rome I Regulation (which requires the choice of a national law) might block the application of the PICC in ad hoc arbitration proceedings seated in the EU. However, the Rome I Regulation does not apply to arbitration (Art 1(2)(b) of the Regulation).

Use of the PICC in arbitration
(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 (2010) (except as to Article 1.7), supplemented when necessary by the law of [jurisdiction XY]. 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. 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, eg if the latter is meant to apply to a breach of contract and the former to the amount of compensation for that breach).

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 or may have derogated from the PICC in favour of domestic law in accordance with Art 1.5. They may also have chosen to apply domestic law to issues not covered by the PICC, as recommended by the Official Comment. In any event, the mandatory provisions of domestic law will prevail (Art 1.4).

Parties may restrict the application of the PICC merely to interpret or supplement the domestic law applicable to the merits (see paras 46–57 below). 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.

Problems of interpretation may arise over clauses restricting the application of the PICC. Unless the restriction is accompanied by an expression 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

33 See below, Introduction to Chapter 6 of the PICC para 4.

34 Arbitral Award 2004, ICC case no 8831 (1998) 125 Claren 1041 (counsel). Unlike 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.

35 OffCentre Art 1.4, Off Cmt to Art 1.4, Off Cmt 4b to Preamble, p 4: see also Commission on Commercial Law and Practice of the ICC (n26 below).

36 See below, Introduction to Chapter 6 of the PICC para 4.


39 Off Cmt 4a to Preamble, p 5, and MB Bonell, 'UNIDROIT Principles and the Lex Mercatoria' in TE Carbonianni (ed), Lex Mercatoria and Arbitration (1998) 249, 254; see above, Preamble 1 para 32 and see also paras 30–35 below.

40 For an illustration, see Arbitral Award 21 April 1997, Ad hoc arbitration (Paris), Unilex.
legal systems, but to select those which had the most persuasive value and/or appeared to be particularly well-suited for cross-border transactions.\(^5\) 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.\(^6\) In practice, what the parties meant by referring to abstract concepts is rarely obvious; it is a fair assumption that many of the drafters of these types of clause would themselves be at a loss to explain what they understood precisely by these notions. On the other hand, what the parties intended to exclude is often clearer. Usually, one or more of the following concerns are instrumental in the insertion of this language. First, the parties wish to escape the vagaries of local law, whether real or imaginary, and increase the predictability of the proceedings and outcome of any dispute. Secondly, they wish to raise the contract from a domestic to an international level, and to ensure that it is governed by rules that reflect an international approach rather than a local or parochial one. Thirdly, they cannot agree, for whatever reason, on the application of a particular national law.

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 to an expression or evidence of transnational law.\(^7\) This is confirmed by abundant case law.\(^8\) Arbitrators dislike working in a vacuum\(^9\) and, when faced with choice of law clauses referring to the dispute general principles (or the like), they appreciate being able to decide on the basis of a tangible set of rules such as the PICC,\(^10\) while sticking to general principles or the *lex mercatoria* for matters not covered by the PICC.\(^11\) For some, even a vague reference to general principles warrants the application of the PICC if the parties did not make any other choice of law.\(^12\)

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.\(^13\) An arbitral tribunal may consider that the PICC should be applicable as part of the general principles mentioned in the clause.\(^14\) Parties may even specifically choose to combine the PICC and a domestic law, either in a choice of law clause in their contract\(^15\) or during the course of the proceedings.\(^16\) 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 matter of general principles of international law.
or transnational law. In such rare events, an arbitral tribunal should determine the relevant general principles without resorting to the PICC, although it may eventually conclude that these general principles are also reflected in the PICC. However, a negative choice should not be assumed lightly.

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

Usages are not mentioned in the Preamble. Indeed, they should be distinguished from general principles of law, as evidenced by their separate treatment in Art 1.9. A usage is merely a prevailing practice established among parties to a contract or actors in the same industry. Usages are part of the contract insofar as it must be assumed that the parties agreed to comply with usages in their own trade; as such, usages normally prevail over merely a prevailing practice established among parties to a contract or actors in the same industry. Usages are part of the contract, not as rules of law. References to 'usages' in arbitration agreements or arbitration rules (such as Art 33(3) of the Swiss Rules and Art 21(2) of the ICC Rules) therefore should not be interpreted as directions to apply the PICC. The better approach, even if not systematically adopted in case law, is to determine the rules of law where there is no express choice of law 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'. The Swiss Rules of International Arbitration appear to restrict the discretion of the arbitral tribunal by requiring it to apply 'the rules of law with which the arbitral tribunal heard the parties, applied the CISG together with the PICC. The arbitral tribunal determined that the procedural law at the seat of arbitration (Singapore) is to be applied to the merits and the arbitral tribunal decided to apply the PICC, pointing out that they 'may provide a more precise set of rules'.

