Preamble I

Purposes, legal nature, and scope of the PICC; applicability by courts; use of the PICC for the purpose of interpretation and supplementation and as a model*

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Preamble

(*Purpose of the Principles*)

These Principles set forth general rules for international commercial contracts.
They shall be applied when the parties have agreed that their contract be governed by them. (*)
They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.
They may be applied when the parties have not chosen any law to govern their contract.
They may be used to interpret or supplement international uniform law instruments.
They may be used to interpret or supplement domestic law.
They may serve as a model for national and international legislators.

(*) Parties wishing to provide that their agreement be governed by the Principles might use the following words, adding any desired exceptions or modifications: "This contract shall be governed by the UNIDROIT Principles (2004) [except as to Articles . . .]".
Parties wishing to provide in addition for the application of the law of a particular jurisdiction might use the following words:
"This contract shall be governed by the UNIDROIT Principles (2004) [except as to Articles . . .], supplemented when necessary by the law of [jurisdiction X]".

I. Purposes and legal nature of the PICC

The Preamble, structured in seven paragraphs and an official footnote, suggests a long list of purposes for the PICC that is not even exhaustive.[1] However, the purposes can be grouped according to types. Frequently, merely two types are distinguished: the PICC aim to be both a description (of existing law outside the PICC) and a prescription (of a codified set of rules);[2] they are a combination of restatement and pre-statement.[3] In reality, the latter purpose must be further divided into one of potential prescription (the PICC as a model for norm makers) and one of actual prescription (the PICC as currently applicable law).[4] These **three types of purposes**—description, potential prescription, and actual prescription—are partly complementary to and partly in conflict with each other. **1**

[1] Off Cmt 8 to Preamble, p 7 ('Other purposes'), introduced in 2003; (2003) Study L – Misc 25, paras 588 (Finn) and 593.

[2] B Ancel, 'Book Review' [1997] Rev crit dr int privé 879, 882; LA DiMatteo, 'Contract Talk: Reviewing the Historical and Practical Significance of the Principles of European Contract Law' (2002) 43 Harv Int'l LJ 569, 576–577.

[3] P Karrer, in H Honsell et al (eds), *Kommentar zum Schweizerischen Privatrecht: Internationales Privatrecht* (1996) Art 187 para 71; KP Berger, 'The relationship between the UNIDROIT Principles of International Commercial Contracts and the new lex mercatoria' [2000] ULR 153, 169; H Kronke, 'The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond' (2005–2006) 25 J L & Com 451, 458–459.

[4] This triad is developed in R Michaels, 'Privatautonomie und Privatkodifikation: Zu Anwendbarkeit und Geltung allgemeiner Vertragsrechtsprinzipien' (1998) 62 RabelsZ 580, 584–591, 611–612, 623–624; it has been followed eg by T Petz, *Die UNIDROIT Prinzipien für Internationale Handelsverträge* (2001) 68–71; F Burkart, *Interpretatives Zusammenwirken von CISG und UNIDROIT Principles* (2000) 51–56; A Gebele, *Die Konvention von Mexiko* (2002) 81. For a somewhat parallel triad (*Rechtserkenntnisquelle*, *Rechtsgeltungsquelle*, *Rechtsgewinnungsquelle*), see CW Canaris, 'Die Stellung der "UNIDROIT Principles" und der "Principles of European Contract Law" im System der Rechtsquellen' in J Basedow (ed), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (2000) 5; P Jung, 'Der Einfluss der UNIDROIT Principles auf das Gemeinschaftsprivatrecht' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 77, 80–84; U Teichert, *Lückenfüllung im CISG mittels UNIDROIT-Prinzipien: Zugleich ein Beitrag zur Wählbarkeit nichtstaatlichen Rechts* (2007) 44–46; for a discussion of Canaris in English, see M Heidemann, *Methodology of Uniform Contract Law: The UNIDROIT Principles in International Legal Doctrine and Practice* (2007) 137–145. But see R 'Goode, 'Rule, Practice and Pragmatism in Transnational Commercial Law' (2005) 54 ICLQ 539, 553 ('blurring the distinction between *lex lata* and *lex ferenda*').

2 In early drafts of the PICC, the purposes were mentioned in draft Art 1.1 (Application of the Principles);[5] later, 'Purpose' (draft Art 1.1) and 'Application' (draft Art 1.2) were even separated in two different articles.[6] Only quite late were both purposes and application moved out of the black-letter articles into the Preamble.[7] Their place in the Preamble is an adequate acknowledgement of the fact that the purposes, even more than the actual black-letter articles, are **merely aspirational**: they suggest possible uses of the PICC but cannot and do not prescribe them.[8]

1. The PICC as a restatement: the description of a common core

3 The first purpose, covered by the first paragraph of the Preamble and characterized by the words 'set forth', consists of the description of actual valid legal rules of transnational contract law. Modelled after the Restatements of the Law in the USA,[9] the PICC assemble and systematize the '**common core**' **of current global contract law** as found in national laws, international Conventions like the CISG, semi-official rule codes like the INCOTERMS, and soft law.[10] In this regard, the PICC are an academic work of comparative law like Ernst Rabel's work on the sale of goods or the *International Encyclopedia of Comparative Law*,[11] differing from these latter only in their form as a codification. With regard to this purpose, they have aptly been described as a source not of law but for the recognition of law (*Rechtserkenntnisquelle*),[12] similar to a secondary source of law.[13]

4 The PICC differ from purely descriptive common core projects[14] in that they contain **some rules that do not represent a common core**. Where legal systems differ, the drafters of the PICC either went with the majority or chose what they deemed to be the best solution;[15] occasionally they declined altogether to deal with tough questions.[16] Where the solutions of

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[5] (1989) Study L – Doc 40 Rev 4, p 1 (Art 1.1).

[6] (1992) CD (72) 6, p 10; (1992) Study L – Doc 51, pp 1–7: see draft Arts 1.1 (Purpose) and 1.2 (Application).

[7] (1993) Study L – Doc 40 Rev 11, p 1.

[8] (1993) CD (72) 19, pp 18–23, 26–27; G Parra-Aranguren, 'Conflict of Law Aspects of the Unidroit Principles of International Commercial Contracts' (1994/95) Tulane LR 1239, 1248; Michaels (n 4 above) 593. For a different view, MA Pendón Meléndez, 'Preámbulo' in D Morán Bovio (ed), *Comentario a los Principios de UNIDROIT para los Contratos del Comercio Internacional* (2nd edn, 2003) 21–22, 45–46.

[9] AT Rosett, 'The UNIDROIT Principles of International Commercial Contracts: A New Approach to International Commercial Contracts' (1998) 46 Am J Comp L (suppl) 347, 355–356; MJ Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, 2005) 9–11, 45–46.

[10] For a list of particularly important sources, see Bonell (n 9 above) 47–48 n 45.

[11] E Rabel, *Das Recht des Warenkaufs* (2 vols, 1936/1958); R David et al (eds), *International Encyclopedia of Comparative Law* (1973 ff–).

[12] Canaris (n 4 above) 15–16; Jung (n 4 above) 81–82.

[13] See R Michaels, 'Retour aux sources? Droit et politiques des sources du droit contemporain aux Etats-Unis' in Société de législation comparée and Cedroma (eds), *Les sources du droit: aspects contemporains* (2007) 97.

[14] P Bonassis et al (eds), *The Formation of Contracts: A Study of the Common Core of Legal Systems Conducted Under the Auspices of the Cornell Law School* (2 vols, 1968); M Bussani and U Mattei, 'The Common Core Approach to European Private Law' (1998) 3 Colum J Eur L 339.

[15] Governing Council of UNIDROIT, 'Introduction to the 1994 Edition' in *UNIDROIT, UNIDROIT Principles of International Commercial Contracts 2004* (2004) xiv, xv; Bonell (n 9 above) 45–47.

[16] EA Farnsworth, 'Closing Remarks' (1992) 40 Am J Comp L 699, 700.

all legal systems seemed inappropriate, in particular for international contracts, they even developed entirely new solutions.[17] Although this approach guaranteed a more comprehensive and superior code, it meant that the individual provisions of the PICC do not necessarily coincide with the solutions in individual legal systems. The PICC are not entirely descriptive, and not every one of their rules can be said to represent a general principle of contract law in a descriptive way. This problem is exacerbated because the text of each provision does not reveal whether it restates or innovates.[18] This Commentary aims to provide further information on this issue by pointing out whether individual provisions represent a common core.

2. The PICC as a model: the prescription of potentially binding rules

The second purpose of the PICC, codified in paragraphs 5–7 of the Preamble and characterized by the words 'may be used' or 'may serve as', is to serve as a **model law** for both national and supranational legislators and as a **guide for contracts** between individual parties. Although structurally similar to a code, the PICC differ from other transnational codifications like the CISG[19] in that they themselves lack formal legitimacy derived from one or several states—they describe potentially optimal law, but they are not, for this purpose, formally valid law themselves. As regards this second purpose, the PICC are aptly characterized as a private codification[20] or as a collective legislative doctrine:[21] they function as 'virtual law'.[22] **5**

Whether the PICC represent an actual common core (see para 4 above) is relatively unimportant for this purpose: although a common core may evidence the superiority of one solution over others, it may also suggest common flaws of legal systems. As a potential **6**

[17] Bonell (n 9 above) 48–56.

[18] ibid 49.

[19] MJ Bonell, 'The UNIDROIT Principles of International Commercial Contracts and CISG: Alternatives or Complimentary Instruments?' [1996] ULR 26, 27–30; IM Sattar, 'The UNIDROIT Principles of International Commercial Contracts and the Vienna Sales Convention: Competing or Completing "*Lex Mercatoria*"?' (1999) 4 Int'l Trade & Bus L Ann 13, 22–23.

[20] C Kessedjian, 'La codification privée' in A Borrás et al (eds), *E Pluribus Unum: Liber Amicorum Georges AL Droz* (1996) 135; Michaels (n 4 above); Petz (n 4 above) 117; KP Berger, 'The New Law Merchant and the Global Market Place: A 21st Century View of Transnational Commercial Law' (2000) Int'l ALR 91; K Osajda, 'The Experiences, Methods, Objectives and Perspectives of Unification of Private Law in the European Union' 6–8 (http://ssrn.com/abstract=897403); J Fernandez Armesto, 'Note on Separate Arbitral Award rendered in 2001 in SCC case 117/1999' [2002] SAR 71, 74; J Jemielniak, 'Legitimization Arguments in the Lex Mercatoria Cases' (2005) 18 International Journal for the Semiotics of Law 175, 182.

[21] P Deumier, 'La doctrine collective législatrice: une nouvelle source de droit?' [2006] RTD civ 63, 65; similarly P Kahn, 'Les Principes UNIDROIT comme droit applicable aux contrats internationaux' in MJ Bonell and F Bonelli (eds), *Contratti commerciali internazionali e Principi UNIDROIT* (1997) 39, 44 ('*construction savante*'); see also B Ancel, 'Auctoritate rationis, Le droit savant du contrat international' in *Clès pour le 20ème siècle: Mélanges de l'Université Paris II Panthéon-Assas* (2000) 583.

[22] D Mazeaud, 'A propos du droit virtuel des contrats: réflexions sur les principes d'UNIDROIT et de la commission Lando' in *Mélanges Michel Cabrillac* (1999) 205; P Mankowski, 'Überlegungen zur sach- und interessengerechten Rechtswahl für Verträge des internationalen Wirtschaftsverkehrs' [2003] RIW 2, 11; general European contract law is described as 'virtual law' in H Kötz, *European Contract Law* (1997) v; C Castronovo, 'Codification and the Idea of Codification in the Principles of European Contract Law' in LL Andersen et al (eds), *Festskrift til Ole Lando* (1997) 109, 123.

prescription, the PICC must **convince through their superior quality**. Although they have been praised as 'the most accurate description to date of the emerging international consensus about the rules that are most suitable to international trade law',[23] this quality must be proven for each and every provision, and some provisions are more convincing than others. In addition, the PICC are more appropriate for international contract legislation than for domestic codifications or for very specific contracts, since they provide a general law of contract and are aimed at international commercial contracts (see paras 14–18 and 21–29 below).

3. The PICC as effective law: the prescription of actually binding rules

7 The third purpose, covered by paragraphs 2–4 of the Preamble and characterized by the words 'shall' or 'may be applied',[24] is both more important and more controversial than the first two. It consists of the actual prescription of effective (applicable) rules that bind parties and adjudicators. The suggestion is that the PICC can provide **applicable norms** when parties select them as applicable law (paragraphs 2–3 of the Preamble) and even when they have not selected any law to be applicable (paragraph 4 of the Preamble). This purpose of actual prescription poses a twofold challenge to traditional conceptions of law. First, traditionally only 'official' law can be the applicable law: the law either of states or of certain groups (religious or otherwise) recognized by states as competent lawmakers. An autonomous law of commerce, a *lex mercatoria*, has mostly been rejected as applicable law at least in state courts; the situation is somewhat different in arbitration. The PICC (other than ratified UNIDROIT Conventions) share the unofficial status of *lex mercatoria*, they are different only in that they provide detailed rules. Second, whether laws are applicable or not in a given legal system is determined by that system's own conflict of laws rules. The PICC, by contrast, seemingly profess to provide these norms on their own in their Preamble.

8 In general, the **extent to which the PICC can fulfil this third purpose** differs from rule to rule. Although details are discussed below, in general, the following ensues: insofar as the PICC fulfil their restatement purpose and provide an accurate description of all actual laws (see paras 3–4 above), they can be said to be valid as a mere systematization, since their application would not contradict any otherwise applicable national laws. Where they fulfil their model purpose and present a superior law (see paras 5–6 above), they can guide the decisions of an adjudicator, but only within the limits from otherwise applicable law (see paras 88–117 below); these limits are stricter for courts than for arbitrators (see below, Preamble II paras 3–4 and passim). Where the PICC fulfil neither the restatement nor the model purpose, their application is not justified except to the degree they are applicable within the limits provided by otherwise applicable law (see paras 30–87 below).

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[23] R Hyland, 'On Setting Forth the Law of Contract: A Foreword' (1992) 40 Am J Comp L 541, 550.

[24] The use of 'may' rather than 'shall' is explained as an expression of self-restraint and modesty by MJ Bonell, 'The UNIDROIT Principles a Decade After Their First Appearance: What Have They Achieved and What Are Their Prospects for the Future?' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 259, 260.

4. The PICC as a general part of transnational contract law

In content the PICC play the role of a 'general part' of the transnational law of obligations.[25] **9**
In this regard, they are modelled less after the *lex mercatoria* and more after the *ius commune* in continental Europe[26] and the common law of contract in England or the USA. As a general part of a transnational law of obligations, they leave room on the one hand for mandatory norms of domestic and supranational origin (Art 1.4), and on the other hand for specific agreements in contractual agreements (Art 1.5). Properly understood, they do not aim to replace or suppress either mandatory norms or contractual agreements; they are, **by design**, **incomplete and supplemental**. This focus equips them better for some purposes: for example, the filling of gaps and the interpretation of unclear provisions in statutes and contractual agreements, and the provision of background norms. It equips them worse for other purposes, such as the replacement or avoidance of mandatory domestic norms or guidance for specific contractual agreements.

II. Scope of the PICC (paragraph 1 of the Preamble)

1. The function of paragraph 1

Paragraph 1 of the Preamble is modelled after the provisions on scope of application in **10**
other international instruments, such as Art 1 CISG. However, unlike Art 1 CISG (which deals only with applicability), paragraph 1 **applies differently to the different purposes of the PICC**. Regarding their restatement purpose (see paras 3–4 above), paragraph 1 proclaims that the PICC restate existing rules for international contracts. This is only partially adequate, because the PICC were influenced not only by international codifications and usages, but also by domestic contract laws.[27] Regarding the model purpose (see paras 5–6 above), paragraph 1 proclaims that the rules of the PICC are deemed superior especially for international commercial contracts, not for other areas of the law. This seems appropriate insofar as the interests of international commerce were influential in the drafting process. Nonetheless, a legislator is not barred from using them as a model for a general contract code treating purely local and non-commercial contracts, and indeed this is where they have been most influential so far (see paras 128–138 below). Regarding their effective law purpose (see paras 7–8 above), paragraph 1 proclaims that where the PICC are the rules applicable in a dispute, this applicability is confined to international contracts. However, because the Preamble, like the whole of the PICC (and unlike Art 1 CISG), is not binding, an adjudicator may and indeed should consider paragraph 1, but would not thereby be barred from applying the PICC to a non-commercial or a non-international contract. Consequently, 'given the particular character of the Principles, there was no absolute necessity to offer a

[25] P Karrer, 'Internationalization of Civil Procedure: Beyond the IBA Rules of Evidence' [2004] ULR 893, 895; S Schilf, 'UNIDROIT Principles 2004: Auf dem Weg zu einem Allgemeinen Teil des internationalen Einheitsprivatrechts' [2004] IHR 236, 236–246; Kronke (n 3 above) 456–457.

[26] Bonell (n 9 above) 3–4.

[27] See para 3 above and Bonell (n 9 above) 46–47.

precise definition of their scope of application',[28] and definitions of 'international' and 'commercial' that had been contained in earlier drafts were deleted.[29]

11 It follows that paragraph 1 contains **mere general suggestions** for their scope whose exact adequacy must be assessed individually for each use. This tentative use is clear from the language ('set forth').[30] The limitation to international commercial contracts derives its persuasive force from the fact that the drafters intended the rules for a specific scope and therefore tried to optimize them with this scope in mind. Any use that goes beyond this scope runs the risk of using rules for purposes for which they were not made. Any use that stays below this scope runs the risk of isolating rules from what is conceived as a coherent whole.

2. 'Rules'

12 The name 'Principles' could suggest that the PICC contain general directives rather than specific regulations. This is true only for some articles, such as Art 1.1 on 'Freedom of contract' or Art 1.7 on 'Good faith and fair dealing'. Mostly, the PICC set forth relatively **specific rules**.[31] Indeed, it is possible (and even necessary for their supplementation, see Art 1.6(2)) to derive general principles from the rules of the PICC themselves.[32] With now 185 articles, the PICC are longer and, at least partly, more detailed than the general law of obligations in traditional codes like the French or German Cc.

13 Genetically, the name '**Principles**' is an indirect remnant from the 'General Principles' listed in Art 38(1)(c) of the Statute for the International Court of Justice of 26 June 1945 as one of the sources of international law. The name 'Principles' was retained (largely for rhetorical reasons) only after a long debate and only for the English version; discretion was given for each translation.[33] Following the suggestion of a German member of the drafting team (Drobnig) who had preferred 'Rules' over 'Principles', the German version carries the

[28] (1992) CD (72) 6, p 9.

[29] cf (1989) Study L – Doc 40 Rev 4, p 1 (Art 1(2)):

> 'For the purpose of these Principles:
> (a) a contract is international whenever it involves a choice between the laws of different countries;
> (b) a contract is of a commercial nature whenever it is made by both parties in the course of their trade or profession.'

[30] Even more tentative ('intend to lay down') was (1989) Study L – Doc 40 Rev 4, p 1 (Art 1.1(1)).

[31] Michaels (n 4 above) 586; Bonell (n 9 above) 21–22; S Schilf, *Allgemeine Vertragsgrundregeln als Vertragsstatut* (2005) 41. Too much weight is put on the name 'Principles' by Rosett (n 9 above) 355–356; H van Houtte, 'The UNIDROIT Principles of International Commercial Contracts' (1996) 2 Int'l Trade & Bus L Ann 1, 10–11.

[32] A list of five 'basic ideas' (freedom of contract; openness to usages; *favor contractus*; observance of good faith and fair dealing; policing against unfairness) is presented in Bonell (n 9 above) chapter 4; see also below, Art 1.6 paras 25, 52–53. Similarly, for the PECL see O Lando, 'Eight Principles of European Contract Law' in R Cranston (ed), *Making Commercial Law: Essays in Honour of Roy Goode* (1997) 103–129; for the CISG see U Magnus, 'General Principles of UN-Sales Law' (1997) 3 Int'l Trade & Bus L Ann 33, 41; for all three see S Guillemard, 'A Comparative Study of the UNIDROIT Principles, the Principles of the European Law of Contracts, and some Dispositions of the CISG Applicable to the Formation of International Contracts' (2000–2001) *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)* 83, 97–111

[33] See the debate in (1994) PC – Misc 19, pp 117–122.

title *Grundregeln* (basic rules). This notion is more accurate than that of 'Principles' used for all other language versions.

3. 'General'

(a) Not specific to individual countries

14 The rules of the PICC are general in several ways. First, the PICC contain, at least at their core, rules that are not specific to individual countries but rather 'reflect concepts to be found in many, if not all, legal systems',[34] a global common core. They thus go beyond the UCC and the US Restatements, which are confined to the USA (though both are inspired in part by comparative law). They also go beyond the PECL, which are restricted to European legal systems, and even the CISG, which is confined to signatory states.

15 The general character of the PICC is also evidenced in the aim to use a **neutral terminology** that is not peculiar to any given legal system.[35] Sometimes terms used in practice (like 'hardship' in Arts 6.2.2–6.2.3) are preferred over technical terms (like 'frustration of purpose', *Wegfall der Geschäftsgrundlage*, and *imprévision*); sometimes new terms (like 'non-performance') are preferred over terms existing in domestic law (like 'breach').[36] However, where rules were more or less adopted from existing Conventions like the CISG, the existing terms and formulations were adopted.[37]

16 Despite their aim at generality, the **predominant influence comes from Western legal systems**.[38] The Official Comment to the PICC, unlike that to the PECL, refrains deliberately from referring to the inspiring sources in part to downplay such an impression.[39] The Western character of the PICC can cause problems in context with non-Western legal jurisdictions, problems that can be enhanced by the requirement to interpret the PICC without reference to local rules or habits.[40] Inhabitants of developing countries, for example, may find themselves unable to comply with the strict notice requirements of the PICC.[41] Most procedural deadlines in Latin American countries, by contrast, are much shorter than in the PICC. The PICC may also be, in parts, incompatible with Islamic law. In particular, the Islamic ban on interest may collide with rules on interest (Arts 7.4.9–7.4.10).[42] By contrast,

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[34] Governing Council of UNIDROIT (n 15 above) xv; (1994) PC – Misc 19, p 3. For criticism, see Teichert (n 4 above) 59–65.