Arbitral Award November 1996 (Paris), ICC case no 8873 (1998) 125 Clunet 1017, (1999) 10(2) ICC Int'l Ct Arb Bull 72, 75. Unlike in such exceptional cases, an arbitral tribunal should not apply the PICC merely on the basis of the parties' silence; an arbitral tribunal should not apply the PICC in such cases without an express choice of law clause but has instead applied references to international trade usages, including the INCOTERMS 1990; the arbitral tribunal found that the dispute was to be resolved on the basis of the contract, supplemented by the applicable local or national law, art 32(1) of the UNCITRAL Arbitration Rules. See also Arbitral Award 30 September 2009, ICC case no 2122 (2014) 143 Clunet 193 (non-performance). In Arbitral Award 2006, ICC case no 13450 (2014) 141 Clunet 193 (non-performance). In Arbitral Award 2003, ICC case no 12040, cited in Jolivet (n 21 above) 907-908. Bousser (n 28 above) 43-45.
the dispute has the closest connection.\textsuperscript{79} Arguably, this is more restrictive, since the law with the closest connection may not be the most appropriate one, for example if it invalidates the contract.\textsuperscript{80} Moreover, the closest connection test, which is a technical conception of traditional conflict of laws rules, will almost invariably lead to the application of national law instead of a non-national rule of law.\textsuperscript{77} Other arbitration laws and arbitration rules provide that where the parties have not agreed on the applicable law, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.\textsuperscript{81} In such cases, the arbitral tribunal has flexibility in choosing the conflict of law rules but has limited discretion in deciding the applicable law.

26 Where both the lex arbitri and the applicable rules of arbitration grant an arbitral tribunal discretion to apply the rules of law of its choosing, the arbitrators are free to apply the PICC. For some authors, arbitrators should only apply transnational rules if the parties explicitly agree to do so. Others advocate that arbitral tribunals should consider national laws and transnational rules to be on a same footing when making a default determination of the governing law.\textsuperscript{78} A more radical stance is that the very nature of international arbitration calls for the application of neutral international norms such as the PICC whenever the parties refrain from making an express choice of law: using neutral norms such as the PICC may be an excellent way to ‘meet the parties’ legitimate expectations’.\textsuperscript{82} As a result, they see the application of the PICC where there is no choice of law clause at almost automatic. Yet it is doubtful whether the drafters of the PICC intended to go that far.\textsuperscript{75} Even if the PICC may be applied theoretically, the arbitral tribunal should be reluctant to do so spontaneously.\textsuperscript{83} 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.\textsuperscript{84} Two instances are identified in which, exceptionally, the PICC—rather than a domestic law—may be applied in the absence of a choice of law clause. First, if the contract presents connecting factors with many countries, none of which show a sufficiently close connection to justify the application of one specific domestic law. The PICC may then be the
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.

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.32 Likewise, an arbitral tribunal might wish to apply the PICC together with international uniform law, domestic law, or international trade usages.33

(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.34 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.35

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.36 Yet PICC is a subsidiary source of law. The parties then bind their pleadings on the PICC. The tribunal reached its decision by applying the PICC and some general principles codified under both Belgian law and Spanish law. The award was confirmed by the Swiss Federal Tribunal (34)37/2002. The application of the PICC was challenged, Arbitral Award 2004, ICC case no 12889, Unilex, Arbitral Award 31 January 2003, Arbitration Court of the Lausanne Chamber of Commerce, Unilex. In Arbitral Award 2006, ICC case no 13400 (2014) 141 Chan 193 (unreported), the arbitration tribunal invited the parties to consider the application of the CISG supplemented by the PICC.

39 Off Cam As to Preamble, p 5; Arbitral Award, Stockholm Chamber of Commerce case no 11/1999 (a 87 above), also in L. Mihaltsis, The UNIDROIT Principles Applied as "Most Appropriate Rules of Law" in a Swedish Arbitral Award (2003) ULR 631. See para 12 above; see also, Preamble para 52

40 Arbitral Award March 1999 (Zurich), ICC case no 9117 (1997) 1902 ICC Int'l Arb Bull 96, 98: there was no choice of law clause; the tribunal applied the terms of the contracts, the CISG, and 'usage of trade' it then applied the PICC as evidence of these usages. See also Arbitral Award August 1999, ICC case no 7519 (2001) 1225 ICC Int'l Arb Bull 84, 87, Unilex: the tribunal relied on rules of interpretation in Arts 1.6 and 4.5 PICC when determining whether the parties had agreed on an arbitration clause; see also the Partial Arbitral Award 2002, ICC case no 11661, cited in Jellinek (a 21 above) 135: the contract was silent as to the applicable law and the arbitral tribunal based its decision on the PICC but applied French law as an additional source of law.

41 eg Münster (a 93 above) 637-639; Lilleur (n 27 above) 82-83; E Schäfer et al, L'arbitrage de la Chambre de commerce international en pratique (2002) 107.

42 Arbitral Award, ICC case no 10422 (a 59 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 general principles of law in accordance with the terms of the contract, the CISG, and rules of 'usage of trade', and in particular the UNIDROIT Principles, since they seem to be a faithful transcription of rules admitted to be applicable in international contracts between traders engaged in international trade.

43 From Partial Arbitral Award 2002, ICC case no 12111, Unilex: clause relating to the applicable rules of law simply stated that 'the present contract is governed by international law'; see also Final Award, unreported, ICC case no 14551 (2012) XXXVI YB Comm Arb 62: the arbitral clause provided for arbitration in Switzerland which would 'proceed in accordance with international law: the tribunal, noting that '[b]oth Parties have invoked the UNIDROIT Principles as internationally recognized principles of law', applied the PICC.