[35] Governing Council of UNIDROIT (n 15 above) xv; Off Cmt 2 to Art 1.6, p 16; Bonell (n 9 above) 65–68.

[36] Off Cmt to Art 7.1.1, p 193.

[37] Governing Council of UNIDROIT (n 15 above) xv.

[38] Bonell (n 9 above) 47: 'For obvious reasons it was impossible to take into account the law of every single country of the world, nor could every legal system have an equal influence on each issue at stake'.

[39] ibid 339.

[40] ibid 83; see below, Art 1.6 paras 7–8.

[41] For the CISG see SG Zwart, 'The New International Law of Sales: A Marriage between Socialist, Third World, Common and Civil Law Principles' (1988) 13 North Carolina Journal of International Law and Commercial Regulation 109, 118–120.

[42] TS Twibell, 'Implementation of the United Nations Convention on Contracts for the International Sale of Goods (the CISG) Under Shari'a (Islamic Law): Will Article 78 of the CISG Be Enforced when the Forum Is in an Islamic State?' (1997) 9 International Legal Perspectives 25; DM Vicente, 'A unificação do direito dos contratos em África: Seu sentido e limites' 15–16 (www.fd.ul.pt/ICJ/luscommunedocs/vicentedario1.pdf); see below, Art. 7.4.9 para 3.

Art 10.9(1) was introduced in response to Islamic concerns.[43] Conflicts with socialist law, which had little influence on the PICC, are no longer an important issue. Within Western legal cultures, the PICC do not prioritize the civil law over the common law despite their codified form, since much of their substance is derived from common law systems, especially the UCC.[44]

17 **(b) General contract law**

A second meaning of 'general' concerns the fact that the PICC treat the general law of obligations and the general law of contract in the style of the German Cc.[45] They can be used for any type of contract, but rules for specific contracts must be drawn from elsewhere: either specific uniform law (such as the CISG) or domestic laws. Moreover, the PICC do not (yet) provide a comprehensive system of general contract law; to prevent such an impression, an earlier draft version that spoke of a 'comprehensive system' was amended accordingly.[46] Important parts of the general law of obligations are still lacking and may be taken up in later revisions.[47]

18 **(c) General character of rules**

A third meaning of 'general' concerns the **open-ended style** of many articles. While some provisions contain definite bright-line rules,[48] others, even if they are detailed, refrain from exact regulation and leave discretion to the judge or arbitrator,[49] in accordance with other modern codifications.[50] Furthermore, the drafters considered it necessary to account for the different styles of users from different legal systems, especially (but not exclusively) civil and common lawyers. It should be noted, however, that such an open-ended style requiring adjudicators to interpret the relevant terms is in tune more with the civil law than with the common law tradition, which traditionally prefers clearly defined terms for legislative and quasi-legislative instruments.

4. 'Contracts'

19 The PICC set forth rules for contracts—not, at least on their face, for non-contractual or quasi-contractual obligations, nor for other areas of the law (like the transfer of property). A **definition** is not given and would indeed be hard to give in view of differences between

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[43] Bonell (n 9 above) 349–350; see (1999) Study L – Misc 21, para 293 (El Kholy); below, Art 10.9 para 1.

[44] A di Majo, 'I "Principles" dei contratti commerciali internazionali tra Civil Law e Common Law' [1995] Riv dir civ 609; cf GC Moss, 'International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith' (2007) 7(1) Global Jurist (Advances) Article 3, 34 (www.bepress.com/gj/vol7/iss1/art3).

[45] For history and comparison, see R Michaels, 'Systemfragen des Schuldrechts' in M Schmoeckel et al (eds), *Historisch-Kritischer Kommentar zum BGB, vol II* (2007) paras 15–16, 51.

[46] See the debate at (1994) PC – Misc 19, pp 1–2.

[47] See para 9 above.

[48] eg Arts 6.1.9 (Currency of payment), 7.1.4 (Cure by non-performing party), 10.5 (Supension of limitation by judicial proceedings), and 10.6 (Suspension by arbitral proceedings). The examples are from Bonell (n 9 above) 61.

[49] For interpretation of the PICC, see Art 1.6 PICC.

[50] B Volders, 'The UNIDROIT Principles of International Commercial Contracts and Dutch Law' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 135, 136–137, 139–140.

legal systems.[51] This does not normally lead to problems; the scope of the PICC can be derived from their provisions without the need for a definition.

Some provisions, like those on set-off, limitation periods, and the assignment of rights and transfer of obligations, pertain to the general law of obligations rather than just to the law of contract; accordingly, the provisions on assignment and transfer use terms like 'obligor and obligee' rather than 'parties'.[52] In theory, the PICC could thus be **applicable to non-contractual obligations and relations**. That the drafters did not intend these rules to apply to such relations and that examples in the Official Comment are drawn from contract law[53] does not automatically rule this out, but it is reason for caution in their use outside contract law. The law of limitation periods is an exception: Art 10.1(1) appropriately confines the scope of Chapter 10 of the PICC to 'rights governed by these Principles', and indeed, limitation periods for non-contractual obligations are very different. **20**

5. 'International'

Unlike the PECL (Art 1:101 PECL), but comparable to the CISG (Art 1(1) CISG), the PICC are confined to international contracts. International is **not positively defined**; an earlier proposal to require parties of different nationalities was abandoned.[54] The Official Comment suggests giving the term 'the broadest possible interpretation';[55] but this provides little guidance. A purely domestic contract does not become international simply through the parties' choice of the PICC or some other law as applicable law.[56] Apart from this extreme case, it appears appropriate to follow the French solution of Art 1492 NCPC and consider any contract international if it has an impact on international trade, without the need to draw a specific list of factors.[57] A more specific definition appears unnecessary in view of the limited practical importance of the criterion (see paras 24–25 below). **21**

Two **reasons** are given for this restriction.[58] First, the PICC are considered particularly important for international contracts, for which domestic laws are viewed as inappropriate, conflict of laws procedures to determine an applicable domestic law as cumbersome, and existing international instruments as insufficient. Second, countries are less eager to provide mandatory rules for international contracts than for domestic ones, because they do not want to disadvantage their citizens vis-à-vis those from other countries in international **22**

[51] M Oudin, 'Un droit européen . . . pour quel contrat? Recherches sur les frontières du contrat en droit comparé' [2007] RIDC 475.

[52] Arts 5.1.9, 6.1.3, 6.1.5–6.1.9, 6.1.12, 8.1, 9.1.7–9.1.13, 9.1.15, 9.2.1, 9.2.3–9.2.8, 9.3.5, 10.2, 10.4–10.6, 10.8–10.11; a definition of the term is contained in Art 1.11.

[53] M Fontaine, 'Content and Performance' (1992) 40 Am J Comp L 645; Bonell (n 9 above) 79.

[54] n 29 above; (1994) PC – Misc 19, pp 3–4.

[55] Off Cmt 1 to Preamble, p 2.

[56] Art 3(3) of (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

[57] C Larroumet, 'La valeur des Principes d'UNIDROIT applicables aux contrats du commerce international' [1997] JCP 147, 148; for criteria see A Kaczorowska, 'L'internationalité d'un contrat' (1995) 72 RDIDC 204; see also LE Mercado, 'Faut-il repenser la notion de contrat international?' [2002] Revue de la recherche juridique: Droit prospectif 1897.

[58] Bonell (n 9 above) 68–71.

commerce, so differences between legal systems are both less frequent and less crucial.[59] These reasons are valid but somewhat exaggerated at least for more modern domestic laws, which are often made also with international contracts in mind.

23 Some rules of the PICC are explicitly focused on international contracts and respond to problems arising from territorial differences in substantive laws (Arts 1.4 and 6.1.14), holidays (Art 1.12(2)), time zones (Art 1.12(3)), languages (Off Cmt 3 to Art 2.1.20, and Art 4.7), local customs (Art 6.1.7(1)), prices (Arts 7.4.6(2) and 7.4.9(2); see also Art 5.1.7(1)), and currencies (Arts 6.1.9–6.1.10 and 7.4.9(2)). Some rules explicitly ban recourse to local laws (Off Cmts 2–4 to Art 1.4), local customs (Off Cmt 4 to Art 1.9), local standards (Off Cmt 3 to Art 1.7) and local modes of interpretation (Art 1.6(1)). However, the vast **majority of rules in the PICC cater for international and domestic contracts alike**.

24 The restriction to international contracts **does not apply exclusively**. First, even purely local contracts can be submitted to the PICC to the extent that the PICC can be incorporated into such agreements;[60] the restriction of paragraph 1 to 'international contracts' plays no role insofar.[61] Although international contracts are the explicit focus of the PICC, applicability (and eligibility) of the PICC are separate from this focus[62] and party autonomy can trump the scope of the PICC. Second, the restriction is irrelevant where the PICC want to serve as a model for national contract legislation (see para 129 below). This is appropriate, in view of the trend for legislators worldwide to aim more and more for rules that are apt for international trade, and much of the substance of the PICC is either not specifically international or not in conflict with rules for domestic contracts.

6. 'Commercial'

25 The PICC are restricted to commercial contracts, but the **notion** 'commercial' is **not defined**. In explicit rejection of an earlier draft,[63] the term 'commercial contracts' goes beyond *actes de commerce* or *Handelsgeschäfte* and beyond contracts between parties who are formally merchants (*commerçants* or *Kaufleute*).[64] As with regard to 'international' (see para 21 above), the suggestion in the Official Comment 'that the concept of "commercial" contracts should be understood in the broadest possible sense', which emerged only after a long debate,[65] again provides little guidance. Despite the terminological difference to the CISG which contains no similar restriction to commercial contracts but only excludes consumer sales in its Art 2(a) and the UCC,[66] the underlying idea is essentially the same.[67] The most

[59] ibid 69–71.

[60] Off Cmt 3 to Preamble, p 3.

[61] See the debate at (1994) PC – Misc 19, pp 3 and 7. For perhaps too-harsh criticism ('useless'), see F Ferrari, 'Defining the Sphere of Application of the 1994 "UNIDROIT Principles of International Commercial Contracts"' (1995) 69 Tul LRev 1225, 1235–1237.

[62] See para 12 above; (1994) PC – Misc 19, pp 8–9.

[63] (1989) Study L – Doc 40 Rev 4, Art 1.1(2)(b): 'For the purpose of these Principles: . . . a contract is of a commercial nature whenever it is made by both parties in the course of their trade or profession'.

[64] Off Cmt 2 to Preamble, p 2; Bonell (n 9 above) 73; Art 1(3) CISG. For the German and French concepts, see § 343 German HGB and Art L 110-1 French Ccom.

[65] Off Cmt 2 to Preamble, p 2; (1994) PC – Misc 19, p 7 (Bonell).

[66] Art 2(a) CISG; § 1-103(a)(1) UCC (USA).

[67] Bonell (n 9 above) 74–75.

appropriate source for the definition of 'commercial' may be found in the footnote to Art 1 of the UNCITRAL Model Law which lists a (non-exclusive) number of typical contracts.[68]

The most relevant element is the intended exclusion of **consumer transactions**.[69] This exclusion is in tune with Art 2(a) CISG, but different from the PECL.[70] Consumer transactions are contracts entered into by a 'consumer', defined as 'a party who enters into the contract otherwise than in the course of its trade or profession'.[71] The exact definition is unclear, but it seems barely relevant. The emphasis in the PICC on good faith makes them suitable for consumer contracts as well; specific consumer protection can be dealt with in special legislation.[72] The practical importance of the limitation is small: the PICC have been used as a model for a uniform law of contract, including consumer contracts,[73] and play an important role as general law of contract (see para 18 above). Special rules on consumer protection can still be applied under Art 1.4 and can inform the good faith standard of Art 1.7. **26**

One **reason given for the exclusion**—consumer law is tied to the local setting and the contracting cultures in different parts of the world are very different[74]—is inconclusive for international consumer contracts. More important is the argument that consumer law, like employment law, has developed differently from commercial contract law in most legal systems. This means that an actual description of a common core would be difficult to determine,[75] and a potential or actual prescription would get into conflict with strong regulatory interests. Moreover, rules explicitly drafted with the interests of international commerce in mind may, for that very reason, be unsuitable for consumer contracts.[76] **27**

Employment contracts are meant not to be excluded from the scope of the PICC. Their drafters justify this with the difficulty of distinguishing employment contracts from **28**

[68] 'Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other form of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.' Similarly Pendón Meléndez (n 8 above) 39–40.

[69] Off Cmt 2 to Preamble, p 2; Bonell (n 9 above) 74–76.

[70] T Wilhelmsson, 'International lex mercatoria and local consumer law: an impossible combination?' [2003] ULR 141, 142–144.

[71] Off Cmt 2 to Preamble, p 2; Art 2 CISG; F Ferrari, 'The CISG's sphere of Application: Articles 1–3 and 10' in F Ferrari et al (eds), *The Draft UNCITRAL Digest and Beyond* (2004) 21, 81–85.

[72] I Veillard, 'The General and Commercial Character of the UNIDROIT Principles of International Commercial Contracts' [2007] Int'l Bus LJ 479, 486–490; for protection of the weaker party, see also G Alpa, 'La protezione della parte debole nei principi UNIDROIT dei contratti commerciali internazionali' in G Alpa, *Il diritto privato nel prisma della comparazione* (2006) 252–267.

[73] Veillard (n 72 above) 484–485; see paras 122–124 (OHADA), 125 (EU), and 126–127 below.

[74] Wilhelmsson (n 70 above) 150–153, quoted approvingly by Bonell (n 9 above) 76.

[75] Off Cmt 2 to Preamble, p 2.

[76] Schlechtriem/Schwenzer/Schlechtriem Art 1 para 60.

other contracts.[77] The distinction in treatment between consumer and employment contracts is hardly convincing, since the situation in the employment context is not materially different from that for consumer contracts. The PICC are as adequate (or inadequate) for employment contracts as they are for consumer contracts.

III. Applicability by courts (paragraphs 2–4 of the Preamble)

29 Although the PICC do not distinguish between courts and arbitral tribunals (see Art 1.11), this section of the Commentary deals only with courts. The applicability by arbitral tribunals is dealt with in a separate part of the Commentary.[78]

1. The function of paragraphs 2–4

30 No normative order can autonomously define its own applicability in a way that binds other normative orders. This is true for the PICC as well: they do not apply by their own force. **Whether, and to what extent, the PICC apply is determined by the norms binding the respective adjudicator confronted with them**. It follows that neither the parties nor the adjudicator can choose the PICC directly unless the relevant conflict of laws norm or norms of substantive contract law entitle them to do so. Paragraphs 2–4 may look like a choice of law rule, but in reality they merely suggest criteria for applicability for choice of law norms that national conflict of laws norms may or may not adopt.[79] That these paragraphs are placed in the Preamble instead of among the black-letter articles of the PICC is therefore appropriate (see para 2 above).

31 Application would be regulated in a quasi-universal fashion if it was laid down in a global Convention. However, **no global Convention for choice of law in contract** exists. A Hague Convention on the Law Applicable to Contracts of Sales has not entered into force;[80] it does not provide for the applicability of non-state law. Currently, the Hague Conference for Private International Law is contemplating a non-binding instrument on choice of law in international contracts. A preliminary report considers the question whether the PICC and other Principles can be selected, but does not reach a conclusion.[81] Whether a Convention project should be undertaken continues to be under review;[82] what role the PICC would play in it is currently an open question.

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[77] (1994) PC – Misc 19, p 7.

[78] See below, Preamble II.

[79] Michaels (n 4 above) 593.

[80] Convention on the Law Applicable to Contracts for the International Sale of Goods (The Hague, 22 December 1986) (www.hcch.net/index_en.php?act=conventions.text&cid=61).

[81] Feasibility Study on the Choice of Law in International Contracts: Report on Work Carried Out and Preliminary Conclusions (Follow-Up Note), Prel Doc No 5 of February 2008, p10 (www.hcch.net/upload/wop/genaff_pd05e2008.pdf). See also MJ Bonell, 'Towards a Legislative Codification of the UNIDROIT Principles?' [2007] ULR 233, 243.

[82] Conclusions and Recommendations adopted by the Council (1–3 April 2008) (www.hcch.net/upload/wop/genaff_concl08e.pdf).

2. Applicability as law chosen by the parties (paragraph 2 of the Preamble)

(a) Different ways of choosing the PICC

(1) The PICC as applicable law under choice of law. Whether the PICC can constitute the applicable law in the sense of choice of law depends on the respectively applicable rules on choice of law. These are the **choice of law rules of the forum**, irrespective of the choice of law rules of the law that would apply in the absence of the choice (as in Art 1:103 PECL). What matters is not whether the PICC are 'law' in a theoretical sense,[83] but rather whether they are 'law' in the sense of 'applicable law' as used within the respective choice of law norms.[84] This is a question not of legal theory but of statutory interpretation (for choice of law codifications) and of legal reasoning (for legal systems with uncodified choice of law regimes). **32**

(2) The PICC as incorporated into the contract under substantive law. Even where the PICC cannot be chosen as applicable law in the sense of choice of law, the parties can incorporate them into their contract (as is frequently done with the UCP 500)[85] within the freedom of contract that the applicable contract law grants. They thereby become **law applicable between the parties**, as it is famously formulated in Art 1134 French Cc. In this case, the PICC do not replace the otherwise applicable law but become applicable within the framework and limits set by that law. This means that the mandatory rules of that law remain applicable, even if they are not internationally mandatory. **33**

Importantly, this freedom to incorporate the PICC by reference into the contract should not be confined by **domestic laws on standard terms**, like the national legislation implementing the European Standard Terms Directive.[86] Although the Directive could apply by its terms, given that the PICC are, in this scenario, contractual terms which have not been individually negotiated (Art 3 of the Directive), it seems appropriate to ignore the Directive in view of the fact that the PICC are more similar to a neutral codification than to 'ordinary' standard terms pre-formulated with the interests of one party or one type of market participant in mind.[87] **34**

(3) The PICC as agreed rules under procedural freedom of disposal. Finally, parties may be able to invoke the PICC within the **procedural autonomy** granted by the applicable laws of civil procedure. They can thereby go beyond the limits not only of conflict of laws,[88] but also of the applicable substantive law, to the extent that the parties can agree, with binding effect on the judge, on the content of the law applicable in litigation. This is so, **35**

[83] *Contra* Schilf (n 31 above) 136, 141, 192; B Schinkels, 'Die (Un-)zulässigeit einer kollisionsrechtlichen Wahl der UNIDROIT Principles nach Rom I: Wirklich nur eine Frage der Rechtspolitik?' [2007] GPR 106.

[84] Michaels (in 4 above); R Michaels, 'The Re-*state*-ment of Non-State Law: The State, Choice of Law and the Challenge from Global Legal Pluralism' (2005) 51 Wayne Law Review 1209, 1237–1240.

[85] (2006) Study L – Misc 25, para 22 (Goode).

[86] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29. Since the Directive applies only to consumer contracts and the PICC apply only to commercial contracts, the question will rarely arise.

[87] Canaris (n 4 above) 21–26; J Basedow, 'Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts' [2000] ULR 129, 132. But see also G Mäsch, *Rechtswahlfreiheit und Verbraucherschutz* (1993) 80–85, who argues that the standard terms act is applicable even to incorporated state law.

[88] G Wagner, 'Fakultatives Kollisionsrecht und prozessuale Parteiautonomie' [1999] ZEuP 6, 21.

for example, in **France**, where Art 12(3) NCPC binds the judge to an express agreement between the parties on the juridical foundations of their litigation, and Art 12(4) NCPC allows the parties to designate the judge as *amiable compositeur*. This means parties should be able to ask the judge for application of the PICC to the same degree as they could ask an arbitrator.[89] Other procedural laws may provide comparable freedom.

36 ***(4) Differences in result.*** Although a great deal has been written on the difference between choice of the PICC as applicable law and their incorporation into the contract, the **practical differences** between these different ways of choosing the PICC **are actually small**.[90] These differences concern these issues in particular: first, the role of internally mandatory norms of the otherwise applicable law (Art 1.4—see para 41 below);[91] second, the potential applicability of norms governing standard terms to the PICC (see para 34 above); third, the interpretation of the PICC as law or as contract terms according to the standards of an otherwise applicable law (see para 39 below). Whether the PICC can be chosen as applicable law is determined by the choice of law norms of the forum alone (unlike in Art 1:103 PECL), whereas whether they can be incorporated into the contract is determined by the law determined through the ordinary choice of law process.

37 **(b) Effects of choice**

Choice of the PICC, in whichever way, has both an including and an excluding effect: to select them as applicable, and to deselect other rules that would otherwise apply. Although both effects are usually treated together and the processes of applying one rule and not applying another often go hand in hand, both aspects present different kinds of problem and therefore benefit from separate treatment.

38 ***(1) Selection of the PICC.*** The including effect of a choice of the PICC is to make them applicable. **Application** is largely unproblematic, regardless of whether the PICC are chosen as applicable law or are incorporated into the contract. Very few of the rules of the PICC are actually incompatible with rules at least of Western domestic contract law, a consequence of the strong influence Western systems had in the drafting (see para 16 above). Exceptions can arise, though, especially with non-Western systems.

39 How the PICC are chosen can impact their **judicial interpretation**. Some provisions in the PICC are quite generally phrased (in particular the good faith provision in Art 1.7). This

[89] B Fauvarque-Cosson, 'Les contrats du commerce international, une approche nouvelle: Les Principes d'UNIDROIT relatifs aux contrats du commerce international' [1998] RIDC 463, 477–478.

[90] C Hultmark, 'UNIDROIT Principles of International Commercial Contracts som alternativ till lagvalsklausl' in *Festskrift till Jan Sandström* (1997) 253, 257; J Samtleben, 'Versuch über die Konvention von Mexiko über das auf internationale Schuldverträge anwendbare Recht' [1998] IPRax 385, 390–391; JP Beraudo, 'Faut-il avoir peur du contrat sans loi?' in *Le droit international privé: esprit et méthodes – Mélanges en l'honneur de Paul Lagarde* (2005) 93, 109–110; GP Romano, 'Le choix des Principes UNIDROIT par les contractants à l'épreuve des dispositions impératives' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 35–54; (2006) Study L – Misc 25, para 22 (Goode).

[91] Viewed as the only relevant difference by F Vischer, 'Die kollisionsrechtliche Bedeutung der Wahl einer nichtstaatlichen Ordnung für den staatlichen Richter am Beispiel der UNIDROIT Principles of International Commercial Contracts' in I Schwenzer and G Hager (eds), *Festschrift für Peter Schlechtriem* (2003) 445, 448; WH Roth, 'Zur Wählbarkeit nichtstaatlichen Rechts' in HP Mansel et al (eds), *Festschrift für Erik Jayme, vol I* (2004) 757, 759.

does not create a problem where the PICC are chosen as applicable law, because then their construction is similar to other construction problems in domestic law, and it does not normally present a problem in arbitration. Their incorporation into the contract, however, may create a problem in legal systems, especially common law systems, where judges are unwilling to be very creative in the construction of vague contract terms.[92]

(2) Deselecting rules of otherwise applicable law. A potentially bigger problem concerns **40** the excluding effect of selecting the PICC: the deselection of otherwise applicable rules of domestic law. Because the PICC are not a fully-fledged codification, they **can never derogate an otherwise applicable law in the areas which they do not cover**. This is undisputed for areas outside contract law and to those areas within contract law that have not yet been codified in the PICC or that are explicitly excluded.[93] It is hard to say in the abstract whether it is also true for domestic rules that are more specific than the rules in the PICC; but where both sets of rules are compatible, it seems advisable to resort to the more detailed domestic rules.

Even within the areas covered by the PICC, deselection of domestic law is only partial. All **41** **mandatory norms** of the domestic law remain applicable for choice of the PICC if the PICC are merely integrated into the contract (see para 33 above)[94] or if the contract is purely local.[95] By contrast, if the PICC are validly chosen as applicable law (see para 32 above), only internationally mandatory norms (norms that apply regardless of the otherwise applicable law) remain applicable; purely internally mandatory norms are displaced, at least if interpretation of the PICC suggests that they supersede norms in that particular area.[96] Whether a norm is internally or internationally mandatory is determined by interpretation of that norm and the applicable choice of law norms.[97]

Selection of the PICC should not automatically be read as deselection of the **CISG or other** **42** **uniform law**.[98] If the choice of the PICC is invalid under existing choice of law rules, this choice should not be viewed as a deselection of the CISG (under its Art 6), because application of the CISG is then likely to be in tune with the parties' intentions. Yet even where the choice of the PICC as applicable law is valid, it would normally seem inadequate to interpret the choice of the PICC as a deselection of the CISG. To the extent that the CISG

92 For English law see *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals* [2004] EWCA Civ 19, [2004] 1 WLR 1784 [52], QB (unwillingness to interpret Shari'ah); J Hill, *International Commercial Disputes in English Courts* (3rd edn, 2005) 470–471.

93 A Giardina, 'I Principi UNIDROIT quale legge regolatrice dei contratti internazionali (I Principi ed il diritto internazionale private)' in MJ Bonell and F Bonelli (eds), *Contratti commerciali internazionali e Principi UNIDROIT* (1997) 55, 67–69; A Prujiner, 'Comment utiliser les Principes d'UNIDROIT dans la pratique contractuelle' (2002) 36 RJT 561, 568–572.

94 Off Cmt 2 to Art 1.4, p 12; see below, Art 1.4 para 4.

95 For Europe, see Art 3(3) of the Rome I Regulation (n 56 above) and Romano (n 90 above) 50; for the USA, see § 187(1) *Restatement 2d Conflict of Laws*; cf PH Glenn, 'International Private Law of Contract' in L Pereznieto Castro et al (eds), *International Law at the Beginning of the Third Millennium: Liber in Memoriam of Professor Friedrich K Juenger* (2006) 53, 64.

96 Off Cmt 3 to Art 1.4, pp 12–13; see below, Art 1.4 para 4.

97 Art 9 of the Rome I Regulation (n 56 above).

98 Prujiner (n 93 above) 573–575; Bonell (n 9 above) 317.

contains more specific rules for international sales contracts than the PICC, one can assume the parties would want these rules to supplement the PICC.[99]

43 *(3) Personal scope of choice.* In some parts, the PICC, since their second edition in 2004, go beyond the model of two-party relations that is traditionally characteristic of contract law. This is true for the provisions on agency (Section 2.2), on contracts for the benefit of third parties (Section 5.2), and on the assignment of rights and transfer of obligations (Sections 9.1–9.3). However, these **three- (or more) party relations** can be split up into separate partial solutions, and applicability of the PICC can and must be determined for each two-party relationship.[100] For example, the question of whether the PICC apply must be answered separately (and may, in fact, find different answers) for the relationship between a principal and its agent, between the principal and another party, and between the agent and the other party.[101] Where an obligation governed by the PICC is transferred, it remains governed by the PICC even if the transfer itself is governed by some other law. Similarly, if an obligation governed by some other law is transferred according to Chapter 9 of the PICC, the transferred obligation itself remains governed by the other law.

44 *(4) Intertemporal applicability: the applicable edition of the PICC.* Since the **1994 and 2004 editions of the PICC** are different, the question can arise of which version applies. The answer is clear if the parties, as is recommended, explicitly determine which version they select. The situation is more complicated if the parties have chosen the PICC without designating a version. If the choice is made after 2004, it can be presumed to be the 2004 edition of the PICC.[102] If the choice was made earlier, the issue arises whether the choice is a dynamic one (designating the PICC in whatever version is current at the time of dispute) or a static one (designating the PICC in the state in which they are at the time of choice). The traditional solution in choice of law is to read party choice as dynamic, going to the version in force at the time of adjudication. The same solution should apply when the PICC are chosen as applicable law.[103] But the solution appears correct even when the PICC are merely incorporated into the contract within the framework of an otherwise applicable contract law. Although the content of a contract is usually fixed at the time when it is made, freedom of contract allows parties to refer dynamically to norms lying outside the contract, and this seems especially appropriate with regard to the PICC (given that it was always known they would be revised). However, where a change would lead to the frustration of the parties' legitimate expectations, these expectations must prevail over the application of the new edition of the PICC.

45 **(c) Choice of law clause**

Altogether, freedom to choose the PICC as applicable law seems desirable (though so far rarely exercised, at least outside of arbitration),[104] but their **choice as applicable law neces-**

[99] Bonell (n 9 above) 317.

[100] ibid 80; see also Off Cmt 3 to Art 1.3, p 11.

[101] See below, Art 2.2.1 para 14.

[102] Centro de Arbitraje de México 30 November 2006, Unilex.

[103] J Kondring, 'Nichtstaatliches Recht als Vertragsstatut vor staatlichen Gerichten – oder: Privatkodifikationen in der Abseitsfalle?' [2007] IPRax 241, 244.

[104] See only (2006) Study L – Misc 25, para 22 (Chappuis).

sarily remains incomplete.[105] First, the PICC are still incomplete even within general contract law (see para 40 above), so any choice must be supplemented with that of a domestic law. Second, the PICC contain no rules for specific contract types (see para 17 above), so they need to be supplemented by some other, often domestic, law. Third, the PICC contain almost exclusively non-mandatory norms, so mandatory norms will still be derived from official law as determined by choice of law rules (Art 1.4; see para 41 above). This means that even where the PICC can be chosen as applicable law, a supplemental domestic law must be determined. This choice of law takes place under the applicable rules of choice and can therefore be based either on a supplemental choice by the parties or, where such a choice is absent or invalid, on the basis of objective connecting factors.[106]

46 Following approval by the Governing Council in 1999,[107] the PICC provide an **official footnote with two suggested texts for choice of law clauses**, formulated by Professor Farnsworth.[108] The first of these model clauses appears inadequate, because parties choosing the PICC will regularly want to minimize uncertainty and determine a supplemental law for areas not covered by the PICC. The second model clause is better in this respect, but it does not account for the possibility of choosing international Conventions instead of, or in addition to, domestic law.[109] A proper model clause must achieve completeness by providing applicable norms for all circumstances. In addition, it must determine the hierarchy between the sources.

47 Model contracts provide better models in this regard.[110] A good model clause, accounting for both the strengths and the incompleteness of the PICC, can be found in Art 14 of the 1999 ITC Model Contract for the International Sale of Perishable Goods:[111]

'In so far as any matters are not covered by the foregoing provisions, this Contract is governed by the following, in descending order of precedence:

- The United Nations Convention on Contracts for the International Sale of Goods
- The UNIDROIT Principles of International Commercial Contracts, and
- For matters not dealt with in the above-mentioned texts, the law applicable at _____ or, in the absence of a choice of law, the law applicable at the Seller's place of business through which this Contract is to be performed.'

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105 H Raeschke-Kaessler, 'The UNIDROIT Principles in Contemporary Contract Practice' [2002] ICC Int'l Ct Arb Bull, Special suppl 99, 99–100.

106 See also para 51 below.

107 (1999) CD 78 (23); dates changed (from the 1994 edition of the PICC to the 2004 edition of the PICC) in (2003) Study L – Doc 85, p 1 (section I A).

108 (1998) Study L – Doc 57; see the debate in (1999) Study L – Misc 21 paras 4–17.

109 Although under current choice of law rules international Conventions cannot normally be selected outside their normal scope of application, it seems safe to assume that a choice of law regime that allows choice of the PICC also allows for the choice of international Conventions.

110 A Mourre and E Jolivet, 'La réception des Principes d'UNIDROIT dans les contrats modèles de la Chambre de Commerce Internationale' [2004] ULR 275, 289–293.

111 International Trade Center UNCTAD/WTO, *International Commercial Sale of Perishable Goods: Model Contract and Users' Guide* (1999) (www.jurisint.org/en/con/339.html). For other clauses, see Kronke (n 3 above) 453–454; F Bortolotti, 'Reference to the UNIDROIT Principles in Contract Practice and Model Contracts' [2005] ICC Int'l Ct Arb Bull, Special suppl 57, 61–64; MJ Bonell, 'UNIDROIT Principles 2004: The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law' [2004] ULR 5, 11.

48 This model can easily be adapted, both for other types of contracts (for which the CISG is less appropriate) and for other criteria to designate the applicable domestic law. Also, parties may want to give the PICC precedence over the CISG on the basis that some rules of the PICC are more specific and/or represent improvements over those of the CISG.[112]

(d) Solutions under existing legal regimes

49 ***(1) General comparative results.*** Although the question of whether the PICC can be the applicable law must be answered separately for each legal system, some general insights arise from comparing their approaches. First, there is some **consistency in statutory interpretation of choice of law rules**. Where choice of law rules designate the 'law of a state', this is universally and appropriately read to exclude the PICC. Where choice of law rules designate 'rules of law' as applicable, this is frequently read as an indicator that the PICC can be included; especially in the context of arbitration.[113] Where, finally, choice of law rules simply speak of 'the law', mere textual analysis is of little help: whether law in this sense includes the PICC must be answered through arguments of drafting history, systematic context, and purposes. The substantive characteristics and purposes of the PICC can become relevant especially for the purposes of such a choice of law rule.

50 Second, comparison shows that **almost all state legal orders reject application of the PICC as law** by confining the status of 'applicable law' to state law, whether as selected law within the scope of party autonomy or as objectively applicable law in the absence of a choice. Traditional choice of law mediates between the legal orders of states, and states are unwilling to give up the traditional state-based concept of law.[114] The situation is different in arbitration, where applicability of the PICC is more widely accepted.[115] Views amongst academics are split. Much of the discussion is devoted to whether the PICC can become the applicable law on the basis of a choice by the parties; their use as applicable law absent a choice by the parties is not yet sufficiently established, although such use seems much more in tune with their purposes and character.[116]

51 ***(2) European Union.*** Until recently, courts in EU member states determined the applicable contract law under the Convention on the Law Applicable to Contractual Obligations (**Rome Convention**).[117] Its Art 3 allows the parties to choose the applicable 'law'. Choice of the PICC as applicable law is thus excluded.[118] Despite occasional claims

[112] Prujiner (n 93 above) 573–575.

[113] See below, Preamble II para 3.

[114] For explication, see Michaels (n 84 above) 1241–1249.

[115] See below, Preamble II para 3.

[116] See para 10 above and paras 67–80 below.

[117] EC Convention on the Law Applicable to Contractual Obligations (Rome Convention) [1998] OJ C 27/34.

[118] Although no court decision is directly on point with regard to the PICC, at least one decision suggests this in an obiter dictum when rejecting the eligibility of other non-state laws: Tribunale di Padova, Sezione di Este 11 January 2005, Unilex (choice of ICC rules); for discussion, see M Luby and S Poillot-Peruzzetto, 'Chronique: Droit international et européen' [2006] JCP 157; F Ferrari, *Contract with no governing law in private international and non-state law: Italian Report to the 17th Congress of the International Academy of Comparative*

to the contrary,[119] this follows quite clearly from a traditional interpretation of the Rome Convention, especially the history of the provisions (non-state law was not considered)[120] and the system of the Convention (other provisions make clear that the Convention is restricted to state law).[121] The distinction between state law and non-state law rests on rational criteria (regardless of whether one agrees with them) and therefore does not

Law (2006, unpublished) 4–5. For another decision rejecting choice of non-state law, see the English case of *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals* [2004] EWCA Civ 19, [2004] 1 WLR 1784 [48], QB (Shari'ah, *lex mercatoria*, 'general principles of law'). Literature on the question is vast. This note collects only authors addressing the PICC specifically, ordered by national origin (although EU law should apply uniformly) because of existing differences in perspective. For Belgian views see M Fontaine, 'Belgium' in MJ Bonell (ed), *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts* (1999) 55, 62. For Dutch views see L Strikwerda, *Inleidinge tot het nederlandse international privaatrecht* (2005) 177–178. For English views see M Bridge, 'The UK Sale of Goods Act, the CISG and the UNIDROIT Principles' in P Šarcevic and P Volken (eds), *The International Sale of Goods Revisited* (2001) 115, 143; R Goode, 'International Restatements and National Law' in W Swadling and G Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chievely* (1999) 45, 49–51; L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, 2006) para 32-081; CMV Clarkson and J Hill, *The Conflict of Laws* (3rd edn, 2006) 176. For French views see P Lagarde, 'Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980' [1980] Rev crit dr int privé 287, 300–301; C Larroumet, 'La valeur des principes d'UNIDROIT applicables aux contrats du commerce international' [1997] JCP 147, 149; P Mayer and V Heuzé, *Droit international privé* (8th edn, 2004) para 703. For German views see U Drobnig, 'The UNIDROIT Principles in the Conflict of Laws' [1998] ULR 385, 388; J Kropholler, *Internationales Privatrecht* (6th edn, 2006) 465; Michaels (n 4 above) 397–398; Teichert (n 4 above) 133–190. For Italian views see U Villani, *La Convenzione di Roma sulla legge applicabile ai contratti* (2nd edn, 2002) 81. For Spanish views see PA de Miguel Asensio, 'Armonización normativa y régimen jurídico de los contratos mercantiles internacionales' (1998) 12 Dir comm int 859, 875, 877. For Swedish views see C Hultmark, 'Sweden' in MJ Bonell (ed), *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts* (1999) 307; Hultmark (n 90 above) 256; M Bogdan, Svensk internationell privat- och processretten (6th edn, 2004) 237–238.

[119] For Dutch views see K Boele-Woelki, 'Principles and Private International Law: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law – How to Apply them to International Contracts' [1996] ULR 652, 665; F de Ly, 'Choice of law clauses, UNIDROIT Principles of International Commercial Contracts and Article 3 Rome Convention: *The lex mercatoria* before domestic courts or arbitration privilege?' in *Études offertes à Barthélemy Mercadal* (2002) 133, 143; A Hartkamp, 'The Use of the UNIDROIT Principles of International Commercial Contracts by National and Supranational Courts' in Institute of International Business Law and Practice (ed), *UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?* (ICC publication no 490/1) (1995) 253, 256. For German views see J Basedow, 'Germany' in MJ Bonell (ed), *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts* (1999) 125, 146–147; S Leible, 'Aussenhandel und Rechtssicherheit' (1998) 97 ZvglRWiss 286, 313–318; Roth (n 91 above) 768–771; Schilf (n 31 above) 371–372; JC Wichard, 'Die Anwendung der UNIDROIT-Prinzipien für internationale Handelsverträge durch Schiedsgerichte und staatliche Gerichte' (1996) 60 RabelsZ 269, 282–290. For French views, see Ancel (n 21 above). See also B Audit, *Droit international privé* (4th edn, 2006) para 821; Vischer (n 91 above) 451–452.

[120] Lagarde (n 118 above); Teichert (n 4 above) 152–154. For views against relevance of the historical argument, see Hartkamp (n 119 above) 256; Schilf (n 31 above) 362.

[121] Especially Art 1(1) of the Rome Convention (n 56 above): 'The rules of this Convention shall apply to contractual obligations in any situation involving a *choice between the laws of different countries*' (emphasis added). See detailed discussion in Schilf (n 31 above) 364–371; Teichert (n 4 above) 141–152.

violate principles of non-discrimination.[122] Neither the substantive quality of the PICC[123] nor their formal character as (legal or quasi-legal) norms[124] requires the legislator to treat them as eligible law. Likewise, even if the EU Treaty[125] should require states to accept party autonomy (in itself a doubtful proposition), the logic of EU law would still support a choice only between the laws of the EU member states, and not that of third country laws, much less that of non-state law.[126]

52 The same is true, after much debate, under the new law. In a Green Book of 2003, the European Commission had considered enabling parties to choose 'general principles of law' as applicable law.[127] Reactions were mixed: many academics were positive,[128] professional associations and practitioners were by and large more hesitant. A 2005 proposal for a new Regulation provided, in the first sentence of its Art 3(2), that '[t]he parties may also choose as the applicable law the principles and rules of the substantive law of contract recognized

[122] See Michaels (n 84 above) 1237–1249; cf most recently Schinkels (n 83 above) 111.

[123] AM López-Rodríguez, 'The Revision of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations: A Crucial Role within the European Contract Law Project?' (2003) 72 Nordic Journal of International Law 341, 351–354 (with references).

[124] Schinkels (n 83 above) 108, 111.

[125] Treaty on European Union of 29 July 1992, [1992] OJ C 191.

[126] Roth (n 91 above) 760; A Tassikas, *Dispositives Recht und Rechtswahlfreiheit als Ausnahmebereiche der Grundfreiheiten* (2004) 22–23; cf S Grundmann, *Europäisches Schuldvertragsrecht* (1999) 74 para 101; S Grundmann, 'Law merchant als lex lata Communitatis: insbesondere die UNIDROIT-Principles' in U Diederichsen et al (eds), *Festschrift für Walter Rolland zum 70: Geburtstag* (1999) 145; B Ancel and HM Watt, 'The Relevance of Substantive International Commercial Norms for Choice of Law in Contract: the Rome and Mexico City Conventions Compared' in L Pereznieto Castro et al (eds), *International Law at the Beginning of the Third Millennium: Liber in Memoriam of Professor Friedrich K Juenger* (2006) 1, 21–22. See also P Wilmowsky, 'EG-Vertrag und kollisionsrechtliche Rechtswahlfreiheit' (1998) 62 RabelsZ 1.

[127] Green Paper on the Conversion of the 1980 Rome Convention on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation of 14 January 2003, COM (2002) 654 final, Question 8 and Comment 3.2.3 (pp 23–24) (based on the empirically doubtful assumption that such references to non-state law are 'common practice in international trade').

[128] eg Max Planck Institute for Foreign Private and Private International Law, 'Comments on the European Commission's Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization' (2004) 68 RabelsZ 1, 32–33; Beraudo (n 90 above) 102–105; P Mankowski and U Magnus, 'The Green Paper on a Future Rome I Regulation: On the Road to a Renewed European Private International Law of Contracts' (2004) 103 ZvglRWiss 131; JL Neels and EA Fredericks, 'Revision of the Rome Convention on the law applicable to contractual obligations (1980): Perspectives from international commercial and financial law' [2004] EUREDIA: Revue européene de droit bancier et financier 173, 175–178; López-Rodríguez (n 110 above); JP Beraudo, 'La modernisation et l'harmonisation du droit des contrats: une perspective européenne' [2003] ULR 135, 137–138; Bonell (n 8 above) 190; Teichert (n 4 above) 195–224. All of the reactions are available at http://ec.europa.eu/justice_home/news/consulting_public/rome_i/news_summary_rome1_en.htm.

internationally or in the Community'.[129] However, that provision was not adopted in the final version of the Regulation.[130]

Should the European legislator want to allow parties to choose the PICC in the future, the text of draft Art 3(2) may need to be reformulated. Although its text made it clear that the general *lex mercatoria* should be excluded and the PICC should be included, the specific **requirement of international recognition** is difficult to define.[131] It seems necessary to confine it to rules that have been widely recognized by adjudicators and/or important international institutions, especially UNCITRAL.[132] Some propose substantive quality as an alternative criterion.[133] But this criterion (which the PICC would meet) would create considerable uncertainty and is not part of the text. Nor is it a requirement for the application of foreign state law, which can become applicable regardless of its substantive quality. **53**

As regards **gaps within the PICC**, the second sentence of draft Art 3(2) provided, like Art 7(2) CISG, that 'questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation'. Properly understood, the first part is in accordance with Art 1.6(2) PICC, and the second part clarifies the need to determine a supplemental law (see para 45 above). Although the text of draft Art 3(2) could be read to suggest otherwise,[134] there can be little doubt that parties can (and should—see paras 45–47 above) select this supplemental law. **54**

[129] Proposal for a Regulation of the European Parliament and the Council on the Law applicable to contractual obligations (Rome I), COM (2005) 650 final (15 December 2005) p 5. See de Ly (n 119 above); B Jud, 'Neue Dimensionen privatautonomer Rechtswahl: Die Wahl nichtstaatlichen Rechts im Entwurf der Rom I-Verordnung' [2006] JBl 695; P Mankowski, 'Stillschweigende Rechtswahl und wählbares Recht' in S Leible (ed), *Das Grünbuch zum Internationalen Vertragsrecht: Beiträge zur Fortentwicklung der vertraglichen Schuldverhältnisse* (2004) 63, 86–103; F Schäfer, 'Die Wahl nichtstaatlichen Rechts nach Art 3 Abs 2 des Entwurfs einer Rom I VO: Auswirkungen auf das optionale Instrument des europäischen Vertragsrechts' (2006) 3 GPR 54; Schinkels (n 83 above); O Toth, 'The UNIDROIT Principles of International Commercial Contracts as the Governing Law: Reflections in Light of the Reform of the Rome Convention' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 201; C Fountoulakis, 'The Parties' Choice of "Neutral Law" in International Sales Contracts' (2005) 7 EJLR 303, 324; S James, 'Time to Slice and Dice in the Contractual Kitchen?' in R Schulze (ed), *New Features in Contract Law* (2007) 299, 305–310; Kondring (n 103 above) 245; H Heiss, 'Die Vergemeinschaftung des internationalen Vertragsrechts durch "Rom I" und ihre Auswirkungen auf das österreichische internationale Privatrecht' [2006] JBl 750, 758–759; P Lagarde, 'Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles (Rome I)' [2006] Rev crit dr int privé 331, 335–336; P Mankowski, 'Der Vorschlag für die Rom I-Verordnung' [2006] IPRax 101, 102; F Marella, 'Prime note circa la scelta del diritto applicabile alle obbligazioni contrattuali nella proposta di regolamento "Roma I"' in P Franzina (ed), *La legge applicabile ai contratti nella proposta di regolamento 'Roma I'* (2006) 28, 35–39; MR McGuire, 'Die geplante Umwandlung des EVÜ in die Rom I-VO' [2006] ecolex 444; M Schmidt-Kessel, 'Neues aus Brüssel' (2006) 3 GPR 47.