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

38 The simultaneous designation need not result in the inoperability of the choice, provided that the scope of application of each domestic law is clearly distinguishable. Parties may provide for a split choice of law (dipage) whereby certain matters are governed by a specific law whilst others are subject to another law. In ICC case no 94/79, 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.\textsuperscript{104} The parties may also expressly opt for the application of only some of the provisions of the PICC to one of the issues raised by their dispute.\textsuperscript{105}

4. Choice of law other than the PICC

39 The Preamble does not foresee the application of the PICC as the lex contractus where parties agree on a specific choice of law clause in favour of a domestic law or an international instrument. The silence of the Preamble in that respect is not surprising: as mentioned above, under virtually all arbitration laws and rules, an arbitral tribunal is bound by any choice of law made by the parties. In that regard, it is well accepted that a common reference to the same law in the submissions of the parties amounts to a choice of law,\textsuperscript{106} at least if no qualification or reservation is made. Hence, where the parties have specifically selected a domestic law or any other set of rules, the arbitral tribunal should normally not apply the PICC as the lex contractus.\textsuperscript{107} The tribunal may, however, decide to rely on the PICC as a means to interpret or supplement the applicable law (see paras 46–57 below).

40 It is conceivable that, in some limited situations, an arbitral tribunal may consider that certain provisions in the applicable law do not fit the context of international commercial contracts.\textsuperscript{108} The tribunal may then be inclined to disregard inappropriate or parochial principles of effective interpretation which is prevalent in international arbitration.\textsuperscript{103}

102 Arbitral Award 5 November 2002, ICAC/UC 2002 case no 112/2002. Unlike: 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 principle of lex mercatoria.

103 Fouchard et al (n 1 above) 835–836.


105 Arbitral Award no 126/90, cited in (1994) PC-Mise 19, p 19 (Makower): the PICC were used for the interpretation of the chartered party clauses.

106 See above Preamble I paras 100–103.

107 See above Preamble I paras 100–103.

108 See above Preamble I paras 100–103. In contrast: 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 ‘foreign arbitration’. Commission on Commercial Law and Practice of the ICC (n 26 above) 21 refers to the possibility of “correcting” or “integrating” inadequate domestic law through the reference to general principles, the PICC, trade usages, but only to the extent that this is admissible under the applicable domestic law.

41 Use of the PICC in arbitration

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.\textsuperscript{109} In some cases, it might be difficult for an arbitral tribunal or the parties to determine the content of the provisions of the applicable law.\textsuperscript{110} The use of the PICC as a substitute for domestic law in such cases was explicitly mentioned in the Preamble of the 1994 edition of the PICC. It has disappeared from the Preamble, but not from the scope of the 2004 or 2010 editions of the PICC, as mentioned in the section of the Official Comment dealing with ‘other possible uses of the PICC’.\textsuperscript{111} The scenario on the minds of the drafters was one where establishing the content of the applicable law proves impossible or excessively burdensome.\textsuperscript{112}

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

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

110 See above Preamble I paras 100–103.

111 See above Preamble I paras 100–103.


113 (1994) PC—Max 19, pp 23–24 (especially Bouillet: ‘the very last resort’).

114 EM Devesch and E Forro-Bullo, ‘Les Principes UNIDROIT relatifs aux contrats de commerce international: une introduction’ [1998] Sem jud 569, 669: the arbitral panel’s right to apply non-national rules is... in their view much more far-reaching where the parties have not made any 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 para 53–57 below.

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

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

43 If an arbitral tribunal finds that the PICC may not be relied upon as the applicable ‘rules of law’, they may nevertheless be used to complement the law found to be applicable. This, as indicated by paragraph 5 of the Preamble, may be either the provisions of international uniform instruments (see paras 44–45 below) or a specific domestic law (see paras 46–57 below). In theory, the complementary function of the PICC is no different in arbitration than in state courts, so the relevant observations made on this topic earlier in this Commentary are also pertinent in the context of arbitration. In practice, arbitral tribunals rely much more frequently on the PICC for complementing the applicable law than do state courts. However, in recent years the number of domestic courts using the PICC to supplement or interpret the applicable law has considerably increased. 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 law of the forum’. 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. The issue is not addressed in the CISG. Other authors consider that the general principles governing the PICC do not necessarily equate to those of the CISG, which is referred to for less relational cross-border sales of goods. The provisions of the PICC have a broader scope of application than those contained in the CISG. Therefore, courts from jurisdictions adopting a ‘formal reasoning approach’ (reflected in the CISG) would have difficulties in applying the PICC to interpret in a broader way the national legislation incorporating the CISG. In line with the above, several authors have suggested that the PICC reflect international trade rules that can therefore be applied to interpret or supplement international uniform law such as the CISG. Finally, as a compromise, it may be possible to use the PICC to supplement CISG only as they help in clarifying or supporting already existing general principles underlying the Convention.

As a first step, arbitral tribunals will have to ensure that the issue at hand is covered by the CISG. At that stage, the PICC can be used to shed light on the CISG. The PICC have also been used to interpret or supplement other instruments of international uniform law, including the Uniform Law on the Formation of Contracts for the International Sale of Goods of 1 July 1964 (ULF), the Principles of European Merchanomic Doctrine and the UNIDROIT Principles of International Commercial Contracts (1997) 38 Law & Policy in Int'l Business 945, Arbitral Award 1995 (Basel), ICC case no 3128, cited in Berger (n 27 above) 136–137, 157. As a second step, the tribunal must show that the relevant provision of the PICC is not included in the CISG or ULF, which would amount to applying them together with the CISG as a sort of lex mercatoria, even when the CISG is not applicable at all. As a third step, the tribunal must show that the relevant provision of the PICC may be considered as an expression of a general principle underlying the provision of the CISG. Therefore, courts from jurisdictions adopting a ‘formal reasoning approach’ (reflected in the PICC) would have difficulties in applying the PICC to interpret in a broader way the national legislation incorporating the CISG. In line with the above, several authors have suggested that the PICC reflect international trade rules that can therefore be applied to interpret or supplement international uniform law such as the CISG. Finally, as a compromise, it may be possible to use the PICC to supplement CISG only as they help in clarifying or supporting already existing general principles underlying the Convention. As a first step, arbitral tribunals will have to ensure that the issue at hand is covered by the CISG. At that stage, the PICC can be used to shed light on the CISG.
Use of the PICC in arbitration

In this respect, it usually does not matter to the arbitral tribunal whether the domestic law is applicable to the contract by virtue of an agreement between the parties (e.g. 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 upon which they do not 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.

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.

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. Arbitral tribunals sometimes consider that the PICC can be taken into account as part of the applicable trade usages.

This is questionable, since usages must be distinguished from transnational principles (see para 22 above).

(b) Use of the PICC as 'interpretor' or 'supplement' the applicable domestic law

It is not entirely clear from the terms of the Preamble what the drafter had in mind when they stated that the PICC may be used to supplement 'domestic law'. There is clearly some overlap with the use of the PICC as a substitute for domestic law, which is discussed above (see paras 41-42 above). This is supported by the illustrations in the Official Comment, namely where the arbitral tribunal cannot find a proper solution under the domestic law.
selected domestic law either because it does not address the issue or because it leads to a number of equally valid options.142

Where the domestic law itself refers to general principles as a source of law or a provision for the interpretation of its provisions, the PICC—to the extent that it qualifies as general principles—become a means to interpret rather than simply supplement the domestic law.143 The same applies where the contract expressly calls for the application of the PICC as a means to interpret the designated domestic law.

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.144 The assertion that arbitral tribunals should necessarily interpret or supplement their domestic law so as to be able to apply the PICC is not necessarily right. There is no obligation to interpret the domestic law in order to apply the PICC. The arbitral tribunal determines what is to be applied. See also Dessemontet (n. 6 above) 165; tribunals faced with gaps in Swiss law regarding the determination of damages referred to Section 7.4 of the PICC to calculate the damages in specific situations not covered by the applicable Swiss provisions. See also Arbitral Award 19 April 2008, ICC case no 96; the arbitral tribunal, having found no specific regulation in applicable Russian civil law dealing with a claim for specific performance of an obligation to deliver the requested documentation, also referred to the UNIDROIT Principles. Article 7.4 of the PlCC to calculate the damages in specific situations not covered by the applicable Swiss provisions. See also Arbitral Award 21 December 2005, Adhoc arbitration (Brazil), Unilex; 'there could be no more useful framework for applying and judging the parties' choice of law clause but merely an issue of contractual interpretation. The arbitral tribunal had made its decision with the benefit of the broadly applicable UNIDROIT Principles'. Arbitral Award 2003, ICC case no 134/2002, Unilex.

The assertion that arbitral tribunals should necessarily interpret or supplement their domestic law so as to be able to apply the PICC is not necessarily right. There is no obligation to interpret the domestic law in order to apply the PICC. The arbitral tribunal determines what is to be applied. See also Dessemontet (n. 6 above) 165; tribunals faced with gaps in Swiss law regarding the determination of damages referred to Section 7.4 of the PICC to calculate the damages in specific situations not covered by the applicable Swiss provisions. See also Arbitral Award 19 April 2008, ICC case no 96; the arbitral tribunal, having found no specific regulation in applicable Russian civil law dealing with a claim for specific performance of an obligation to deliver the requested documentation, also referred to the UNIDROIT Principles. Article 7.4 of the PlCC to calculate the damages in specific situations not covered by the applicable Swiss provisions. See also Arbitral Award 21 December 2005, Adhoc arbitration (Brazil), Unilex; 'there could be no more useful framework for applying and judging the parties' choice of law clause but merely an issue of contractual interpretation. The arbitral tribunal had made its decision with the benefit of the broadly applicable UNIDROIT Principles'. Arbitral Award 2003, ICC case no 134/2002, Unilex.