[130] Art 3 of the Rome I Regulation (n 56 above).

[131] Discussed by Jud (n 129 above) 698–701.

[132] See para 102 below.

[133] Jud (n 129 above) 701–704 sets out these criteria: balanced content, neutrality of drafters, specificity, completeness, and publicity.

[134] Toth (n 129 above) 207.

55 *(3) Other European countries.* In European countries where the Rome I Regulation[135] does not apply, the answer must be found in domestic choice of law rules. The situation in **Switzerland** was long unclear. Art 116 of the 1987 Swiss Conflict of Laws Act only refers to the chosen law, without explicit restriction to state law.[136] Based on views in the literature advocating eligibility of the PICC and other non-state law,[137] the Commercial Court of St Gallen held in 2004 that the FIFA rules could be chosen as applicable law like the PICC.[138] The Federal Court overruled this decision with regard to the FIFA rules based on two considerations: codifications established by private organizations are subordinated to state law, and the FIFA rules themselves accept this subordination.[139] Although both arguments do not apply directly to the PICC, they make it unlikely that the Federal Court would reach a different decision with regard to the PICC.[140]

56 Other countries apparently take no position at all or a similarly negative one. This is so, for example, in **Croatia**[141] and presumably for **Serbia** and **Montenegro**,[142] as well as various new EU member states before their entry into the EU: they include **Hungary**,[143] the **Czech Republic**,[144] and **Romania**.[145] A similar result holds, at least in effect, in **Norway**, which follows the Rome Convention in this regard.[146]

57 *(4) North America.* Choice of law in the USA is not unified; different states take different methodological approaches.[147] Some scholars have proposed allowing the choice of the

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[135] n 56 above.

[136] Bundesgesetz über das internationale Privatrecht (English translation at www.umbricht.ch/pdf/SwissPIL.pdf).

[137] M Amstutz, NP Vogt, and M Wang, *Kommentar zum schweizerischen Privatrecht* (1996) Art 116 para 21; F Vischer, L Huber, and D Oser, *Internationales Vertragsrecht* (2nd edn, 2000) 66; F Vischer, 'The Relevance of the UNIDROIT Principles for Judges and Arbitrators in Disputes Arising out of International Contracts' (1998–1999) 1 EJLR 203, 212; Vischer (n 91 above) 451–452; cf K Siehr, *Das internationale Privatrecht der Schweiz* (2002) 232; U Portmann, 'Alles was Recht ist: Die Rechtswahl der UNIDROIT-Prinzipien und deren Lückenfüllung im schweizerischen IPRG' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 191; I Schwander, 'Der "contrat sans loi" und das nichtstaatliche Recht im Internationalen Privatrecht' in *Swiss Reports Presented at the XVIIth Congress of Comparative Law* (2006) 117.

[138] Handelsgericht St Gallen 12 November 2004, Unilex.

[139] DFT 20 December 2005, 132/2005 III 285, Unilex with notes by Ivo Schwander [2006] AJP 615; Kondring (n 103 above).

[140] Portmann (n 137 above) 199–200; Schwander (n 137 above).

[141] M Župan, *Croatian National Report: Contracts with no governing law in private international law and Non-State law – Report for the 17th Congress of the International Academy of Comparative Law* (2006, unpublished) 7.

[142] M Stanivukovic, *Contracts without a proper law in private international law and non-state law in Serbia and Montenegro Law – Report for the 17th Congress of the International Academy of Comparative Law* (2006, unpublished) 5–6, see also p 9 (for the law of Serbia and Montenegro, but presumably this also applies to the successor states).

[143] G Palasti, *Contracts with no governing law in private international law and Non-State law: Hungarian Report* (2006, unpublished) 2.

[144] M Pauknerová, *Contracts with no governing law in private international law and Non-State law: Czech Report* (2006, unpublished) 3.

[145] PM Cosmovici and R Munteanu, 'Romania' in MJ Bonell (ed), *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts* (1999) 281, 292.

[146] LM Heggberget and E Nyland, 'Formulering av Internasjonale Kontraktsrettlige Grunnprinzipper og Betydningen for Norsk Rett' (2002) 115 Tidskrift for Rettsvitenskap 252, 282.

[147] EF Scoles, P Hay, PJ Borchers and SC Symeonides, *Conflict of Laws* (4th edn, 2004) chapter 18.II.

PICC generally in the USA,[148] but so far to little avail. Currently, eligibility of the PICC as applicable law is almost universally rejected in the **common law systems of the USA**.[149] Twenty-four states follow the Restatement 2d Conflict of Laws, which, in its § 187(2), allows the parties to choose the applicable law. However, this choice is confined to the law of a state.[150] Only incorporation of the PICC into the contract (see para 33 above) is possible under § 187(1).[151] The same is true under the UCC. Its old § 1-105 allows only for choice of the law of a state with some connections, making it impossible to choose the PICC as applicable law. The new § 1-301, introduced in 2001 but retracted in 2008, would have given up the requirement of a close connection (and has, for this reason, been adopted merely by a small number of states) but still confined choice to the law of a state. Choice of non-state law was discussed but rejected.[152] It follows that the PICC can only be incorporated into the substance of the contract under § 1-302 UCC (USA),[153] a decision that holds despite occasional criticism in the literature.[154]

The situation in **states with codified choice of law rules** is different. The Louisiana codification is unclear: Art 3540 Lousiana Cc allows for the choice of a 'law' without explicit restriction to state law, and the main academic drafter of the codification considers applicability of the PICC possible.[155] More clarity exists in Oregon, where the PICC can be chosen under the 2001 Codification of Choice of Law for Contracts.[156] A comment to Art 120, which allows parties to choose the applicable 'law', says explicitly: 'In exercising this autonomy, parties may select model rules or principles. For example, parties to an international contract may choose to have it governed by the Unidroit Principles of International Commercial Contracts'.[157] No pertinent case is known. **58**

[148] PJ Borchers, 'The Internationalization of Contractual Conflicts Law' (1995) 28 Vand J Transnat'l L 421, 438.

[149] *Trans Meridian Trading Inc v Empresa Nacional de Comerzialicion de Insumos* 829 F 2d 949, 953–954 (9th Cir 1987): choice of UCP 500.

[150] SC Symeonides, 'Contracts Subject to Non-State Norms' (2006) 54 Am J Comp L, Suppl 209, 217.

[151] RJ Weintraub, '*Lex Mercatoria* and the UNIDROIT Principles of International Commercial Contracts' in PJ Borchers and J Zekoll (eds), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K Juenger* (2001) 141, 153; Symeonides (n 150 above) 216–217.

[152] ALI, Uniform Commercial Code. Revised Article 1. General Provisions, Members Consultative Group Draft (Feb 28, 2000) 24–25, cited after Bonell (n 9 above) 187 n 40.

[153] § 1-302 Cmt 2 UCC (USA); Bonell (n 9 above) 186–188; FK Juenger, 'Some Random Remarks from Overseas' in KP Berger (ed), *The Practice of Transnational Law* (2001) 81, 87–88; SH Jenkins, 'Contracting Out of Article 2: Minimizing the Obligation of Performance and Liability for Breach' (2006) 40 Loy LA LRev 401, 402–405.

[154] JM Graves, 'Party Autonomy in Choice of Commercial Law: The Failure of Revised UCC § 1-301 and a Proposal for Broader Reform' (2005) 36 Seton Hall Law Review 59.

[155] Symeonides (n 150 above) 221–222.

[156] Oregon Revised Statutes 81.100–135 (2001); JAR Nafziger, 'Oregon's Conflicts Law Applicable to Contracts' (2002) 38 Willamette Law Review 397, 400, 403; SC Symeonides, 'Codifying Choice of Law for Contracts: The Oregon Experience' (2003) 67 RabelsZ 726, 738; Symeonides (n 150 above) 221; S Symeonides, 'Oregon's Choice-of-Law Codification for Contract Conflict: An Exegesis' (2007) 44 Willamette Law Review 205, 228.

[157] Comments (to the Bill underlying the legislation), Section 7 Cmt 3, printed as Annex III in Nafziger (n 156 above) 419, 421.

59 In **Canada**, the question is rarely discussed; where it is, choice of the PICC as applicable law is excluded.[158]

60 *(5) Latin America.* Latin American legal systems have traditionally been sceptical of party autonomy in choice of law.[159] This changed somewhat with the Inter-American Convention on the Law Applicable to International Contracts of 1994 ('**Inter-American Convention**'),[160] which provides in its Art 7(1)(1): 'The contract shall be governed by the law chosen by the parties'. Although many scholars have argued that 'law' must be read to include non-state law like the PICC,[161] it appears more plausible that their choice is excluded.[162] Traditionally, in the Latin American context 'law' refers to official law; the eligibility of non-official law would need to be more express. This is so even though the Spanish version speaks of *derecho* rather than *ley* (unlike, for example, the Spanish version of the Rome I Regulation).[163] The reason is a systematic one: while Art 9(2)(2) of the Inter-American Convention explicitly requires the judge to look also to 'general principles of . . . law' when the parties have not chosen a law,[164] Art 7 of the Convention does not contain a similar expression.

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[158] For Québec, see JA Talpis, 'Retour vers le futur: application en droit québécois des Principes d'UNIDROIT au lieu d'une loi nationale' (2002) 36 RJT 608, 616 (with critique of this result at pp 618–621); cf Glenn (n 95 above) 62–63.

[159] See A Boggiano, 'The Contribution of the Hague Conference to the Development of Private International Law in Latin America: Universality and Genius Loci' (1992–II) 233 Recueil des Cours 99, 132–134; CF de Aguirre, *La autonomia de la voluntad en la contratación internacional* (1991); S Rippe, 'Problemas de derecho internacional privado en materia de contratos comerciales internacionales, con especial referencia a la aplicabilidad imperativa de los principios del proyecto UNIDROIT en los estados partes del MERCOSUR' in MJ Bonell and S Schipani (eds), *'Principi per i contratti commerciali internazionali' e il sistema giuridico latinoamericano* (1996) 51, 53–56; N de Araujo, *Contratos Internacionais: Autonomia de Vontade, Mercosul e Convenções Internacionais* (3rd edn, 2004) 91–129 (Brazil), 77–90 (other MERCOSUR member states).

[160] Inter-American Convention on the Law Applicable to International Contracts (Mexico, 17 March 1994).

[161] FK Juenger, 'The Inter-American Convention on the Law Applicable to International Contracts; Some Highlights and Comparisons' (1994) 42 Am J Comp L 381, 392; FK Juenger, 'Contract Choice of Law in the Americas' (1997) 45 Am J Comp L 195, 204; G Parra-Aranguren, 'The Fifth Inter-American Specialized Conference on Private International Law, Mexico City, 14–18 March, 1994' in A Borrás et al (eds), *E Pluribus Unum: Liber Amicorum Georges AL Droz* (1996) 299, 308; JL Siqueiros, 'Los Principios de UNIDROIT y la Convención Interamericana sobre el derecho aplicable a los contratos internacionales' in Instituto de Investigaciones Jurídicas (ed), *Contratación internacional: Comentarios a Los Principios sobre los Contratos Comerciales Internacionales del UNIDROIT* (1998) 217, 227; for a constitutional argument, see L da Gama e Souza jr, *Contratos Internacionais à luz dos Princìpios do UNIDROIT 2004: Soft Law, Arbitragem e Jurisdicao* (2006) 434–438; for extensive discussion, see Schilf (n 31 above) 347–359.

[162] A Boggiano, 'La Convention interaméricaine sur la loi applicable aux contrats internationaux et les Principes d'UNIDROIT' [1996] ULR 219, 226; R Herbert, 'La Convención Interamericana sobre Derecho Aplicable a los Contratos Internacionales' (1994) Revista Uruguaya de derecho internacional privado 45, 54; da Gama e Souza jr (n 161 above) 432; DP Fernández Arroyo, 'La Convention inter-américaine sur la loi applicable aux contrats internationaux: certains chemins conduisent au-delà de Rome' [1995] Rev crit dr int privé 178, 182–183; also O Lando, 'Some Issues Relating to the Law Applicable to Contractual Obligations' (1996) 7 King's College Law Journal 55, 63; MN Lamm, *Die Interamerikanischen Spezialkonferenzen für Internationales Privatrecht* (2000) 268; DP Fernández Arroyo (ed), *Derecho Internacional Privado de los Estados del Mercosur* (2003) 996–1006.

[163] Beraudo (n 90 above) 106. For the Rome Regulation, see n 56 above.

[164] See para 75 below.

The question is largely irrelevant in practice, since so far only Mexico and Venezuela have ratified the Inter-American Convention.[165] **Mexico** allows party autonomy, but whether it extends to the PICC is unclear.[166] **Venezuela** has adopted Art 7 of the Inter-American Convention in Art 29 of its 1998 Private International Law Act;[167] whether the PICC can be chosen excluding other laws is likewise not certain.[168] **61**

Outside the Inter-American Convention, choice of the PICC appears largely unavailable. Party autonomy is excluded altogether in the **Montevideo Treaties** of 1889 and 1940,[169] and largely rejected in the domestic conflict of laws rules relating to the courts[170] of **Bolivia**,[171] **Brazil**, **Colombia**, **Paraguay,** and **Uruguay**.[172] It follows, *a fortiori*, that the PICC can only be integrated into the contract,[173] but not chosen as applicable law.[174] The same is true for **Argentina** and **Chile**, which allow for party autonomy but not for the choice of the PICC.[175] In both countries, the details still need clarification.[176] **62**

(6) Asia. Asian countries appear to be unanimous in refusing to recognize the PICC as applicable law. In the **People's Republic of China**, such applicability is hardly endorsed.[177] In **Japan**, it appears that no court has yet used the PICC; scholars advocating their eligibility are in the minority.[178] The new 2006 Japanese Choice of Law Act endorses party **63**

[165] See the list of signatory countries to the Inter-American Convention (www.oas.org/juridico/english/Sigs/b-56.html).

[166] JL Siqueiros, 'Los nuevos principios de UNIDROIT 2004 sobre contratos comerciales internacionales' (2005) Rev der priv 129, 134 (see 135 for interpretation of uniform law).

[167] Ley de Derecho Internacional Privado of 6 August 1998.

[168] AA Andrade and NM Fernández, 'Los Principios UNIDROIT en las Relaciones Comerciales Internacionales' (2006) 25 Revista de Derecho, Universidad del Norte 47, 69–73.

[169] Tratados de Derecho Civil Internacional y de Derecho Comercial Internacional (Montevideo, 12 February 1889), Tratados de Derecho Civil Internacional, de Derecho de Navegación Comercial Internacional y de Derecho Comercial Terrestre Internacional (Montevideo, 19 March 1940); L da Gama e Souza jr, 'The UNIDROIT Principles of International Commercial Contracts and their Applicability in the MERCOSUR Countries' (2002) 36 RJT 375, 387.

[170] In all of these countries (except for Uruguay), party autonomy is accepted if the dispute is submitted to arbitration: J Kleinheisterkamp, *International Commercial Arbitration in Latin America* (2005) 325–327.

[171] ibid 325.

[172] da Gama e Souza jr (n 169 above) 390–394; Kleinheisterkamp (n 170 above) 324.

[173] da Gama e Souza jr (n 161 above) 400–401.

[174] ibid 403, 406.

[175] Fernández Arroyo (ed), *Derecho Internacional Privado* (n 162 above) 1008–1010.

[176] Kleinheisterkamp (n 170 above) 324–325.

[177] H Danhan, 'The UNIDROIT Principles and their Influence in the Modernisation of Contract Law in the People's Republic of China' [2003] ULR 107, 109, 116. But see Xun Ma, 'Guo Ji Shang Shi He Tong Tong Ze' and Xian Dai Shang Ren Fa' [the UNIDROIT Principles and Modern Lex Mercatoria], [2006] Jiang Su Shang Lun [Jiangsu Commercial Forum] 104–106 (envisaging applicability by courts in the future).

[178] See Y Nishitani, 'Ist das Kollisionsrecht für den internationalen Rechts- und Wirtschaftsverkehr ein ausreichendes Instrumentarium? Unter besonderer Berücksichtigung der "lex mercatoria"', in K Riesenhuber and K Takayama (eds), *Rechtsangleichung: Grundlagen, Methoden und Inhalte – Deutsch- Japanische Perspektiven* (2006) 311, 324 with further references (also for *lex mercatoria*); T Kansaki, *Contracts without a proper law in private international law and non-state law: Japanese Report Law – Report for the 17th Congress of the International Academy of Comparative Law* (2006, unpublished).

autonomy in its Art 7,[179] but it does not address the question of non-state law.[180] Similar information emerges with regard to **Vietnam**: even for those international contracts for which the application of Vietnamese law is not obligatory, Part 7 of the Civil Code of 1 July 1996, which governs choice of law, does not provide for the application of non-state law.[181] A proposal to allow for the choice of the PICC in a future **ASEAN** Private International Law Convention is unlikely to succeed anytime soon.[182]

64 **3. Choice of general principles of law or lex mercatoria (paragraph 3 of the Preamble).**

General principles of law, a source of public international law,[183] refer to principles common to the laws of all—or at least most—states in the world. *Lex mercatoria*, a somewhat vague and very contentious concept, describes an alleged body of non-national and transnational rules of law that have been created, at least in part, within commerce rather than by states.[184] Both general principles and the *lex mercatoria* are relevant more for arbitration than for domestic courts (see below, Preamble II); but the main **three questions involved in paragraph 3 of the Preamble** can be dealt with here.

65 First, where general principles or the *lex mercatoria* have validly been chosen as the applicable law, **can the PICC be applied as a codification of the *lex mercatoria*?** If the frequent claim that the PICC represent an adequate codification of the *lex mercatoria* is valid,[185] then their applicability is justified. However, since no domestic conflict of laws regimes currently allow for a choice of the *lex mercatoria*, this question is relevant only in arbitration.[186]

66 Second, can the parties' reference to 'general principles of law' or the *lex mercatoria* be interpreted as an **indirect designation of the PICC**? This is a question of interpretation of the contract. This question is governed by the applicable choice of law regime or, where the

[179] Hô no Tekiyô ni kansuru Tsûsoku-Hô (Act on General Rules for Application of Laws), Law No 78 of 21 June 2006; translated in (2006) 8 Yearbook of Private International Law 427 with comment by Y Okuda at 145.

[180] See Y Nishitani, 'Party Autonomy and its Restrictions by Mandatory Rules in Japanese Private International Law: Contractual Conflicts Rules' in J Basedow et al (eds), *Japanese and European Private International Law in Comparative Perspective* (2008) 77, 87–88.

[181] Le Net, 'Vietnam' in MJ Bonell (ed), *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts* (1999) 421, 427–428; MH Nguyen, 'Les Principes UNIDROIT: Jurisprudence et expériences pour le Vietnam' [2005] Int'l Bus LJ 619; D Van Dai, 'Les Clauses de Droit Applicable au Vietnam' [2005] Int'l Bus LJ 601.

[182] B Hardjowahono, *The Unification of Private International Law on International Commercial Contracts within the Regional Legal System of ASEAN* (2005) 204–205.

[183] Art 38(1)(c) of the Statute of the International Court of Justice of 26 June 1945.

[184] R Michaels, 'The True Lex Mercatoria: Law Beyond the State' (2007) 14 Indiana Journal of Global Legal Studies 447 with further references.

[185] Arbitral Award (Paris), ICC case no 8873, (1998) 125 Clunet 1017, with obs Harder, Unilex, G Baron, 'Do the UNIDROIT Principles of International Commercial Contracts form a new lex mercatoria?' (1999) 15 Arb Int'l 115; A Leduc, 'L'émergence d'une nouvelle *lex mercatoria* à l'enseigne des principes d'UNIDROIT relatifs aux contrats du commerce international: thèse et antithèse' (2001) 35 RJT 429; cf CW Fassberg, 'Lex Mercatoria: Hoist with its own Petard?' (2004) 5 Chicago Journal of International Law 67, 79–81; VR Anou-Nigm, 'The lex mercatoria and its current relevance in international commercial arbitration' in *Liber amicorum: Homenaje al professor Dr Opertti Badán* (2005) 469, 483.

[186] See below, Preamble II paras 16–20.

PICC are incorporated into the contract, the applicable rules of domestic contract law, and thus not different between state courts and arbitrators. In general, caution seems in order: the *lex mercatoria* is different from the PICC in important ways, and parties, by choosing the *lex mercatoria*, may not expect the PICC to apply or may even be trying actively to avoid their application.[187]

Third, a choice of the *lex mercatoria* as applicable law may be impossible under the applicable choice of law regime where a choice of the PICC is possible (for example, under the proposed Art 3(2) of the draft Rome Regulation—see paras 52–54 above). In this situation, can the adjudicator, if the parties choose the *lex mercatoria*, **apply the PICC to save the choice of law clause**? Again, this is a matter for the applicable rules on choice of law or on contractual interpretation. In general, parties facing this scenario cannot reasonably object if the PICC are used to save an otherwise invalid choice.[188] **67**

4. Applicability without a choice by the parties (paragraph 4 of the Preamble)

(a) The PICC as objective substantive law. Traditionally, where the parties do not choose a law to govern their contract, choice of law rules designate a domestic law on the basis of some objective criterion like the 'closest connection'. Application of the PICC as objective law by a state court, as provided in paragraph 4 of the Preamble, **would violate traditional choice of law principles**. This use has garnered comparably less attention than the question of whether the parties can choose the PICC, a surprising contrast to the main model for the PICC, the US Restatement of the Law of Contracts, which is never discussed as an object of party choice.[189] A provision like paragraph 4 was not even part of the 1994 edition of the PICC. Paragraph 4 was added in 2004 in light of arbitral decisions that had used the 1994 version of the PICC for this purpose.[190] In addition, several academics have proposed substantive universal law as an alternative to the choice of law approach. **68**

Many **reasons** given for the application of the PICC as objective law are unconvincing. Although many emphasize the difficulty of traditional conflict of laws in designating the applicable law,[191] this difficulty seems overrated. A stronger argument is that domestic laws are intrinsically inadequate for international contracts, but the PICC are not dramatically more international in focus than the domestic laws on which they draw (see para 24 above). The argument that state laws are unduly restrictive towards free trade[192] is weak in view of the great scope that the PICC leave for restrictive mandatory norms (Art 1.4). **69**

The PICC have the strongest claim for application as objective law where they concern areas in which different domestic laws do not have strong differences in substance **70**

[187] Kahn (n 21 above) 45, 47.

[188] Michaels (n 4 above) 602.

[189] Similarly D Oser, *The UNIDROIT Principles of International Commercial Contracts: A Governing Law?* (2008) 13–15.

[190] (2003) Study L – Misc 25, paras 604 (Bonell) and 608 (Komarov); Bonell (n 111 above) 19–20.

[191] H Schack, 'Das IPR: Ein Buch mit sieben Siegeln, reif für das moderne Antiquariat?' in H Krüger and HP Mansel (eds), *Liber Amicorum Gerhard Kegel* (2002) 179, 185–186.

[192] Schilf (n 31 above) 2–4.

or policy.[193] In these areas, the PICC are most likely to fulfil both their restatement purpose (see paras 3–4 above) and their model purpose (see paras 5–6 above). As objective law in this sense, the PICC provide not a fully-fledged legal system but rather a background law for the contractual agreement of the parties on the one hand and the mandatory norms of concerned legal systems on the other. Notably, this also accords with the the US Restatements (the model for the PICC), which are not open for choice by the parties but which are applicable when there is no clearly deviating domestic law.

(b) Solutions under existing conflict of laws regimes

71 *(1) General comparative results.* The concept of a substantive transnational law stands **in conflict with most traditional choice of law regimes** that designate one official legal system as the applicable law. Typically, choice of law rules speak of 'the law of the state . . . ' which is read unanimously to prevent the PICC from being applicable (see para 48 above). Only where choice of law rules designate 'rules of law' could such freedom exist, but this is not the case for domestic legal systems. If non-state law like the PICC is mentioned at all, it is usually not a fully applicable law, but merely a legal system to be taken into consideration, as in the Inter-American Convention (see para 78 below). Indeed, adjudicators usually only make occasional reference to the PICC. Where the PICC are used at all by state courts, they are not applied as the law governing a contract.

72 *(2) European Union.* Under **Art 4(1)** of the **Rome Convention**,[194] when the parties do not choose the applicable law, 'the contract shall be governed by the law of *the country* with which it is most closely connected'. The new European Regulation does not alter this reference to the law of a country.[195] It follows that the PICC, which are not the law of a country, are not applicable. This appears to be undisputed even among authors who favour the applicability of the PICC if the parties have chosen them.[196]

73 It has been suggested to make the PICC applicable under **Art 18 of the Rome Convention**, which requires that '[i]n the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application'.[197] This seems incorrect. Unlike Art 9(2)(2) of the Inter-American Convention,[198] Art 18 of the Rome Convention concerns the interpretation of choice of law rules. The PICC, however, come into play only in the interpretation of substantive law. Whether substantive law should be interpreted in a way that accommodates the PICC is determined by that law itself. The new Rome I Regulation does not include a similar provision on its own interpretation.[199]

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193 Vischer (n 137 above) 212–214.

194 See n 56 above.

195 See para 52 above.

196 Boele-Woelki (n 119 above) 672 (but see also her criticism of this solution at 672–674); Drobnig (n 118 above) 392; Wichard (n 119 above) 294; E Lein, 'La portée pratique des Principes UNIDROIT: une perspective allemande' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 169, 178–179; Teichert (n 4 above) 225–232.

197 Beraudo (n 90 above) 100–101.

198 See para 75 below.

199 n 129 above.

(3) United States. In US law, if the parties have not chosen a law, the applicable law is currently always the law of a state or a nation; **resorting to the PICC as applicable law is not discussed**. The same is largely true for **Canada**.[200] Inapplicability seems inevitable for traditional approaches that determine the applicable law on the basis of territorial sovereignty, since the PICC are not based on sovereign power, nor are they territorial. It is in contrast, however, with the frequent application of the Restatement 2d Contracts, one of the models for the PICC. Indeed, existing methods of choice of law do not require this result, and application of the PICC would actually be compatible with US law on conflict of laws. **74**

The PICC can apply in a **governmental interest analysis**, namely in 'no-interest' or 'unprovided-for' cases—cases where no government is interested in the application of its own laws. Interest analysis provides no clear guidance for such cases, because under this approach, application of a state's law is triggered only by the state's interest in the law's application. Where no governmental interests are involved, the application of a non-governmental law should be possible. **75**

The PICC can also provide the applicable law under the **Restatement 2d Conflict of Laws**. Application is excluded under a literal application, since § 188 of the Restatement designates the law of the state with the closest connection, and the PICC are not the law of any state.[201] But since the Restatement 2d Conflict of Laws is not a legislative act, it does not require literal application. Application of the PICC is attractive in view of the factors mentioned in § 6(2) of the Restatement, at least in cases without strong policy concerns. The needs of the interstate and international systems outlined in § 6(2)(a) are better served by the PICC than by application of a state law. Governmental interests under § 6(2)(b) and (c) are often not implicated; if they are, they can be dealt with through Art 1.4 PICC. **76**

The protection of justified expectations under § 6(2)(d) can be guaranteed in cases in which the parties did not positively expect the application of any one state law. In such situations the application of any such state law would be both surprising and arbitrary, while the PICC could function as a common denominator. Furthermore, even where parties consider the potentially applicable laws but do not choose an applicable law because they cannot agree on one, the PICC provide a better, more neutral background law against which such negotiations can take place than an objectively determined domestic law. The basic policies underlying the field (§ 6(2)(e)) are incorporated into the PICC. Certainty, predictability, and uniformity under § 6(2)(f) can be guaranteed, as can the requirement under § 6(2)(g) for ease in the determination and application of the releveant law, **77**

Finally, the PICC could also be applied, with limitations, under the so-called **Better-Law Approach**, which in essence designates the better of the several potential laws to be applicable. Where the PICC are in accordance with one of these potential laws, they can serve as a tie-breaker, provided they fulfil their model purpose with regard to the specific norm (see paras 5–6 above, 83 below). **78**

[200] But see Glenn (n 95 above) 63 about the PICC as proper law under Québec choice of law when the parties have not chosen a law.

[201] Symeonides (n 150 above) 215–216.

79 *(4) Latin America.* Art 9(2)(2) of the **Inter-American Convention** requires that the Court 'shall also take into account the general principles of international commercial law recognized by international organizations'.[202] Art 10 of the Inter-American Convention provides: 'In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case'. Unlike Art 18 of the Rome Convention,[203] these provisions obviously refer to substantive law, and legislative history shows that 'principles of international commercial law' includes the PICC.[204]

80 However, the actual scope is not clear. Some have argued that these provisions allow adjudicators to designate the PICC as applicable law when the parties have not made a choice.[205] This is unpersuasive in view of the legislative history—an explicit proposal of this sort by the US delegation had been rejected.[206] It appears more plausible to read the two provisions as suggesting use of the PICC to interpret and potentially supplement the applicable domestic law (paragraph 6 of the Preamble).[207] Arts 9 and 10 of the Inter-American Convention have been adopted, more or less verbatim, into Arts 30 and 31 of the 1998 Venezuelan Private International Law Act.[208] In countries that are not parties to the Inter-American Convention, the PICC are not applicable.

81 *(5) Asia.* Applicablity of the PICC as law where the parties make no choice has been proposed for a potential ASEAN Convention,[209] but so far to no avail.

5. Application where choice of law rules do not yield results

82 The choice of law process encompasses **two steps**: determining which law applies and determining the content of that law. Either step may be impossible to be put into practice with regard to national law. The PICC can help in different ways, depending on the step at which the problem arises.

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[202] n 160 above.

[203] See para 70 above; for the Rome I Convention see n 117 above.

[204] HS Burman, 'International Conflict of Laws, the 1994 Inter-American Convention on the Law Applicable to International Contracts, and Trends for the 1990s' (1995) 28 Vand J Transnat'l L 367, 381. For closer analysis, see L Pereznieto Castro, 'Los Principios de UNIDROIT y la Convención Interamericana sobre el Derecho Aplicable a los Contratos' in Instituto de Investigaciones Jurídicas (ed), *Contratación Internacional: Comentarios a los Principios sobre los Contratos Comerciales Internacionales del UNIDROIT* (1998) 209, 211–215.

[205] Juenger, 'The Inter-American Convention' (n 161 above); Siqueiros (n 161 above) 223–224 (perhaps); Beraudo (n 90 above) 109.

[206] See Juenger, 'The Inter-American Convention' (n 161 above) 391; H Veytia, 'The Requirements of Justice and Equity in Contracts' (1995) 69 Tul LRev 1191, 1194–1195, both with slightly different texts of the proposal. According to Juenger, the proposal read: 'If the parties have not selected the applicable law, or if this election proves ineffective, the contract shall be governed by the general principles of international commercial law accepted by international organizations'.

[207] Samtleben (n 90 above) 390.

[208] Ley de Derecho Internacional Privado y Exposición de Motivos, in (1998) 110 Revista de la Facultad de Cicencias Jurídicas y Poíticas de la Universidad Central de Venezuela 188 (see also n 167 above); J Samtleben, 'El enigma del Artículo 30 de la Ley de Derecho Internacional Privado' in *Libro Homenaje a Gonzalo Parra-Aranguren, Addendum 2001* (2002) 355; Andrade and Fernández (n 168 above) 69–73.

[209] Hardjowahono (n 182 above) 209.

83 (a) **Application when it cannot be determined what law applies.** Sometimes, despite best efforts, a judge cannot determine which of several potentially applicable national laws applies, either because the applicable choice of law norms are unclear, or because the facts required to determine the connecting factor in the applicable choice of law rule cannot be established. Although the PICC have not yet been used for these situations, they can arguably provide a solution. To the extent that they fulfil their restatement function (see paras 3–4 above), they can serve as a (rebuttable) presumption that all potentially applicable laws would lead to the same result, so the applicable law can be left undetermined and the PICC applied instead. Where, by contrast, the potentially applicable laws differ, the PICC may, insofar as their model purpose is fulfilled (see paras 5–6 above), serve as a tie-breaker in favour of that law with which they are in accordance. Details depend on the applicable choice of law regime.

84 (b) **Application when the content of the applicable law cannot be established.** A separate problem exists where the applicable law can be determined but its content remains unclear. Paragraph 4 of the Preamble of the 1994 edition of the PICC suggested that the PICC 'may provide a solution to an issue raised when it proves impossible to establish the relevant rule of an applicable law'. Since this provision was thought to have limited practical importance,[210] it has been relegated from the text of the 2004 edition of the PICC to an 'other possible use' in the Official Comment.[211] Yet given that these situations are frequent and traditional solutions unsatisfactory,[212] the **PICC can play an important role** here.

85 Normally, a judge is required to determine the **likely content of the applicable law** even if the content cannot be determined with certainty. Rather than applying forum law, drawing on analogies to existing rules in the applicable law, or borrowing from a closely related legal system (as is frequently suggested),[213] it is sometimes more satisfactory to draw on the PICC. Insofar as their restatement function is fulfilled (see paras 3–4 above), the PICC can be presumed to contain the unavailable content of the applicable law (although existing case law shows that this presumption is often erroneous).[214] They can therefore be applied, except where strong evidence suggests that they do not represent the content of the applicable law and another legal system is more likely to represent that content.

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[210] (2003) Study L – Misc 25, paras 600–603; Bonell (n 9 above) 256–257.

[211] Off Cmt 8 to Preamble, p 7.

[212] For discussions, see N Jansen and R Michaels, 'Die Auslegung und Fortbildung ausländischen Rechts' (2003) 116 Zeitschrift für Zivilprozess 3; M Jänterä-Jareborg, 'Foreign Law in National Courts: A Comparative Perspective' (2003) 304 Recueil des Cours 181, 307–324; S Gerooms, *Foreign Law in Civil Litigation* (2004) 194–213.

[213] Jänterä-Jareborg (n 212 above) 331–333; Gerooms (n 212 above) 211–212.

[214] eg the Dutch case of Rechtbank Zwolle 5 March 1997 (HA ZA 95-640), (1997) 15 NIPR 282, Unilex: interpretation of good faith in French (as foreign) law based on PICC; the Spanish case of TS (Sala de lo Civil) 4 July 2006 (2421/1999), RJ 2006 no 6080, Unilex: Art 1.7 used to interpret § 242 German Cc; the Italian case of Tribunale Rovereto 15 March 2007 (1052/04), Unilex: suggestion to use Art 7.4.13 to interpret English law rejected. See also J Kleinheisterkamp, 'Los Principios UNIDROIT en la interpretación del derecho nacional por tribunales estatales' in MP Ferrer Vanrell and A Martínez Cañellas, *Derecho contractual europeo y Principios UNIDROIT* (forthcoming).

86 Where the content of the applicable law can be determined but **gaps** exist, a judge should fill those gaps by analogy, and if necessary develop the applicable law further to the extent possible within the spirit of that law.[215] In some ways, this is no different from ordinary interpretation of domestic law, for which the PICC have a role to play (see paras 111–117 below). However, to the extent that policy decisions must be made, judges will often have a hard time arguing within the spirit of the foreign law, and the PICC are often a more reliable source for such decisions than speculations on the foreign law's policy. Insofar as their model function is fulfilled (see paras 5–6 above), the PICC can thus provide an important source of inspiration for the development of foreign law.

87 Where all of these steps do not yield a solution, many legal systems provide, either explicitly or customarily, that an **alternative body of law** should be applied instead of the normally applicable law whose content remains unascertainable. In most cases this is the law of the forum as generally subsidiary law. By contrast, some authors have proposed to use uniform law or general principles as a substitute,[216] which would suggest the application of the PICC.[217] This last view is the most adequate. Where the normally applicable law cannot be determined, a subsidiary law needs to be determined but *lex fori* is inadequate. Insofar as their restatement and model functions are fulfilled, the PICC can apply as the generally subsidiary law for international contracts.

IV. Use for the purposes of interpretation and supplementation (paragraphs 5–6 of the Preamble)

1. International uniform laws (paragraph 5 of the Preamble)

(a) General issues

88 *(1) Interpretation.* International uniform laws must normally be **interpreted in an autonomous manner**; supplementation with domestic law must remain an exception. Their goal of achieving uniformity would be severely hampered if each court interpreted them in accordance with its own domestic principles.[218] However, general principles for such interpretation are lacking. Although the Vienna Convention on the Law of Treaties[219] is technically applicable, it is ill-suited.[220] Its focus is on so-called *traités-contrats* (treaties exchanging rights and duties among states), and its rules are mostly borrowed

[215] Jansen and Michaels (n 212 above) 18, 39–44.

[216] H Kötz, 'Allgemeine Rechtsgrundsätze als Ersatzrecht' (1970) 34 RabelsZ 663; K Kreuzer 'Einheitsrecht als Ersatzrecht: zur Frage der Nichtermittelbarkeit fremden Rechts' [1983] NJW 1943.

[217] For the Inter-American Convention, see Veytia (n 206 above) 1197.

[218] UP Gruber, *Methoden des internationalen Einheitsrechts* (2004) 80–86; J Felemegas, 'Introduction' in J Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (2007) 10–13, both with references.

[219] United Nations Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 UNTS 331.

[220] See Gruber (n 218 above) 121–124.

from contract law, applied here to treaties as contracts among states. By contrast, uniform law generally consists of so-called *traités-lois* (treaties establishing substantive law), and the relevant interpretative principles must be those for laws. This makes it necessary to resort to general principles of interpretation.

Following the explicit provisions in Art 7 CISG, **three levels of interpretation** can be distinguished. On a first level, uniform law must be interpreted in independence from other texts and sources, with a view especially to its text and its objectives and purposes ('truly autonomous interpretation'). Here, the PICC can play a role based on their model character (see paras 5–6 above); certainly insofar as they have served as a model for the uniform law (see para 93 below), but also insofar as the respective adjudicator considers them to determine which of several possible interpretations is the most appropriate. **89**

On a second level, uniform law must be interpreted in the light of general principles of uniform, transnational, and comparative law—not truly autonomously, but autonomously from individual domestic laws ('transnational interpretation'). Here the PICC can play a role based on their restatement function (see paras 3–4 above), but they can fulfil this function only to the extent that they actually restate these general principles.[221] They can, at least *prima facie*, be used to provide the general principles needed for interpretation. This is so especially where interpretation of the uniform law should be based on a comparison of relevant domestic and international laws, since such a comparison underlies much of the PICC. On a third level, an additional law must be determined to supplement the norms of the uniform law. Here, the PICC can provide this law if their application complies with the applicable choice of law rules. **90**

That the PICC form a private codification of **non-binding nature is irrelevant** for both their restatement function and their model function.[222] It follows that the PICC can be used for interpretation even though they are not formally effective law.[223] Nor does it matter, as many have argued,[224] whether they were **passed after the respective uniform law**—as long as either the principles restated by the PICC are the principles that underlie the uniform law, or the substance of the PICC provides an attractive model for interpretation of uniform law within the adjudicator's interpretative discretion. **91**

The starting point of all interpretation of uniform law is the **text** of the uniform law. To the extent that the PICC contain more specific definitions or details of terms and rules that can be found in the uniform law text as well, they can often be used for its interpretation. However, similar terminology alone is not sufficient, since terms can have different meanings between different texts. The PICC can be used only under certain conditions. Where a **92**

[221] Bonell (n 9 above) 233; Wichard (n 119 above) 297; Burkart (n 4 above) 214–219; Canaris (n 4 above) 28; Petz (n 4 above) 96; see also MdP Perales Viscasillas, 'UNIDROIT Principles of International Commercial Contracts: Sphere of Application and General Provisions' (1996) 13 Ariz J Int'l & Comp L 381, 404.

[222] See paras 4–7 above.

[223] cf F Sabourin, 'Quebec' in MJ Bonell (ed), *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts* (1999) 237, 247–248.

[224] eg JJ Fawcett, JM Harris and M Bridge, *International Sale of Goods in the Conflict of Laws* (2005) 934–935.

uniform law text passed after the PICC explicitly adopts the PICC's terminology, the PICC can be used for interpretation (based on their model purpose—see paras 5–6 above) because then the definitions and interpretation of the PICC can be presumed to have been adopted as well. Where the uniform law did not explicitly adopt the relevant rules and terms from the PICC (because the law was either passed before the PICC or borrows its terminology from somewhere else), the PICC can still be used (based on their restatement purpose—see paras 3–4 above) insofar as the rules and terms that the uniform law refers to are accurately restated in the PICC.

93 In addition, uniform law must be interpreted according to its **goals and purposes**. The PICC cannot help in determining these goals of uniform law. However, similarity of purposes (especially regarding their model and effective law functions) is a precondition for the PICC to serve as an aid in interpretation.

94 To some extent, the **genesis** of the uniform law, especially as derived from preparatory materials, provides a valid criterion of interpretation. Here, the PICC have an obvious role to play if they provided an explicit basis for the creation of the uniform law (see para 117 below). Where this was not the case, the PICC can still be used if the uniform law was based on a comparison of the same domestic and international laws that went into the PICC, but this latter use is bound to be limited to situations in which the drafters of the uniform law really aimed at codifying a common core.

95 The biggest role for the PICC in interpretation exists where uniform law is, as is frequently the case, supposed to be interpreted on a **comparative analysis** of the legal orders of the different countries governed by the uniform law.[225] Traditionally, such comparative interpretation was regularly too complex for adjudicators. Now, where comparative interpretation of uniform law is intended to make sure that the uniform law accords with domestic laws, the PICC can help based on their restatement purpose.[226] Where, by contrast, a comparative interpretation is aimed at giving the adjudicator a superior solution, the PICC can provide such a solution based on their model purpose.[227]

96 *(2) Supplementation.* Only where an interpretation or analogy does not yield results, the uniform law must be supplemented with some other text. Typically, resort is had to domestic law, determined through some choice of law rule. However, supplementation with domestic law is unattractive, so **resorting to the PICC** is often advisable. The PICC are written for the same kind of international transaction as the uniform law they are supposed to supplement. In addition, to the extent that the PICC can also be used for interpretation (see para 87 above), no differentiation between interpretation and supplementation need be made—an important advantage over Art 7(1) and (2) CISG. Of course, the problem remains that the PICC themselves need to be interpreted and potentially supplemented (see Art 1.6).[228]

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[225] Gruber (n 218 above) 198–204.

[226] ibid 200.

[227] But for the dangers of such a short-cut, see Kleinheisterkamp (n 214 above).