On the other hand, a comparative basis and made reference to the PlCC for that purpose, claiming that 'there could be no more useful.!' The assertion that arbitral tribunals should necessarily interpret or supplement their domestic law so as to be able to apply the PICC is not necessarily right. There is no obligation to interpret the domestic law in order to apply the PICC. The arbitral tribunal determines what is to be applied. See also Dessemontet (n. 6 above) 165; tribunals faced with gaps in Swiss law regarding the determination of damages referred to Section 7.4 of the PICC to calculate the damages in specific situations not covered by the applicable Swiss provisions. See also Arbitral Award 19 April 2008, ICC case no 96; the arbitral tribunal, having found no specific regulation in applicable Russian civil law dealing with a claim for specific performance of an obligation to deliver the requested documentation, also referred to the UNIDROIT Principles. Article 7.4 of the PlCC to calculate the damages in specific situations not covered by the applicable Swiss provisions. See also Arbitral Award 21 December 2005, Adhoc arbitration (Brazil), Unilex; 'there could be no more useful framework for applying and judging the parties' choice of law clause but merely an issue of contractual interpretation. The arbitral tribunal had made its decision with the benefit of the broadly applicable UNIDROIT Principles'. Arbitral Award 2003, ICC case no 134/2002, Unilex.
by the applicable domestic law or arbitration rules to consider general principles (of which the PICC are used as an expression).

56 There are numerous examples of arbitral awards containing obiter dicta to the effect that a particular solution in domestic law reflects a transnational consensus evidenced by the PICC. Thus, arbitral tribunals have used the PICC to provide guidance regarding rules of interpretation, modification of contracts, the principles of good faith, nominalism, price determinability, quantification of losses, loss of profit, mitigation of damages, hardship, the right to terminate a contract, and error and fraud. It has been said that this use of the PICC has an "educational purpose" to the extent that "it reassures any party that may have been opposed to the application of the municipal law applied... and it promotes the UNIDROIT Principles as a body of rules whose role is naturally to be applied to international contracts." The PICC have also been used to support decisions of tribunals on the agreement of the parties regarding the law applicable to the contract, and even on whether a valid, binding contract existed.

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. Yet, in the context of international arbitration, this may prove important and very useful in order to 'meet the legitimate expectations of the parties'. Parties themselves try to add strength to their submissions by stating that the PICC provide a solution similar to that reached under the applicable lex contractus.

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

With respect to the 1994 edition of the PICC, there remained doubt as to whether the enumeration of potential uses of the PICC in the Preambule was exhaustive. 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.
reasons that in the many arbitrations brought under bilateral investment treaties, mostly under the ICSID Convention, the PICC were rarely invoked or applied by the arbitral tribunals. Remedies are available under most investment protection treaties for breaches 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 reparations claims after the first Gulf War, referred to the PICC as an expression of general principles, relating to force majeure issues amongst other things.

However, if a state participates—and is itself 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, non-performance, compensation in case of breach of treaty obligations 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). neuen, bursts271

A number of more recent awards have referred to the PICC, however (eg Bernardini, 'UNIDROIT Principles and International Investment Arbitration' (2014) ULR 561; G Coetzer and M de Beaufils, 'The Reference of the UNIDROIT Principles in Investment Arbitration' (2004) ULR 570). In Joseph Charles Lemoine v Ukraine, ICSID case no ARB/06/18, Decision on Jurisdiction and Liability (44 below) the settlement agreement provided that the applicable law should be determined in accordance with Art 54 of the ICSID Additional Facility Arbitration Rules and ‘gives the parties implied negative choice of any municipal legal system, the Tribunal [found] that the most appropriate decision [was] to submit the Settlement Agreement to the rules of international law, and within these, in particular regard to the UNIDROIT Principles’ at [111] (emphasis added); see also Joseph Charles Lemoine v Ukraine, ICSID case no ARB/06/18, Award, 18 September 2006; PSEG Global Inc and others v Republic of Turkey, ICSID case no ARB/03/25, Decision on Jurisdiction and Liability, 4 June 2004; PSEG Global Inc and others v Turkey, ICSID case no ARB/02/25, Award, 15 January 2007; African Holdings Co of America Inc and Societe Africaine de Construction au Congo SARL v Republic of Democratic Republic, ICSID case no ARB/08/12, Award and Dissenting Opinion, 30 July 2010; Amit Corp v Argentine Republic, ICSID case no ARB/07/37, Award, 28 March 2011; El Paso Energy International Co v Argentine Republic, ICSID case no ARB/05/15, Award, 31 October 2011 (commented upon by AM Steingruber, 'El Paso a Argentine Republic: UNIDROIT Principles to the Fore in International Energy Contracts as a Reflection of “General Principles of Law Recognized by Civilised Nations” to the Context of an Investment Treaty Claim’ (2013) ULR 509). The Rio Tinto Group PLC v Republic of El Salvador, ICSID case no ARB/06/18, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012; see also above, preamble para 29.


Arbitral Award, ICC case no 14381/2011 XXXVII Yrb Comm Arb 155, 164–6: a US joint venture company concluded a production sharing agreement with the W which provided for arbitration of ‘any dispute’ that arose. However, it was not until more recently that the PICC was used in this context. The United Nations Compensation Commission, in a UN body sitting in Geneva and adjudicating war reparations claims after the first Gulf War, referred to the PICC as an expression of general principles, relating to force majeure issues amongst other things.

However, if a state participates—and is itself 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, non-performance, compensation in case of breach of treaty obligations 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).
or contractual obligations, and the impact of unforeseen events on the treaty or contract. It is therefore conceivable that the PICC may be applied or invoked in appropriate circumstances in the context of a public international law dispute. In fact, the PICC have been well received not only in arbitrations opposing private parties to states but also in arbitration proceedings involving private parties and international organizations.