[228] eg Gerechtshof 's-Hertogenbosch 16 October 2002 (HA ZA 98-1077), NIPR 2003, no 192, excerpt in German with comment by A Janssen in [2004] IHR 194: no rules on whether standard terms must be made

The PICC can be used for supplementation **only within the scope of the respective uniform law**.[229] For example, because contract validity is excluded from the CISG (see Art 4 CISG), Chapter 3 of the PICC cannot be used for interpretation or supplementation. Rather, questions outside the scope of the uniform law must be determined by another law to be determined through choice of law. Although it seems especially desirable in this situation for the PICC to play this role, the question is resolved through ordinary choice of law rules. **97**

(3) General part of uniform contract law. Due to their character as general contract law (see para 17 above), the PICC can play a role in interpretation and supplementation **for a great number of uniform laws**. This should help in bringing about more consistency and coherence in international uniform commercial law.[230] Moreover, the PICC could play the role of a general part of unified contract law, much like Art 1 UCC in the USA or like §§ 241–432 German Cc.[231] Their adequacy for interpretation and supplementation would then not have to be demonstrated afresh for each new uniform law. It requires that they are sufficiently attuned to existing uniform contract law, which, it is submitted, is the case.[232] In addition, their connection with specific instruments makes their interpretation more precise, too.[233] **98**

(b) Special applications

(1) The CISG and other UNCITRAL Conventions. In 2004 the United Nations Commission on International Trade Law (**UNCITRAL**) circulated the 2004 edition of the PICC to its member states for possible **endorsement**, envisaging that 'such circulation would facilitate coordination between UNCITRAL and UNIDROIT and would be of assistance to states that were not members of UNIDROIT and to other prospective users in using the UNIDROIT principles in their legislative and other work'.[234] However, instead of a formal endorsement that had been widely anticipated for 2007,[235] or an official recommendation of their use for interpretation,[236] the General Assembly of UNCITRAL decided merely to **99**

available to the other party in order to become part of the contract in either the CISG or Art 2.20 of the 1994 edition of the PICC (now Art 2.1.20 PICC); Art 2.104 PECL applied.

[229] Bonell (n 9 above) 233; J Basedow, 'Die UNIDROIT-Prinzipien der Internationalen Handelsverträge und die Übereinkommen des einheitlichen Privatrechts: Eine theoretische Studie zur praktischen Anwendung des internationalen Transportrechts, besonders der CMR' in J Basedow et al (eds), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* (1998) 19, 29; cf H Mather, 'Choice of law for international sales issues not resolved by the CISG' (2001) 20 J L & Com 155, 180–182, 188, 195–196, 198–200.

[230] U Magnus, 'Konventionsübergreifende Interpretation internationaler Staatsverträge privatrechtlichen Inhalts' in J Basedow et al (eds), *Aufbruch nach Europa: 75 Jahre Max-Planck-Institut für Privatrecht* (2001) 572, 577; for criticism see M Torsello, *Common Features of Uniform Law Conventions* (2004) 73.

[231] P Karrer, 'Internationalization of Civil Procedure: Beyond the IBA Rules of Evidence' [2004] ULR 893, 895; Schilf (n 25 above); Kronke (n 3 above) 456–457; see para 9 above.

[232] But see G Herrmann, 'Vision for UNCITRAL: Global Commerce Needs a Global Uniform Law' [2001] Business Law International 249, 251–252, criticizing insufficient attention to the United Nations Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) (www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html).

[233] SM Carbone, 'Principi dei contratti internazionali e norme di origine internazionale (con particolare riguardo al diritto uniforme)' [1997] Nuova Giurisprudenza Civile Commentata II 25.

[234] Official Records of the General Assembly, Sixty-first Session, Supplement No 17 (A/61/17), para 234.

[235] ibid; (2006) Study L – Doc 99, para 5; Bonell (n 81 above) 239.

[236] ibid 240.

'commend . . . the use of the Unidroit Principles 2004, as appropriate, for their intended purposes'.[237] It is unclear whether this was a deliberate distinction driven by caution over unintended far-reaching consequences[238] or whether it presents a mere terminological distinction without consequences (as claimed by UNIDROIT).[239] The exact effect of this commendation is also unclear.

100 The **CISG** is the international instrument for which the PICC can become most useful.[240] First, the PICC themselves were developed in parallel to and are closely modelled after the CISG, so their solutions are by and large either compatible with the system of the CISG or drafted with the specific purpose of remedying its shortcomings.[241] The goals of interpreting the CISG set out in its Art 7(1)—international character, uniformity in application, observance of good faith—are all matched by the PICC. Second, the PICC cover several areas left outside the explicit scope of the CISG. At the same time, because of the close proximity between the instruments, gaps in the CISG are frequently mirrored by gaps in the PICC.[242] Third, the PICC are more specific than the CISG—to some extent in the rules, but even more so in their Official Comment.[243] Even the CISG Advisory Council uses the PICC frequently for its interpretation of the CISG.[244] It has even been suggested that adjudicators are obliged to consult the PICC;[245] this appears exaggerated.

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[237] Official Records of the General Assembly, Sixty-second Session, Supplement No 17 (A/62/17), para 213. The full text of the resolution is as follows:

'The United Nations Commission on International Trade Law,

- *Expressing* its appreciation to the International Institute for the Unification of Private Law (Unidroit) for transmitting to it the text of the 2004 edition of the Unidroit Principles of International Commercial Contracts,
- *Taking note* that the Unidroit Principles 2004 complement a number of international trade law instruments, including the United Nations Convention on Contracts for the International Sale of Goods (1980),
- *Noting* that the preamble of the Unidroit Principles 2004 states that the Unidroit Principles 2004 set forth general rules for international contracts and that: [follows text of Preamble]
- *Congratulating* Unidroit on having made a further contribution to the facilitation of international trade by preparing general rules for international commercial contracts,
- Commends the use of the Unidroit Principles 2004, as appropriate, for their intended purposes.'

The PICC are not included among the endorsed texts listed at www.uncitral.org/uncitral/en/other_organizations_texts.html.

[238] See the critical remarks by the former Secretary General of UNCITRAL (n 232 above).

[239] (2007) CD (87) 2, p 16.

[240] See the article-by-article analysis in Part II of Felemegas (n 218 above).

[241] Bonell (n 9 above) 305.

[242] See Gerechtshof 's-Hertogenbosch 16 October 2002 (n 228 above); B Zeller, 'Measurement of damages when contract avoided: Remarks on the manner in which the UNIDROIT Principles may be used to interpret or supplement Article 76 of the CISG' in J Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (2007) 223.

[243] Arbitral Award 6 June 2003, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation case no 97/2002, Unilex, para 3.4: Off Cmt to Art 7.4.7, p 243, is used to interpret Arts 74 and 77 CISG.

[244] eg CISG Advisory Council Opinion No 6, *Calculation of Damages under CISG Article 74* (2006); cf the cautious remarks of the *rapporteur* of the Opinion, JY Gotanda, 'Using the UNIDROIT Principles to Fill Gaps in the CISG' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (2008) 107. On the role of the CISG Advisory Council, see L Mistelis, 'CISG-AC Publishes First Opinions' (http://cisgw3.law.pace.edu/cisg/CISG-AC.html).

[245] Burkart (n 4 above) 222–223.

Under **Art 7(2) CISG**, '[q]uestions concerning matters governed by [the CISG] which are not expressly settled in it are to be settled in conformity with the general principles on which it is based . . . '. With some exceptions (discussed in comments on individual articles in this Commentary), the PICC can serve as 'general principles underlying the CISG'.[246] Many have argued against this possibility, pointing out that the CISG predates the PICC and can therefore logically not be based on them.[247] This is a misunderstanding. What underlies the CISG are not the PICC but rather the general principles that the PICC have restated.[248] Use in this sense is therefore justified (and limited) by the restatement function of the PICC (see paras 3–4 above). In addition, the PICC can serve as general principles also in their model function (see paras 5–6 above) where an adjudicator looks for the most attractive interpretation of an unclear provision. Where they fulfil neither purpose, they cannot apply. As desirable as it might seem to use the PICC in their entirety as a 'general part of the CISG', this seems currently impossible without a formal adoption by the treaty parties. **101**

Strictly speaking, the PICC are **used not as general principles but as elaborations on such principles**. Most rules in the PICC are too specific to constitute general principles (see para 12 above). Indeed, where the PICC do express general principles, their use for the CISG is problematic. For example, the CISG does not expressly submit parties to a general principle of good faith, and there is an ongoing dispute over whether this principle can be read into the CISG.[249] In view of this debate, the existence of such a principle in the PICC (Art 1.7) cannot be viewed as conclusive for the CISG.[250] By contrast, the PICC are most useful where they are more specific than the rules of the CISG.[251] In some cases, the PICC can serve to specify unclear rules in the CISG. For example, the rule on fundamental breach in Art 25 CISG can be interpreted in light of the factors listed in Art 7.3.1(2) PICC.[252] **102**

[246] Arbitral Award December 1997 (Paris), ICC case no 8817, (1999) 10(2) ICC Int'l Ct Arb Bull 75, Unilex: 'its general principles [are] now contained in the [PICC]'; similarly Arbitral Award 1995 (Basle), ICC case no 8128, (1996) 123 Clunet 1024, Unilex: 'The arbitrator considers it justified to apply to the dispute identical rules contained in the UNIDROIT Principles and the PECL as general principles in the sense of Article 7(2) of the Vienna Convention 1980'; Magnus (n 32 above) 54–55; AR Vidal Olivares, 'La función integradora de los principios generales en la compraventa internacional de mercaderías y los principios de la UNIDROIT sobre contratos comerciales internacionales' [2003] ADC 993, 1032–1040; Burkart (n 4 above) 213–221 with references.

[247] eg F Ferrari, 'General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions on International Factoring and Leasing' (1998) 10 Pace Int'l LRev 157, 168; cf Drobnig (n 118 above) 228.

[248] Basedow (n 87 above) 136–137.

[249] See the discussion in BC Sheehy, 'Good Faith in the CISG: Interpretation Problems in Article 7' (2005–2006) *Review of the Convention on Contracts for the International Sale of Goods (CISG)* 153.

[250] But see Bridge (n 118 above) 132–133.

[251] Bonell (n 9 above) 318–325.

[252] Bridge (n 118 above) 134; R Koch, 'Whether the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Article 25 CISG' [2005] IHR 65 = '"Fundamental breach": Commentary on whether the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Article 25 CISG' in J Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (2007) 124; Bonell (n 9 above) 318.

In addition, the PICC are often mentioned merely to point out that rules from the CISG have been generalized for all contract types; here, they do not play an important role.[253]

103 An important problem in using the PICC concerns the question of **whether the matters in question are governed by the CISG** (so that general principles become relevant under Art 7(2) CISG) or not (so that the applicable law must be determined through choice of law). Some whole areas are expressly outside the scope of the CISG. For example, contract validity is explicitly excluded in Art 4(a) CISG, so recourse to Chapter 3 of the PICC must likewise be excluded. Other individual issues are not expressly excluded, thus raising the issue of whether Art 7(2) CISG, and thus the PICC, can apply. The most contentious *lacuna* in the CISG concerns interest rates (Arts 78 and 84(1) CISG).[254] Under the traditional approach, it is necessary to determine the applicable national law according to choice of law rules.[255] This means one important advantage of the CISG—uniformity and the avoidance of domestic law—is lost. Art 7.4.9(2) PICC can be used to fill this *lacuna*.[256] This is so even though Art 7.4.9(2) does not restate a common core or a general principle underlying the CISG: the calculation of the proper amount of interest was (and remains) disputed, which is why the matter was left out of the CISG. Instead, Art 7.4.9(2) can be used on the basis of the model purpose (see paras 5–6 above): it expresses a solution for which there is broad consensus, and it is adequate for the purposes of the CISG. Most of all, its adoption can ensure the need for uniformity envisaged in Art 7(1) CISG.[257]

[253] eg CA Grenoble 23 October 1996, [1997] Rev arb 87, Unilex: Art 57(1) CISG and Art 6.1.6 PICC; Arbitral Award December 1997 (Paris), ICC case no 8817 (n 246 above): Art 9.1 CISG and Art 1.8 PICC, Art 77 CISG and Art 7.4.8 PICC; Arbitral Award March 1998 (Zurich), ICC case no 9117, (1999) 10(2) ICC Int'l Ct Arb Bull 96, Unilex: Art 29(2) CISG and Art 2.18 of the 1994 edition of the PICC (now Art 2.1.18 PICC); Arbitral Award, ICC case no 11849, (2006) 31 YB Comm Arb 151: Art 74 CISG and Art 2.18 of the 1994 edition of the PICC (now Art 2.1.18 PICC).

[254] See the discussion in Schlechtriem/Schwenzer/Bacher Art 78 paras 26–36, with further references.

[255] ibid Art 78 para 27 n 25.

[256] Arbitral Award 20 May 2003, Supreme Economic Court of the Republic of Belarus case no 8-5/2003; Arbitral Award 15 June 1994 (Vienna), Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft case no SCH-4318: para 5.8; Arbitral Award 15 June 1994 (Vienna), Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft case no SCH-4366, [1994] RIW 591: para 5.2.2 with note by P Schlechtriem; A Veneziano, 'La Convenzione sulla vendita internazionale e i Principi UNIDROIT dei contratti commerciali internazionali, in due recenti lodi della Corte arbitrale della Camera di Commercio di Vienna' (1995) Riv arb 547 and I Seidl-Hohenveldern, (1995) 122 Clunet 1055; Arbitral Award 1995 (Basle), ICC case no 8128, (1996) 123 Clunet 1024, with obs D Hascher, Unilex; Arbitral Award (Zurich), ICC case no 8769, (1999) 10(2) ICC Int'l Ct Arb Bull 75; Arbitral Award 19 May 2004, International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation case no 100/2002, Unilex; Schlechtriem/Schwenzer/Bacher Art 78 para 31a; KL Kizer, 'Minding the Gap: Determining Interest Rates under the UN Convention for the International Sale of Goods' (1998) UChic LRev 1279, 1294–1296. This is not a majority opinion: for debate, see n 255 above.

[257] The PICC can fill other similar gaps too, such as the admissibility of and limits on contract penalties (Art 7.4.13): Arbitral Award 5 June 1997, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation case no 229/1996, Unilex; Arbitral Award 27 July 1999, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation case no 302/1997, Unilex; Schlechtriem/Schwenzer/Stoll/Gruber Art 74 para 49. See also below, Art 7.4.13 para 22.

It has been suggested that the PICC can serve to identify the **general usages** that parties are deemed to have implicitly made applicable to their contracts (Art 9(2) CISG).[258] This seems doubtful. The PICC mostly restate legal rules, not actual trade usages; in fact, their Art 1.8 is quite similar in this regard to Art 9(2) CISG.[259] Without more precise knowledge of an individual rule, it cannot be presumed to constitute a usage in the sense of Art 9(2) CISG.[260] **104**

(2) Other Conventions. Use of the PICC for the interpretation and supplementation of **UNIDROIT Conventions** raises the fewest problems. Although all UNIDROIT Conventions are negotiated amongst countries (unlike the PICC), the fact that both are created under the banner of the same institution allows for a presumption that the PICC can be used for their interpretation. However, it is important to look carefully at whether the purpose and scope of the PICC and the respective Convention are the same. Thus, for example, if the Cape Town Convention on International Interests in Mobile Equipment asks that interpretation and gap-filling occur 'in conformity with the general principles on which it is based',[261] it would be risky to assume that the PICC can deliver these general principles. That Convention deals with collaterals rather than general contract law, and the PICC's emphasis on good faith would conflict with the overarching need in the law of collaterals for legal certainty.[262] On the other hand, the PICC can very well serve to interpret the 1988 Factoring Convention[263] (although that Convention predates the PICC), to the extent the PICC codify the general principles on which the Factoring Convention is based (see its Art 4(2)). **105**

Given the close collaboration between UNIDROIT and UNCITRAL, the PICC should also prove useful for the interpretation of **UNCITRAL Conventions**, including those other **106**

[258] Arbitral Award 5 June 1997, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation case no 229/1996 (n 257 above); Arbitral Award 27 July 1999, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation case no 302/1997 (n 257 above); cf Gotanda (n 244 above) section V; A Janssen, 'Die Einbeziehung von allgemeinen Geschäftsbedingungen in internationale Kaufverträge und die Bedeutung der UNIDROIT- und der Lando-Principles: Zugleich Anmerkung zu Hof 's Hertogenbosch (Niederlande), Urteil vom 23.10.2002, Nr C 01/00017, NIPR 2003, Nr 192' [2004] IHR 194, 199; Schlechtriem/Schwenzer/Schmidt-Kessel Art 9 para 26. For a differentiated rule-by-rule solution, see Fawcett, Harris and Bridge (n 224 above) 935–936.

[259] See below, Art 1.8 paras 4, 17–18; J Oviedo Albán, 'Usages and practices: Editorial remarks on the manner in which the UNIDROIT Principles may be used to interpret or supplement CISG Article 9' in J Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (2007) 51.

[260] The situation is different where explicit reference is made to the PICC for determination of usages, as in Art 31(3) of the ITC Contractual Joint Venture Model Agreement (three parties or more) and Art 23(3) of the ITC Contractual Joint Venture Model Agreement (two parties only), see International Trade Center UNCTAD/WTO, *ITC Contractual Joint Venture Model Agreements* (2004) 26, 77 (www.jurisint.org/doc/orig/con/en/2004/2004jiconen3/2004jiconen3.pdf); see also JP Vulliéty, 'Le contrat-type pour les Joint Ventures contractuelles du Centre du Commerce International au regard des Principes d'UNIDROIT et d'autres normes d'unification du droit des contrats' [2004] ULR 295, 301–303.

[261] Art 5(2) of the Convention on International Interests in Mobile Equipment (Cape Town, 16 November 2001) (www.unidroit.org/english/conventions/mobile-equipment/main.htm).

[262] Kronke (n 3 above) 459.

[263] UNIDROIT Convention on International Factoring (Ottawa, 28 May 1988) (www.unidroit.org/english/conventions/1988factoring/1988factoring-e.htm).

than the CISG. This is so even though UNCITRAL itself stopped short of a formal endorsement (see para 98 above).

107 The PICC can be used to interpret Conventions dealing with **transportation matters**, especially the Convention on the Contract for the International Carriage of Goods by Road (CMR), but also others.[264] Even though the CMR does not contain a provision similar to Art 7 CISG, it seems appropriate to use the same principles of interpretation (see paras 88–95 above). This makes the PICC useful for a variety of issues that are unclear under the text of the CMR.[265] There is little weight in the counter-argument that the PICC are based on contractual autonomy (Art 1.1 PICC) whereas the CMR is binding in its entirety (Art 41 CMR): in fact, it is precisely because the CMR is binding that it becomes necessary to resort to general contract rules for its interpretation, because the intention of the parties must be irrelevant.[266] This gives the PICC an important role for matters of form, contractual liability, and good faith.

108 In order to give a broad meaning to the term 'international' in the 1975 **Inter-American Convention on International Commercial Arbitration**,[267] the Venezuelan Supreme Court invoked what is now Official Comment 1 to the Preamble (see paras 21–24 above).[268] Given that the Convention does not deal with contracts, the reference is not very convincing or relevant.

109 ***(3) European Union law.*** The PICC can be useful in interpreting and supplementing **EU contract law**. Actual use so far is sparse and inconclusive.[269] But the PICC provide helpful rules to interpret especially the numerous European Directives in the area of contract law,[270] and also to help specify the so-called 'general principles' of EU law in the area of private law.[271] At first sight the PECL might appear more appropriate, but both texts are quite similar,[272] and the greater practical experience with the PICC

[264] For the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924) (Hague Rules), see Carbone (n 233 above) 29, 30.

[265] Basedow (n 229 above) 31–32 and 35–37; Bonell (n 9 above) 229–230.

[266] Basedow (n 229 above) 33.

[267] Inter-American Convention on International Commercial Arbitration (Panama City, 30 January 1975) 438 UNTS 245, (1975) 14 ILM 336 (www.oas.org/juridico/english/treaties/b-35.html).

[268] Supreme Court of Venezuela 9 October 1998 (summary in [1998] ULR 176); da Gama e Souza jr (n 169 above) 414.

[269] Jung (n 4 above) 84, 90–91.

[270] ibid 84–85 with specific suggestions: Art 7.4.1 for a general concept of damages, Art 7.4.2 for non-monetary damages in vacation litigation, Art 7.1.7 with comments for the definition of *force majeure* in Art 9 of the Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers [1997] OJ L 43/25; CM Bianca, in S Grundmann and CM Bianca (eds), *EU-Kaufrechtsrichtlinie: Kommentar* (2002) Art 3 para 81: application of Art 7.1.3 within Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12.

[271] S Grundmann, 'Law merchant als lex lata' (n 126 above) 156; O Meyer, 'The UNIDROIT Principles and their impact on European private law: some comments on the opinion (31 January 2002) of Advocate General LA Geelhoed, 'Court of Justice of the European Communities in case C-334/00 – *Tacconi*' [2002] ULR 1222, 1225–1226; Jung (n 4 above) 86.

[272] Meyer (n 271 above) 1225–1226.

appears to qualify them better, at least in the eyes of those who have referred to either document.

The PICC can also be useful for the **Brussels I Regulation** on jurisdiction and the recognition and enforcement of foreign judgments.[273] They have been invoked in the context of Art 5(3) of the Brussels Regulation (delictual liability): Advocate General Geelhoed referred to what is now Art 2.1.15 PICC to determine whether breaking off negotiations could lead to pre-contractual liability. However, use of the PICC was not decisive, since the question was only whether such liability, if existing, should be viewed as tortious for the purpose of Art 5(3) of the Brussels Regulation.[274] Actually, the PICC could be more useful for Art 5(1) of the Brussels Regulation. In a traditional interpretation, the place of performance of a contract is determined either by the Brussels Regulation or by the applicable domestic law. It would be more attractive autonomously to use the PICC to determine general principles, like the place of performance for monetary obligations under Art 6.1.6.[275] Art 1.9(2) can also suggest the existence and relevance of certain uses regarding the place of performance.[276] **110**

2. Domestic law (paragraph 6 of the Preamble)

A provision concerning the interpretation and supplementation of domestic law was not included in the 1994 edition of the PICC, and was added only in view of actual practice using the PICC for this purpose.[277] Suggestions of combining this use with that of paragraph 5 of the Preamble were rejected because the use for uniform international law had proven to be controversial.[278] Indeed, the interpretation and supplementation of domestic law is *prima facie* different from that of uniform law. First, most domestic legal systems (especially in the continental tradition) are presumed to be complete, so interpretation would need to draw entirely on material within the system and leave no room for the PICC. Second, many legal systems (especially in the common law tradition) base the legitimacy of law, including contract law, on the command of the sovereign, so the PICC as non-official **111**

[273] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

[274] ECJ Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH* [2002] ECR I-7357, opinion of the Advocate-General, paras 55–56 and 59 n 45; see MJ Bonell, 'Pre-contractual liability, the Brussels Jurisdiction Convention and . . . the UNIDROIT Principles (Case 334/00 – Tacconi v HWS)' in PH Delvaux et al (eds), *Mélanges offerts a Marcel Fontaine* (2003) 359, 364–365, 368–370.

[275] CA Grenoble 23 October 1996 (n 253 above); B Gsell, 'Autonom bestimmter Gerichtsstand am Erfüllungsort nach der Brüssel I-Verordnung' [2002] IPRax 484, 491; Tribunale di Padova, Sezione di Este 11 January 2005, Unilex; M Luby and S Poillot-Peruzzetto, 'Chronique: Droit international et européen' [2006] JCP 157; F Ferrari, 'Remarks on the Autonomous Interpretation of the Brussels 1 Regulation, in Particular of the Concept of "Place of Delivery" under Article 5(1)(b), and the Vienna Sales Convention (on the Occasion of a Recent Italian Court Decision)' [2007] Int'l Bus LJ 83, 93; also A Veneziano, 'The Application of UNIDROIT Principles in International Sales' [2001] Int'l Bus LJ 477, 482.

[276] CA Grenoble 7 May 1997 (97-049233) (LexisNexis), p 5.

[277] (2003) Study L – Misc 25, paras 594 (Bonell) and 603; Bonell (n 9 above) 234 n 170.

[278] (2003) Study L – Misc 25, paras 596 (Bonell) and 600 (Lando).

law would play no role. As both views are changing, the **PICC can become more relevant, although their role so far is quite limited**, at least in state courts.[279]

112 Clearly the PICC as a non-binding instrument **cannot trump binding domestic law where its content is clear**.[280] For unresolved questions, they may provide additional support for one of the various possible responses[281]—although in this regard they do not stand above scholarly opinions or other secondary sources, and are in fact often cited side by side with those.[282] In some decisions listed on Unilex they play an even lesser role of pure illustration.[283] More importantly, they can even serve as tie-breakers between otherwise equally attractive responses.[284] For example, Arts 4.1–4.3 PICC have been invoked to abolish or at least restrain the English rule that pre-contractual negotiations cannot be used for the interpretation of a contract.[285] The justification can lie both in their restatement function—their application guarantees that domestic law is in accordance with international consensus—and in their model function—they represent a solution that a group of experts considered preferable after considerable debate, especially for contracts that are both international and commercial.[286]

[279] For Australian law see M Sychold, 'The Impact of the UNIDROIT Contract Principles on Australian Law' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 149, 150–153. For Lithuanian law see T Žukas, 'Reception of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law in Lithuania' in ibid 231, 238–239; see also n 293 below. For Dutch law see Volders (n 50 above) 143–146. Other countries have only three or less decisions with reference to the PICC, according to Unilex. For arbitration, see below, Preamble II.

[280] F Dessemontet, 'Use of the UNIDROIT Principles to Interpret and Supplement Domestic Law' [2002] ICC Int'l Ct Arb Bull, Special suppl 39; but see Bonell (n 9 above) 242–243, effectively suggesting that the PICC are specialized rules of equity providing corrections to the law.

[281] Bonell (n 9 above) 295–296 (with references in n 101); Heggberget and Nyland (n 146 above) 304.

[282] See the Dutch decision HR 2 February 2001 (R99/120), Unilex: Art 2.1.13; and the decision by the Argentinian Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal (CNCom Sala B) 10 June 2004, Unilex at IV(a)(i): Art 2.1.4.

[283] eg Sychold (n 279 above) 154, referring to the 274-page judgment in *GEC Marconi* (n 287 below): 'it would have been surprising if the UNIDROIT Principles had *not* been cited somewhere in that mammoth product of judicial analysis!'.

[284] eg Polish Supreme Court, 6 November 2003: Art 7.4.13; Bonell (n 9 above) 297–299 nn 102–103.

[285] *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69, 57; see MJ Bonell, 'The UNIDROIT Principles and CISG: Sources of Inspiration for English Courts?' [2006] ULR 305; *The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* [2006] EWCA Civ 1690 [61]–[63]. But see *Great Hill Equity Partners II LP v Novator One LP* [2007] EWHC Comm 1210 (denying that *Proforce* overruled the exclusionary rule); *Hideo Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523, 548–549, NZCA (Art 8 CISG and Arts 4.1–4.3 PICC in favour of liberal interpretation, but ultimately rejected because of contrary views in the Privy Council), reversed on other grounds in [2002] UKPC 40, PC. See also E McKendrick, *The Creation of a European Law of Contracts: The Role of Standard Forms and Principles of Interpretation* (2004) 40–43. For the rule itself, see Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 913, HL.

[286] See Rechtbank Zwolle 5 March 1997 (HA ZA 95-640), (1997) 15 NIPR 282, Unilex: interpretation of good faith in French (as foreign) law based on PICC; M Mustill, 'The Use of the UNIDROIT Principles by National and Supranational Courts' (unpublished, 1994), cited after Bonell (n 9 above) 238–239.

The most frequently-used provision of the PICC is the **principle of good faith** (Art 1.7), typically invoked to limit harshness arising from a literal application of law.[287] This suggests a growing acceptance of such a principle also in international trade, for which the PICC certainly have some responsibility. However, given the general character of Art 1.7, this is not a typical use for the interpretative purposes of the PICC, whose other provisions are adequate for interpretation because they are detailed. Art 1.7 is so general that specific applications of a principle of good faith can be based on it only in part. Use of other provisions by state courts is rare; they include Art 2.1.21[288] or Art 6.1.4 (with its Official Comment 2).[289] **113**

The most important role of the PICC lies in interpreting **open-ended clauses in legislation**, where domestic law refers to transnational and comparative law, or general principles of law,[290] or otherwise requires internationally uniform interpretation. Whereas such references are rare, the same result arguably occurs where 'generally recognized principles and norms of international law' are part of domestic law, including private law.[291] It is less certain whether this is also true where a judge is supposed to decide 'as though he were the legislator', as Art 1(2) Swiss Cc requires: legislators do not necessarily rely on the results of comparative law. **114**

The PICC, including the Official Comment, have another important role to play in the **genetic interpretation** of legislation that relies either wholly or partially on the PICC,[292] for example, in Lithuania.[293] They may also play a role for countries in transition towards a **115**

[287] *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, FCA, cited also in *Alcatel Australia Ltd v Scarcella & Ors* (1998) NSWLR 349, NSWSC; see the note by B Zeller [2000] ULR 836; *Central Exchange Ltd v Anaconda Nickel Ltd* (2002) 26 WAR 33, WASCA; *Aiton v Transfield* (1999) 153 FLR 236, NSWSC; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50, Federal Court of Australia (on these Australian cases, see also Sychold (n 279 above); *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506, NZCA. For further suggestions in Australian law, see GA Moens, L Cohn and D Peacock, 'A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Contracts – The Australian Experience' (2000) 5 Int'l Trade & Bus L Ann 219, 224–251.

[288] CA Grenoble 23 October 1996, [1997] Rev arb 87, Unilex; ES Darankoum, 'L'application des Principes d'UNIDROIT par les arbitres internationaux et par les juges étatiques' (2002) 36 RJT 421, 437–438.

[289] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (n 287 above), also cited in *Tan Hung Nguyen v Luxury Design Homes* [2004] NSWCA 178, NSWCA.

[290] Bonell (n 9 above) 238 names three examples: § 7 Austrian Cc; Art 1 Swiss Cc; Art 6(2) Russian Cc.

[291] For Russian law see J Skala, 'The UNIDROIT Principles of International Commercial Contracts: a Russian Perspective' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 119, 124–125.

[292] (2003) Study L – Misc 25, para 599 (Schlechtriem). For legislation relying on the PICC, see paras 118–128 below.

[293] Supreme Court of Lithuania 11 February 2002 (3K-3-281/2002), Unilex (Art 6.193 Lithuanian Cc based on Art 4.1 PICC); Supreme Court of Lithuania 19 May 2003 (3K-3-612/2003), Unilex (Arts 6.204 Lithuanian Cc corresponds in substance to PICC Arts 6.2.1 to 6.2.3), Supreme Court of Lithuania 19 January 2005 (3K-3-38/2005), Unilex (Art 6.163 of Lithuanian Cc corresponds to PICC Art 2.1.15); Supreme Court of Lithuania 6 November 2006 (3K-P-382/2006), Unilex; see also *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafta* [2006] 1 Lloyd's Rep 181, EWHC Comm: there are extensive quotes to the commentary on the Lithuanian Civil code with reference to the PICC – on which see the critique by L Šaltinytû, 'Determining the Common Intention to Be Bound by an Arbitration Clause: Svenska Petroleum v Republic of Lithuania' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 245, 249–252. See Žukas (n 279 above) 236–243,

market economy.[294] Yet even where the legislation is based on another rule and that rule is merely restated in the PICC, the PICC can provide some guidance, based on their restatement function, on the proper meaning and interpretation of the rule. Of course, this can only occur where the PICC do indeed restate pre-existing law, and where the pre-existing law can be presumed to be in accordance with the PICC.[295]

116 Where law must be interpreted according to its **goals and purposes**, the PICC can be helpful to interpret domestic law that was not drafted specifically with international contracts in mind. By contrast, the PICC can also be used for purely domestic contracts,[296] because their confinement to international contracts is not binding (see para 25 above). In this case, however, their model purpose is more limited than for international contracts.

117 To the extent that domestic law should be interpreted on a **comparative law** basis, the PICC provide valuable material. Unlike for uniform law, where such comparative interpretation furthers uniformity and the autonomy of international instruments, this is controversial for the interpretation of domestic law where international uniformity is typically less important.[297] The PICC can still play a role based on their model purpose, but in this sense their role is not greater than that of other legal systems and regimes.

V. Use as a model (paragraph 7 of the Preamble)

1. Legislation

118 The PICC are not a model code,[298] though they might at some point be transformed into one.[299] Unlike official model codes, including those adopted by UNIDROIT,[300] they lack explicit governmental endorsement. Nonetheless, use of the PICC as a model for legislation, originally considered only a supplemental purpose, has become perhaps their **most important role**.

pointing out the important role of one judge, Mikelûnas, who left the Court in 2006. For influence of the PICC on the Lithuanian Cc, see para 135 below.

294 Bonell (n 9 above) 234–235.

295 Problematical insofar the Spanish TS (Sala de lo Civil) 4 July 2006 (2421/1999), RJ 2006 no 6080, Unilex: Art 1.7 used to interpret § 242 German Cc; see M Perales Viscasillas, 'La aplicaciòn jurisprudencial en España de la Convenciòn de Viena de 1980 sobre compravendita internacional, los Principios de UNIDROIT y los Principios del derecho contractual europeo: De la mera referencia a la integraciòn de lagunas' (2007) 6725 Diario La Ley, 31 May 2007, 1.

296 eg the Dutch HR 2 February 2001 (n 282 above); see Volders (n 50 above) 147–148 for further opinions; Bonell (n 9 above) 299 n 104.

297 For discussions, see B Markesinis and J Fedtke, *Judicial Recourse to Foreign Law* (2006).

298 Bonell (n 9 above) 243–244 n 196; cf C Kessedjian, 'Une exercice de rénovation des sources du droit des contrats du commerce international: Les Principes proposés par l'UNIDROIT' [1995] Rev crit dr int privé 641, 649–650.

299 Bonell (n 9 above) 244.

300 eg UNIDROIT Model Franchise Disclosure Law 2002 (www.unidroit.org/english/modellaws/2002franchise/main.htm). There is also a proposed UNIDROIT Model Law on Leasing (www.unidroit.org/english/workprogramme/study059a/main.htm); see also 'Preparation of a Model Law on Leasing' [2007] ULR 356.

Some general insights emerge. First, despite their international character, they have been used even more for domestic than for international legal reform. Most domestic laws on commercial contracts are drawn also with international commerce in mind, and in turn the PICC are largely not specific to international contracts (see para 24 above). Second, the PICC have rarely been used as a model in their complete form; more frequent use involves individual Chapters of the PICC or even individual rules. This is an appropriate reaction to findings that not all norms of the PICC are optimal, in particular for every regional context. Third, where the PICC have substantial influence, this is regularly due to the influence of individual advisors acquainted with them. These include Professor Schlechtriem for Estonia (see para 134 below) and active promotion—within financial constraints—by UNIDROIT, such as for OHADA (see paras 122–124 below).[301] Fourth, it is often hard to tell whether influence comes from the PICC or from the CISG. **119**

(a) **Global unification.** The PICC play a central role in debates over a **global commercial code**.[302] If such a code is created, its relationship to the PICC must be defined. According to one view, such a code should refer to the PICC as underlying general principles, much like Art 7(2) CISG.[303] According to another view, the PICC themselves should be transformed or at least incorporated into such a code.[304] A binding global code, as envisaged by some,[305] seems both improbable and unattractive; it would also be in tension with the nature of the PICC that are decidedly non-binding. A non-binding global code, on the other hand, would presumably not look very different from the PICC as they exist now. **120**

The PICC can also provide a model for **international Conventions**, especially those drafted by UNIDROIT or other international organizations like UNCITRAL. So far, the CISG seems to be more influential than the PICC. For example, the UNCITRAL Model Law on Electronic Commerce[306] was first drafted on the basis of the CISG and largely rejected alternative solutions by the PICC, until the *ad hoc* expert group of the ICC requested that **121**

[301] H Kronke, 'Which Type of Activity for Which Organisation? Reflections on UNIDROIT's Triennial Work Programme 2006–2008 in Context' [2006] ULR 135, 137–138.

[302] G Herrmann, 'The Role of UNCITRAL' in I Fletcher et al (eds), *Foundations and Perspectives of International Trade Law* (2001) 28, 35; G Herrmann, 'The Future of Trade Law Unification' [2001] IHR 6, 12. The idea was first proposed by UNIDROIT in connection with the project that became the PICC: 'Progressive codification of the law of international trade, Note by the Secretariat of the International Institute for the Unification of Private Law (UNIDROIT)' 1968–1970 UNCITRAL Yearbook 285, UN Doc A/CN.9/SER A/1970; see also CM Schmitthoff, 'The Codification of the Law of International Trade' [1985] JBL 34.

[303] MJ Bonell, 'Do We Need a Global Commercial Code?' (2001) 106 Dickinson LR 87 = [2000] ULR 469; Bonell (n 81 above) 244.

[304] O Lando, 'The CISG and the UNIDROIT Principles in a Global Commercial Code' in PH Delvaux et al (eds), *Mélanges offerts à Marcel Fontaine* (2003) 451; O Lando, 'A Global Commercial Code' [2004] RIW 161; O Lando, 'A Vision of a Future World Contract Law: Impact of European and UNIDROIT Contract Principles' (2004) UCC LJ 3; O Lando, 'CISG and its Followers: A Proposal to Adopt some International Principles of Contract Law' (2005) 53 Am J Comp L 379; (2006) Study L – Misc 25, para 13 (Lando); for doubts as to feasibility, see Beraudo (n 128 above) 139.

[305] See n 304 above.

[306] UNCITRAL Model Law on Electronic Commerce of 12 June 1996 (www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html).

the PICC be considered as well.[307] In the future, recourse might rather be had to the PICC, especially for the general part of such Conventions.[308] The recent commendation of the PICC by UNCITRAL (see para 99 above) should help.

122 However, the PICC are not necessarily well-suited to be a model for transnational unification. Modern Conventions, especially in the commercial law sector, aim not only for neutral terminology (as do the PICC—see para 15 above) but also for self-sufficient and very specific rules in view of the desired purposes.[309] Although some provisions of the PICC are quite specific, many are drafted in more general terms. Their better use would be as a general part of a transnational law of obligations, supplementing more specific Conventions.[310] This suggests that Conventions should refer to the PICC as such, rather than be modelled on them.[311] Their more important value could be to provide a common neutral terminology.[312]

(b) Regional unification

123 ***(1) Organization for the Harmonization of Business Law in Africa.*** The most direct influence on regional codification can be seen in the Organization for the Harmonization of Business Law in Africa (**OHADA**).[313] In 2002, the OHADA Council of Ministers decided to ask UNIDROIT to provide a **draft Uniform Act of Contract**[314] after previous acts for the region had often been based on purely civilian models.[315] A Belgian member of the PICC drafting group, Professor Fontaine, prepared such a draft on the basis of the PICC after consulting with experts from several African countries. The draft Act—with an Explanatory Note—was published (in French) in 2004, and amended in 2005 with a view to its coordination with the preliminary draft OHADA Uniform Act on Consumer Contracts.[316] Unlike the PICC, the draft code was originally intended to cover

[307] 'Note by the Secretariat on legal aspects of electronic commerce; electronic contracting: provisions for a draft convention' (2002) 33 UNCITRAL Yearbook 406, 412 paras 48 (usefulness of the CISG is evidenced by the fact that UNIDROIT used it as a model for the PICC), 68–69 (rejection to adopt Art 2.1 PICC), and 76 (doubts about Arts 3.5–3.6 PICC); 'Report of the ad hoc Expert Group of the International Chamber of Commerce on the Draft United Nations Commission on International Trade Law Convention on Electronic Contracting' ibid 425, paras 18 (Art 2.1 PICC), 25 (Arts 2.20–2.22 PICC). All article numbers refer to the 1994 edition of the PICC.

[308] See also 'Report of the Working Group on Electronic Commerce on its thirty-eighth session (New York, 12–23 March 2001) (A/CN.9/484)' (2001) 32 UNCITRAL Yearbook 226, 243 para 124 (avoidance of duplicative work by UNCITRAL and UNIDROIT); 'Draft Model Law on Electronic Signatures: compilation of comments by Governments and international organizations' ibid 303, 308 (comment by Columbia).

[309] H Kronke, 'Der "Commercial Approach" in der Rechtsangleichung und das Internationale Privat- und Verfahrensrecht' in P Gottwald (ed), *Festschrift für Dieter Henrich* (2000) 386; I Davies, 'The New Lex Mercatoria: International Interests in Global Equipment' (2003) 52 ICLQ 151, 173–174.

[310] Kronke (n 3 above) 459–460.

[311] Bonell (n 9 above) 245: 'term of reference'.

[312] ibid 246; see para 15 above.

[313] CM Dickerson, 'Harmonizing Business Laws in Africa: OHADA Calls the Tune' (2005) Colum J Transnat'l L 17.

[314] For an overview, see 'Preparation by UNIDROIT of a draft OHADA Uniform Act on Contracts' (www.unidroit.org/english/legalcooperation/ohada.htm).

[315] N Enonchong, 'The Harmonization of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?' (2007) 51 Journal of African Law 95, 97.

[316] See 'Acte uniforme OHADA sur le droit des contrats – avant-projet (May 2006)' (including references to the corresponding PICC articles) and 'Acte uniforme OHADA sur le droit des contrats – note explicative à

commercial and non-commercial contracts; this question is currently open.[317] The draft is nearly identical to the PICC in order to establish compatibility with developments elsewhere in the world:[318] 161 articles are identical, 31 have been reformulated, and 35 are new and largely concern areas not governed by the PICC. Matters not covered by the PICC were drafted on the basis of the PECL, other recent Western codifications, and, to some extent, the contract laws of Senegal and Mali.[319]

The draft Act was submitted to the OHADA member states in 2005 and at this stage has been neither adopted nor rejected. **Whether it will be successful** remains to be seen.[320] First, OHADA still needs to gain more influence on member states; its uniform acts are not yet widely enforced.[321] Second, the question has been raised (like in the EU) whether unification of the law of contract is required and legitimate, especially on the basis of a text conceived by some as foreign to African legal traditions.[322] Third, the fact that French is the exclusive language of the OHADA may pose problems given the degree of affinity the PICC have towards the common law and given that most of their materials are in English.[323] Should these obstacles be overcome, the draft provides a promising basis. Its aim of overcoming the divide between civil law and common law should be attractive to member states whose laws are based on different legal traditions.[324] In any case, it should be more attractive than the French project for a reform of the law of obligations which has been proposed as a viable competitor to the PICC.[325] It may then also provide an incentive for other regions in

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l'avant-projet' (www.unidroit.org/french/legalcooperation/OHADA). For a slightly diverging English version of the explicatory note, see M Fontaine, 'The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts' [2004] ULR 573–584.

317 See Acte Uniforme (n 316 above) Arts 00/1 and 0/1, and the debate in Note explicative (n 316 above) paras 21–27; for criticism, see FO Etoundi, 'Les Principes d'UNIDROIT et la sécurité juridique des transactions commerciales dans l'avant-projet d'Acte uniforme OHADA sur le droit des contrats' [2005] ULR 683, 710–715; PG Pougoue, 'L'avant projet d'Acte Uniforme OHADA sur le drot des contrats: les tribulations d'un universitaire' (2007) 3–7 (www.ohada.com/biblio_detail.php?article=914).

318 Note explicative (n 316 above) para 12; Etoundi (n 317 above) 689–692.

319 Note explicative (n 316 above) paras 53–54.

320 A congress on 'The Harmonisation of contract law in OHADA', held in Ougadougou in November 2007, addressed these questions. See 'Conference Report: The Harmonisation of Contract Law within OHADA, Ouagadougou (Burkina Faso) – 15–17 November 2007' [2007] ULR 818. The Acts of the Colloquium will be published by UNIDROIT.