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

DIRC and two US investors. The arbitral tribunal invoked Art 7.1.1 PICC to conclude that non-performance includes defective or late performance. In Pac Rim Cogas LLC v Republic of El Salvador, Decision on the Respondent's Jurisdictional Objections (n 179 above), the ICSID tribunal mentioned the decision above and the reference to Art 7.1.1 PICC to conclude that El Salvador's alleged violation of the Dominican Republic—Cayman Islands—US Free Trade Agreement occurred before the claimant's change of nationality by the respondent's choice of law clause but the parties agreed on the application of 'generally accepted principles of international law'. The arbitral tribunal referred to Art 7.1.1 PICC to reject the claimant's argument relating to the respondent's non-compliance with its obligations under the arbitration agreement.

See ECreevo BV v Poland, Partial Award 19 August 2005, Ad hoc arbitration, Under: the Dutch-Polish Bilateral Investment Treaty provided that 'the tribunal shall decide on the basis of respect for the law, including... the universally acknowledged rules and principles of international law'. In denying the claimant's assertion of exception of non-performance, the tribunal referred to Art 7.1.3 PICC as an 'example' which illustrates that each exception only applies to simultaneous performance of particular obligations. The tribunal went on to conclude that 'such is exactly the case with Article 1 of the First Addendum'. See also Cleves-Trisco v Ecuador, Ad hoc arbitration (The Hague, 26 March 2010), the applicable law in the majority of cases, the Bilateral Investment Treaty and any relevant provisions of other sources of international law (at [119]). The respondent cited the PICC to refute the claimant's assertions of damage for 'loss of chance'. The tribunal agreed with the respondent and stated that the 'loss of chance' principle does not have wide acceptance across legal systems such that it can be considered a 'general principle of law recognized by civilized nations' since the principle is applied in situations in which there exists a harm whose existence cannot be disputed but which it is difficult to quantify, as noted in the commentary to the UNIDROIT Principles cited by the Respondent' (at [187]).

In an ad hoc arbitration under the UNCITRAL Arbitration Rules, cited in Briner (n 178 above), respondent Canadian companies to the UN relating to a contract for the transport of UN personnel and military personnel on behalf of the UN, the arbitral tribunal applied the PICC. The contract did not contain any choice of law clause but the parties agreed on the application of 'generally accepted principles of international commercial law'. Taking into account the international context of the case, the PICC were considered to provide the more appropriate international guideline, in defining the generally accepted principles of international commercial law under which the contract was governed. In an ad hoc arbitration with assets in New York between the UN and a European company concerning a contract for the supply of goods to connections with a peacekeeping operation in Africa, the contract was silent as to the applicable law but the parties agreed to the application of the CISG and the PICC. The parties chose to settle their dispute (www.unilex.info/case?cf=690699); Ben Hamida (n 178 above) 1235-1242.

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

Arbitral awards are subject to review by state courts in annulment or enforcement proceedings. The grounds for annulment are set out in the lex arbitri at the place of arbitration. The prerequisites for the enforcement of an award, on the other hand, are determined by the law of the place where the enforcement is sought. In most countries, this is the New York Convention.195

Most national arbitration laws, as well as the New York Convention, allow only very narrow grounds for annulment or refusal to enforce arbitral awards. In essence, they are limited to violations of procedural or substantive public policy.196 In order to offend public policy, an award—in both its result and effect—must be incompatible with fundamental principles of justice or morality, or must have been made in proceedings that disregarded basic rules of due process.197

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).

195 (1994) PCI—Misc 19, p 26 (Buswell: the PICC are 'an expression of ratio scripta, of fair rules of behaviour'); Lande: 'someone asked to act as amiable compositeur would [not] be expected to use the [PICC, but rather] the most expedient solution', Brazil: 'under the Argentine conception of amiable compositeur, award rendered on the basis of UNIDROIT Principles by amiable compositeur might be appealable to the court'); 196 eg Arbitral Award 10 December 1997, Ad hoc arbitration (Buenos Aires) (1998) ULR 178, 178–179, 1979 Vienna Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1954). 197 For the history and development, see J Kleinheisterkamp, 'Recognition and Enforcement of Foreign Arbitral Awards' in R Wallumrød (ed), Max Planck Encyclopedia of Public International Law (2008). 198 International Law Association, Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards (2002) Rule (1) 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 Poujade and Bruson (n 1 above) 856–861 on enforcement proceedings and 736–759 on annulment proceedings.

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

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

(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.

Where the parties have chosen a domestic law (other 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 disregarded a domestic law and apply another domestic law instead.

In some jurisdictions, an award disregarding the applicable law clause may be set aside or may not be recognized and enforced.198 In others, such as Switzerland, arbitral awards will not be annulled on this ground since, in substance, the only ground to set aside an award is violation of public policy.199 The application of the PICC, in lieu of the designated domestic law, would constitute a violation of public policy only if, as a result of applying the PICC, the outcome of the award is substantially different than it would have been under the otherwise applicable domestic law or violates a general principle of such domestic law (see para 79 below).200 It would seem to be even more difficult to challenge an award where the arbitrators have based their award on both the terms of the contract and the PICC.201

For situations where the parties have not chosen any law and the arbitrators decide to apply the PICC, a crucial case is Norsol v Pakhalh Tzaaret, in which an ICC arbitral tribunal sitting in Vienna decided a dispute based on the terms of the contract and the lex mercatoria alone. The award was challenged and a lower Austrian court set it aside on the basis that the arbitrators should have determined the applicable law. The Austrian Supreme Court reversed the decision and held that the mere fact that the award was exclusively based on the lex mercatoria was not objectionable since the arbitrators had not acted ultra vires by applying a non-national legal system, nor had they acted as amiable compositeurs or violated mandatory rules of Austrian law.202 The Norsol solution has since been widely admitted in other jurisdictions. In Switzerland, the Federal Tribunal will not verify how
the arbitrators determined or applied the applicable law unless the result of the award is contrary to international public policy.\textsuperscript{203} In France, the Court 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."\textsuperscript{204} In Germany, in contrast, such liberty on the part of the arbitrators is a ground for setting aside the award.\textsuperscript{205}

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

(b) Recognition and enforcement of awards

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

Article V(1)(c): The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or 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 so not 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].

Some authors advocate the view that Article V(1)(c) of the New York Convention can be invoked as an objection to enforcement where the tribunal failed to apply the rules of law chosen by the parties or acts as "amicable compositeur" or in equity without this having been agreed by the parties.\textsuperscript{206} However, the prevailing view is that this interpretation considerably stretches the text of Article V(1)(c).\textsuperscript{207} In relying on the PICC, arbitrators do not exceed the scope of their mission as envisaged by Article V(1)(c) of the New York Convention.\textsuperscript{208} Nor can they be blamed for deciding in fine petita or having failed to determine the applicable law as contractually agreed, for instance, by decisions of the French courts.\textsuperscript{209} It therefore appears that a tribunal may refer to legal principles not specifically agreed by the parties and may also decide not to apply a specific national law in the absence of agreement between the parties. However, it is unclear whether an award which actually fails to apply a law that was agreed by the parties is enforceable.

It is arguable that failing to apply the law agreed by the parties would not constitute a ground for resisting enforcement under Article 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 Article 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 Article V(1)(d) was limited to cases where the procedural violation caused substantial prejudice to the party resisting enforcement.\textsuperscript{210} Even though the facts in that case were quite specific, the decision indicates that a high threshold must be met for a procedural violation to justify refusal to enforce an award under the New York Convention.\textsuperscript{211}

When the arbitral tribunal fails to apply the substantive law agreed by the parties, the arbitral procedure is not "in accordance with the agreement of the parties" (Article V(1)(d)) because the parties' choice of law was in conflict with the conclusions of the arbitral tribunal.\textsuperscript{212} The application of such conflict-of-law rules and thus applies the incorrect law to the merits, will normally not be sufficient: \textquote{[u]nconflict-of-laws cases do not fall under the scope of Article V(1)(d) or the chosen by the parties, this does not constitute an excuse for the arbitrator of his authority within the meaning of Article V(1)(d).}\textsuperscript{213}

\textsuperscript{203} Scherer (in 27 above) 115: 'In the framework of a challenge of the arbitral award, the court will usually not, or not merely, examine whether the arbitrators have 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.'


\textsuperscript{205} See para 4 above.


\textsuperscript{207} 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." In Germany, in contrast, such liberty on the part of the arbitrators is a ground for setting aside the award.

\textsuperscript{208} It is arguable that failing to apply the law agreed by the parties would not constitute a ground for resisting enforcement under Article 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 Article 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 Article V(1)(d) was limited to cases where the procedural violation caused substantial prejudice to the party resisting enforcement. Even though the facts in that case were quite specific, the decision indicates that a high threshold must be met for a procedural violation to justify refusal to enforce an award under the New York Convention.

\textsuperscript{209} When the arbitral tribunal fails to apply the substantive law agreed by the parties, the arbitral procedure is not "in accordance with the agreement of the parties" (Article V(1)(d)) because the parties' choice of law was in conflict with the conclusions of the arbitral tribunal. The application of such conflict-of-law rules and thus applies the incorrect law to the merits, will normally not be sufficient: "[u]nconflict-of-laws cases do not fall under the scope of Article V(1)(d) or the chosen by the parties, this does not constitute an excuse for the arbitrator of his authority within the meaning of Article V(1)(d)."
Convention at all.219 However, the cases do not address the situation where, instead of, or in addition to applying the law agreed by the parties, the tribunal also refers to other legal principles (see para 77 above).

The violation of public policy (of the state where enforcement is sought) is a ground to refuse enforcement under Art VI(2)(b) of the New York Convention. The application of the PICC instead of a national law will not generally be characterized as such a violation unless its application leads to a result that is contrary to public policy.220 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.221 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.

Most legal systems (as well as the PICC, see Art 1.4) eschew the rule that arbitral tribunals should take into account the relevant mandatory rules of laws other than those applicable to the dispute. However, a failure to apply mandatory provisions of domestic law does not automatically qualify as a violation of public policy that warrants the refusal of recognition and enforcement of the award. The enforcement of the award should not be denied merely because the arbitral tribunal failed to apply a mandatory provision, unless the provision formed part of the international or national public policy of the country in which enforcement of the award is sought.254 Therefore, a violation or non-application of a mandatory provision of a domestic law is not necessarily tantamount to a violation of public policy.217

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.216

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

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 doctrine of the PICC did not have in mind forum selection clauses or arbitration agreements.222 Nevertheless, in practice, arbitral tribunals sometimes apply the PICC to arbitration clauses. Ultimately, however, like any contractual agreement, the arbitration clause should be given the effect that the parties intended. Thus, whether the law applicable to the merits of the entire contract also applies to the arbitration clause is to be established by reference to the agreement of the parties. Whether such choice of law, which may embody the PICC, is admissible will in turn depend on the lex arbitri. Special care needs to be taken in case the PICC are applied to issues relevant to the jurisdiction of the arbitral tribunal. Issues pertaining to the merits are often also relevant to the issue of jurisdiction: for example, the validity of the contract comprising the arbitration agreement, the validity of an assignment of the contract,223 and the interpretation of the intention of the parties to be bound.241 Applying the PICC or other non-national

213 Nacimiento (n 212 above).
214 Decision (n 80 above) 16: the cause of the refusal of enforcement is not the choice of one law rather than another, but the fact that it provides a solution contrary to the notion of public policy as defined by the law of the place where enforcement is sought’.
215 Deutsche Schacht- und Tiefbohrgesellschaft v Rasal Khaimah National Oil Co [1987] 2 All ER 789, CA;
Craig et al (n 26 above) 337.
216 International Law Association (n 197 above) Rule 3a.
217 This is certainly the case in Switzerland, see DFT 9 January 1995 (1997) XLI YB Comm Arb 799; overseas public policy is not necessarily violated where the foreign provision is contrary to a mandatory provision of Swiss law.
218 In the related context of non-monetary proceedings, see ECJ Case C-126/97 Eco-Sioiss China Time v Benetton (1999) ECR I-5095 [57]; arbitral awards can be set aside if they violate mandatory European competition law provisions; of DFT 8 March 2006 (47,278/2005), ABA Bull 22:2006, 563–566; competition law, whether EU or Swiss, is not part of the public policy of Switzerland (a non-EU country).
219 Council in 35 above 920–921.
220 Art 34(2)(a) of the UNCITRAL Model Law.
221 In DFT 30 September 2003, 130 III 35, ABA Bull 3/2004, 574, an arbitral award was set aside because the arbitral tribunal had relied on a contractual provision and a legal doctrine that had not been advanced by either party.
222 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’.
223 See above, Art 8.1 para 5–10.
224 See also Arbitral Award 10 February 2005, Netherlands Arbitration Institute (2007) XXXII YB Comm Arb 95: the general conditions provided for the application of Dutch law and arbitration in Rotterdam in accordance with the NAI rules. The respondent objected to the jurisdiction of the arbitral tribunal on the ground that it had not appeared either orally or in writing that the arbitration clause contained in the conditions of the seller. The tribunal sustained in jurisdiction holding that the fault of the respondent to object in a timely
rules to the arbitration agreement instead of a domestic law may therefore carry risks, since
annulment courts are often reluctant to admit that the parties intended to submit their
arbitration agreement to a law distinct from the law applicable to the merits, US courts will apply mandatory provisions of federal and state law in order to
assess the validity of the arbitration agreement.228 Arbitral tribunals sitting in France assess
the validity of the arbitration agreement on the basis of so-called autonomous international
rules, but only because a rule in French case law directs them to do so.229

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

---

227 See arbitration proceedings in Switzerland, see Art 178(2) of the 1987 Swiss Private International Law (2) above; there is a choice of three laws, as long as the arbitration clause conforms with one of them; see W. Wengen, Article 178 in IV Berti et al (eds), International Arbitration in Switzerland: An Introduction and Commentary on Articles 178–194 of the Swiss Private International Law (States) (2000) 527, 549: 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 those potentially applicable national laws.

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

229 The rule was developed by the CA Paris and ultimately confirmed in the Délits decision of the Cour de cassation: Cass.civ (10 December 1993) 91-16828 (1994) Rev. civ 116 cols H Gaudemet-Tallon. See also Frischard et al (n 1 above) 228–236.

230 Arbitral Award 25 November 1994, Zurich Chamber of Commerce, ASA Bull 2/1996, 305: Unlike 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 has also noted that its interpretation of Swiss law reflected a general worldwide consensus evidenced by a similar rule in the PICC. See also Final Award, uniden, ICC Case no 14541 (2002) XXIV YB Comm Art 62: the arbitration clause provided for arbitration in Switzerland which would 'proceed in accordance with international law'. The arbitral tribunal found that such choice of law as to be understood as a choice of law on the merits, but it could in addition be understood as a choice of law also for the arbitration agreement', and it applied Swiss law and the PICC, respectively, then the 'Common standards of Swiss law and international law (UNIDROIT Principles in this case); in ICC case no 31609 (2011) XXVII YB Comm 47, 55 dealing with an ambiguous arbitration clause, the arbitral tribunal found that English law was applicable to the interpretation of the arbitration agreement. In addition, it noted that 'in principle, this task of avoiding voidness for uncertainty, recourse should be made to the specific principles of interpretation developed for international contracts, which can be found in Art 4 UNIDROIT Principles'.