321 Dickerson (n 313 above) 62.

322 Vicente (n 42 above) 6–13; Pougoue (n 317 above) 5–6 and passim.

323 Enonchong (n 315 above) 98; see also AT Muna, 'Is OHADA "Common Law Friendly?"' (2001) 3 International Law FORUM du droit international 172; GK Douajni, 'L'influence de l'internationalité dans l'élaboration du droit. OHADA' [2005] Penant – Revue de Droit des Pays d'Afrique (no 851) 174, 186, 188; Pougoue (n 317 above) 10–11.

324 SK Date-Bah, 'The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of the Principles of Commercial Contracts in West and Central Africa: Reflections on the OHADA Project from the Perspective of a Common Lawyer from West Africa' [2004] ULR 269, 270–271.

325 K Mbaye, 'Le destin du Code civil en Afrique' in *Le Code civil 1804–2004: Livre du bicentenaire* (2004) 443; P Meyer, 'The Preliminary Draft OHADA Uniform Act on Law of Contracts: Innovations and Debates' [2008] Int'l Bus LJ 291.

Africa, for example the Economic Community of West African States (ECOWAS)[326] or the Southern African Development Community (SADC).[327]

125 More problematic is the question of whether the draft Act is sufficiently sensitive to **African peculiarities** (see para 16 above).[328] The main drafter of the Act found virtually no African peculiarities requiring significant deviations.[329] This appears bold. For example, the absence of formal requirements in Art 1.2 PICC (Art 1/3 of the draft Act) may conflict with a traditional African emphasis on formal contracts.[330] If this is viewed as a problem, local usages can be implemented through Art 1.9 PICC (Art 1/8 of the draft Act).[331] At the same time, the draft Act has been praised precisely because it can overcome the colonial and customary heritage of African law and adapt Africa to modern commercial exigencies.[332]

126 *(2) Others.* For a possible **European contract law codification**,[333] the PICC are not *prima facie* as relevant as other projects, most notably the PECL, but are frequently listed among influential models.[334] Currently, the EU is planning for a so-called Common Frame of Reference (CFR), a quasi-codification with a legal nature that is as yet unclear.[335] The CFR will combine two influences: the so-called *acquis* of existing EU contract law[336] and findings of comparative law, likely to be based on the results of the successor to the Lando Group, the so-called Study Group on a European Civil Code (which goes beyond mere contract law).[337] At least insofar as the PICC still maintain an influence on the latter,

[326] Date-Bah (n 324 above) 271.

[327] Kronke (n 3 above) 464; S Mancuso, 'Trends on the Harmonization of Contract Law in Africa' (2007) 13 Annual Survey of Int'l & Comp Law 157. See also Meyer (n 325 above).

[328] S Melone, 'Les résistances du droit traditionnel au droit moderne des obligations' (1977) Revue Sénégalaise de Droit 47.

[329] Note explicative (n 316 above) paras 12–18.

[330] Etoundi (n 317 above) 701–703.

[331] ibid 703–705.

[332] ibid 692, 699–706, 708–710; RF Oppong, 'Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa' (2007) 30 Fordham Int'l LJ 296, 337–338.

[333] N Jansen, 'European Civil Code' in J Smits (ed), *Elgar Encyclopedia of Comparative Law* (2006) 247–258.

[334] B Fauvarque-Cosson, 'Droit européen et international des contrats: l'apport des codification doctrinales' [2007] D 96; G Weiszberg, 'Les premières années de jurisprudence sur la "contravention non essentielle" dans la Convention de Vienne du 11 avril 1980 sur la vente internationale de marchandises' [2006] Int'l Bus LJ 106; Jung (n 4 above); R Zimmermann, 'European Contrat Law: General Report' [2007] EuZW 455, 456–457; MJ Bonell, 'European Contract Law and the Development of Contract Law Worldwide' in *4. Europäischer Juristentag – 4th European Jurists' Forum – 4ème Journée des Juristes Européens* (2008) 85.

[335] Communication from the Commission to the European Parliament and the Council: European Contract Law and the revision of the acquis: the way forward, 11 October 2004, COM(2004) 651 final. See also C von Bar et al (prepared by), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR) – Interim Outline Edition* (2008).

[336] Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles): Contract I – Pre-contractual Obligations, Conclusion of Contract, Unfair Terms* (2007) (www.acquis-group.org).

[337] Published studies are C von Bar (prepared by), *Benevolent Intervention in Another's Affairs (PEL Ben Int)* (2006); MW Hesselink et al (prepared by), *Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC)* (2006); M Baudendrecht et al (prepared by), *Service Contracts (PEL SC)* (2007); U Drobing (prepared by), *Personal Security (PEL Pers Sec)* (2007); K Lilleholt et al (prepared by), *Lease of Goods (PEL LG)* (2008); E Hondius and others (prepared by), *Sales (PEL S)* (2008). Nine more volumes are planned (http://sgecc.net).

they will also be indirectly influential on any future Common Frame of Reference.[338] In addition, some influence exists because the *acquis* in turn shows some influence by the PECL and thereby, indirectly, the PICC.[339] Arguably, it makes sense for the drafters of the CFR to consider the PICC directly, too, given their model purpose (see paras 5–6 above).[340] Of course, it will be necessary to account for the fact that consumer contracts, explicitly (though unconvincingly) excluded from the PICC (see paras 26–27 above), will likely play a central role in any European codification.[341]

For some time hope existed that the PICC could serve as a model for a unified contract law in **Latin America**,[342] where the core of the various countries' contract law is said to be very similar to that of the PICC.[343] The most promising institutional framework for any such unification could have been provided by MERCOSUR, which views contract law as one of its prime goals of unification. However, it appears that both traditional limitations to private law unification in Latin America[344] and the decreasing role of MERCOSUR in general make such projects, as of now, rather unlikely. The PICC have also been proposed as the basis for a supranational contract law for NAFTA,[345] but it does not appear as though contract law harmonization is on the agenda.[346] Projects for a unified contract law within the Organization of American States (OAS) have not yet yielded specific results.[347]

[338] U Blaurock, '*Lex mercatoria* und Common Frame of Reference' [2007] ZEuP 118, 126–128. For direct influence Jung (n 4 above) 87.

[339] R Schulze, 'Die "Acquis-Grundregeln" und der Gemeinsame Referenzrahmen' [2007] ZEuP 731, 733.

[340] Jung (n 4 above) 88–89.

[341] Wilhelmsson (n 70 above); Jung (n 4 above) 83.

[342] LO Baptista, 'The UNIDROIT Principles: a possible model for the harmonisation of international contract law in the context of the regional integration of the Americas, with special reference to MERCOSUR' in UNIDROIT (ed), *The UNIDROIT Principles: a Common Law of Contracts for the Americas?* (1998) 119; L Borjas Hernández, 'Los Principios de UNIDROIT: Un modelo posible con miras a la armonización del derecho de los contratos comerciales internacionales en el contexto de la integración regional en las Américas?' ibid 137, 144–145; S Schipani, 'Armonización y unificación del derecho: derecho común en materia de obligaciones y contratos en América Latina' in J Adame Goddard (ed), *Derecho privado: Memoria del Congreso Internacional de Culturas y Sistemas Jurídicos Comparados* (2005) 665, 694–695. For comparison of individual rules, see MJ Bonell and S Schipani (eds), *'Principi per i contratti commerciali internazionali' e il sistema giuridico latinoamericano* (1996).

[343] AM Garro, 'Unification and Harmonization of Private Law in Latin America' (1992) 40 Am J Comp L 587, 608–610; AA Alterini, 'Los Principios de UNIDROIT y las soluciones del derecho común' in UNIDROIT (ed), *The UNIDROIT Principles: a Common Law of Contracts for the Americas?* (1998) 259; JC Rivera, 'Los Principios UNIDROIT: una alternativa de morigeración de la lex mercatoria para Lationamérica' in in J Adame Goddard (ed), *Derecho privado: Memoria del Congreso Internacional de Culturas y Sistemas Jurídicos Comparados* (2005) 413, 417–419; MA Gwynn, *Contratos internacionales para el sector privado: Estudios comparativos entre principios de UNIDROIT y el MERCOSUR* (2007).

[344] Garro (n 343 above) 610–613.

[345] J Adane, 'The UNIDROIT Principles and NAFTA' (1997) 4 Annual Survey of Int'l & Comp Law 56.

[346] AM Garro, 'Legal Framework for Regional Integration in the Americas: Inter-American Convention and Beyond' in F Ferrari (ed), *The Unification of International Commercial Law* (1998) 85, 89.

[347] See Presentation of the SLA/CIDA Project: 'Legal Harmonization in the Americas: Business Transactions, Bijuralism and the OAS' CP/CAJP-1881/02, 26 February 2002 (www.oas.org/consejo/CAJP/docs/cp09310e04.doc); N Bourély, 'The Context for Transactional Legal Harmonization in the Americas' in OAS Secretariat for Legal Affairs (ed), *Legal Harmonization in the Americas. Business Transactions, Bijuralism and the OAS* (2002) 7 (www.oas.org/legal/english/osla/bourely.doc).

128 The Association of South East Asian Nations (**ASEAN**) showed an early interest in the PICC as a model for their own codification.[348] Now, there are plans for 'Asian Principles of Contract Law', based in part on the PICC.[349] But contract law unification is not currently among the projects envisaged by ASEAN.[350] A proposal for the **Economic Cooperation Organization** (**ECO**) between Iran, Pakistan and Turkey was not taken up.[351]

129 (c) **National legislation.** The broadest **success for the PICC** has come in the area of domestic law reform. Although no domestic codification has used them wholly as a model, at the same time almost every recent project has used them as at least one of its various sources of inspiration. Their explicitly international focus does not bar such use for domestic legislation (see para 25 above) and may indeed be an advantage, if law reform tries to overcome an assumed parochial character of traditional domestic contract law. Also, their non-binding character rightly does not prevent lawmakers from using the PICC, since what makes them attractive are both their restatement character—the lawmakers know when they are in accordance with other legal systems—and their model character—they provide *prima facie* good rules. If provisions in domestic law are based on rules of the PICC, this can be relevant to their interpretation (see para 115 above).

130 *(1) Europe.* Mutual influence between the **Dutch Cc** and the PICC was especially fruitful for both codes and resulted in a large degree of similarity, such as regards the abolition of *causa* as a requirement for contract validity, and the detailed rules on offer and acceptance.[352] Also, the styles are quite similar, as were the working methods of the authors.[353]

131 Influence on the current **French** reform project of the law of obligations and the law of prescription[354] is mostly either negative or non-existent.[355] The project was in some degree

[348] Letter of the [Australian] Attorney General's Department to the Secretary-General of UNIDROIT of 19 November 1993, as quoted in Bonell (n 9 above) 244–245.

[349] R Amoussou-Guenou, 'Perspectives des Principes Asean (ou Asiatiques) du droit des contrats' [2005] Int'l Bus LJ 573; B Hardjowahono, 'The UNIDROIT Principles and the Law Governing Commercial Contracts in Southeast Asia' [2002] ULR 1005, especially 1010–1011 and 1013–1014; Hardjowahono (n 182 above) 167–176.

[350] www.aseansec.org/asean_project.htm.

[351] Bijan Izadi, 'Harmonisation of Commercial Contract Law in the ECO Region: a Role for the UNIDROIT Principles' [2001] ULR 301, 308–314.

[352] Volders (n 50 above) 135, 137–139. For an explicit article-by-article comparison with the PECL, see D Busch et al (eds), *The Principles of European Contract Law and Dutch Law: A Commentary* (2002).

[353] Volders (n 50 above) 136–137 and 139–141.

[354] P Catala (ed), *Avant-projet de réforme du droit des obligations et du droit de la prescription* (2006) (English translation at http://denning.law.ox.ac.uk/iecl/research.shtml). See B Fauvarque-Cosson and D Mazeaud, 'L'avant-projet français de réforme du droit des obligations et du droit de la prescription' [2006] ULR 103, and Issue 1 of [2006] RDC, *La réforme du droit des contrats: projet et perspectives (Acte du colloque du 25 octobre 2005)*, with the text of the reform proposals ibid 199. In English, see B Fauvarque-Cosson, 'Towards a New French Law of Obligations and Prescription? About the Avant-projet de réforme du droit des obligations et de la prescription' [2007] ZEuP 428; S Vogenauer, 'The Avant-projet de réforme: an Overview' in J Cartwright et al (eds), *Reforming the French Law of Obligations: Comparative Observations on the* Avant-projet de réforme du droit des obligations et de la prescription (*the* 'Avant-projet Catala') (forthcoming 2009, with an annotated English translation of the reform proposals in the Appendix).

[355] D Tallon, 'Teneur et valeur du projet appréhendé dans une perspective comparative' [2006] RDC 131; D Mazeaud, 'Observations conclusives' [2006] RDC 177, 179–180.

drafted to maintain French peculiarities as a counter-attack against the Europeanization and globalization of contract law.[356] Nonetheless, the PICC were occasionally consulted positively, especially with regard to prescription.[357]

When the **German** government proposed a reformed law of obligations in 2000, one criti- **132**
cism was that comparative law, including the PECL and the PICC, had not been sufficiently consulted.[358] The finally-adopted reform does reveal influences from the PECL and the PICC, especially with regard to a unified concept of breach of contract and in the law of prescription, which follows the PECL.[359] It may not have been irrelevant that the same scholar, Professor Zimmermann, was responsible for the law of prescription in the PECL and in the earlier project for a reform of the German law of obligations.[360]

The **Scottish** Law Commission referred to the PICC regularly in the 1990s,[361] 'so as to **133**
ensure that Scottish law benefits from the best international practice in this area'.[362] The Law Commission for **England and Wales** seems less interested so far.[363] Surprisingly, the PECL are not used more frequently than the PICC, although the Chairman of the Commission, Professor Beale, was a prominent member of the PECL group. In **Ireland**, Arts 5.2.1–5.2.6 PICC have been used as 'a further indication that in international commercial transactions there is a trend towards facilitating the enforceability of third party rights where to do so will give effect to the clear intentions of the contracting parties'.[364]

The PICC have been quite influential on recent law reform in **Spain**. They were used, **134**
alongside the CISG and the PECL, as inspiration for the 2006 proposal to modify the

[356] B Fauvarque-Cosson and D Mazeaud, 'L'avant-projet français de réforme du droit des obligations et du droit de la prescription' [2006] ULR 103, 128–132.

[357] ibid 106. See also O Lando, 'L'avant-projet de réforme du droit des obligations et les Principes du droit européen du contrat: analyse de certaines différences' [2006] RDC 127. For comparison of current French law with the PICC and the PECL, see P Malinvaud, *Droit des obligations* (10th edn, 2007).

[358] R Zimmermann, *The New German Law of Obligations* (2005) 34; O Meyer, 'Principi internazionali del diritto dei contratti nella riforma del diritto tedesco delle obligazioni' [2004] Contr impr Europa 824, 826–828.

[359] ibid 828–830; E Lein, 'La portée pratique des Principes UNIDROIT: une perspective allemande' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 169, 182–185.

[360] F Peters and R Zimmermann, 'Der Einfluss von Fristen auf Schuldverhältnisse. Möglichkeiten der Vereinheitlichung von Verjährungsfristen' in Bundesminister der Justiz (ed), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts* (1981); R Zimmermann, 'The New German Law of Prescription and Chapter 14 of the PECL' in A Vaquer (ed), *La Tercera Parte de los Principios de Derecho Contractual Europeo/The Principles of European Contract Law Part III* (2005) 451; for a comparison of the PECL and the PICC rules on prescription, see R Zimmermann, 'The UNIDROIT Principles of International Commercial Contracts 2004 in Comparative Perspective' (2006) 21 Tul Eur & Civ L Forum 1, 8–20.

[361] Discussion Paper 109 on Remedies for Breach of Contract (April 1999); Report on Interpretation in Private Law (Scot Law Com No 160, 1997); Report on Penalty Clauses (Scot Law Com No 171, 1999); Report on Remedies for Breach of Contract (Scot Law Com No 174, 1999). Reference to the PECL but not to the PICC is made in Report on Interest on Debt and Damage (Scot Law Com, 2006) no 3.14 (www.scotlawcom.gov.uk/html/publications.html).

[362] Fifth Programme on Law Reform (Scot Law Com No 159, 1997) no 2.22.

[363] But see Consultation Paper No 167: Compound Interests (2002) nos 3.16–3.17.

[364] Consultation Paper. Privity of Contract: Third Party Rights (2006), nos 1.157–1.158 (www.lawcom.gov.uk/docs/cp167.pdf).

general part of the Spanish Commercial Code.[365] They are also among the sources used for a proposed new law on distribution contracts.[366] In particular, Art 9 of the proposal incorporates, almost verbatim, Arts 3.5, 3.13(1)(1), and 3.7 PICC.

135 The PICC have been influential on codifications in **formerly socialist countries**. The **Lithuanian** Cc of 2000 draws especially on the rules on contract formation and those on quality of performance and contract price.[367] The PICC were also among the materials consulted for the 2002 **Estonian** Law of Obligations Act.[368] Some limited influence can also be found in the first draft of the new **Hungarian** Civil code[369] and the Green Book for a new **Polish** codification.[370]

136 *(2) The Americas.* Since the **Québec** Cc was finalized in the same year as the 1994 edition of the PICC, this first edition could not have had a direct influence. However, Professor Crépeau, author of an earlier draft of the Québec Cc and one of the drafters of the PICC, has found the new Québec Cc to be deficient in comparison with the PICC, especially as regards contractual justice, and has proposed amendments to it in light of the PICC.[371] The new **Brazilian** Civil Code of 2003 adopted provisions on gross disparity and hardship in accordance with Arts 3.10 and 6.2.1 PICC; whether the influence comes from the PICC or from the legal systems underlying them, in particular the CISG, is not certain.[372]

137 *(3) Asia-Pacific.* Although the most important influence on the **Chinese** Contract Law of 1999[373] was the CISG, the PICC—available in Chinese since 1996—were independently

[365] Comisión general de codificación: sección de derecho mercantil, 'Propuesta de anteproyecto de ley de modificación del código de comercio en la parte general sobre contratos mercantiles y sobre prescripción y caducidad' (2006) Boletín de Información del Ministerio de Justicia 605, especially 605–606; for detailed analysis, see A Martínez Cañellas, 'The Influence of the UNIDROIT Principles on the Proposal of the Reform of the Spanish Commercial Code' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 215.

[366] Comisión general de codificación: sección de derecho mercantil, 'Propuesta de anteproyecto de ley de contratos de distribución' (2006) Boletín de Información del Ministerio de Justicia 618, 619, 620.

[367] V Mikelenas, 'Unification and Harmonisation of Law at the Turn of the Millennium: The Lithuanian Experience' [2000] ULR 253; V Mikelenas, 'The Main Features of the New Lithuanian Contract Law System Based on the Civil Code of 2000' [2005] Juridica International 42, 47 and 50; Žukas (n 279 above); *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafta* (n 293 above) 30.

[368] V Kõve, 'Applicable Law in the Light of Modern Law of Obligations and Bases for the Preparation of the Law of Obligations Act' [2001] Juridica International 30, 37; P Varul, 'CISG: A Source of Inspiration for the Estonian Law of Obligations' [2003] ULR 209; K Pavkovic, 'Estonia: A Model for Economic Success in Transition Economies' (2007) 19 Pacific McGeorge Global Business & Development Law Journal 531, 538, 541. Professor Schlechtriem, as external expert advisor, is greatly responsible for this influence.

[369] P Gárdos, 'Recodification of the Hungarian Civil Law' (2007) 15 ERPL 707, 721; (2004) CD (83) 24, Item 7 (Hármathy), cited after Bonell (n 111 above) 8 n 16.

[370] Z Radwański (ed), *Civil Law Codification Commission, Green Paper: An Optimal Vision of the Civil Code of the Republic of Poland* (2006) (www.ejcl.org/112/greenbookfinal-2.pdf).

[371] PA Crépeau and ÉM Charpentier, *Les Principes d'UNIDROIT et le Code civil du Québec: valeurs partagées? = The UNIDROIT Principles and the Civil Code of Québec: Shared Values?* (1998); for a shorter version, see PA Crépeau, 'The UNIDROIT Principles of International Commercial Contracts' in AM Rabello (ed), *The Principles of UNIDROIT and Modern National Codifications* (2001) 21, especially 61. For comparison, see also Sabourin (n 223 above), with a synopsis at pp 275–280.

[372] E Grebler, 'The Convention on International Sale of Goods and Brazilian Law: Are Differences Irreconcilable?' (2005–06) 25 J L & Com 467, 470.

[373] www.cclaw.net/download/contractlawPRC.asp.

influential to some degree, too, especially where they are more detailed than the CISG.[374] The PICC are sometimes also used as a model for proposed further legal reforms.[375] Their influence on other East Asian laws is unknown, but it can be presumed that countries like **Indonesia**, **Vietnam**, and **Cambodia** will look to the PICC for guidance in their reform efforts,[376] as will **Mongolia**.[377]

138 The drafters of the three parts of the **Russian** Cc (between 1994 and 2001) are reported to have relied frequently on the PICC,[378] even though direct influence is difficult to assess.[379] For example, Art 451 (hardship) of the Russian Cc is very similar to the PICC doctrine of hardship.[380] The PICC are also among the models consulted for the new **Israeli** Civil code.[381]

139 In **Australia**, the role of the legislator in contract law is too minimal to enable significant influence of the PICC.[382] The same is true for **New Zealand**, where contract statutes predate the PICC. Nonetheless, the use of the PICC as a model for a new contract code has been proposed there.[383]

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374 Danhan (n 177 above) 109–114; X-Y Li-Kotovchikhine, 'Le nouveau droit chinois des contrats internationaux' (2002) 129 Clunet 113, 116; B Ling, *Contract Law in China* (2002) 37–38; see also H Kronke, 'Der Gesetzgeber als Rechtsvergleicher: Aspekte der chinesischen Vertragsrechtsreform' in J Basedow et al (eds), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* (1998) 579. The influence of the PICC is perhaps exaggerated in J Xi, 'The Impact of the UNIDROIT Principles on Chinese Legislation' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 107, 111–112; G Lefebvre and J Jiao, 'Les Principes d'UNIDROIT et le droit chinois: convergence et dissonance' (2002) 36 RJT 519, 525; (2006) Study L – Misc 25, para 30 (Zhang). For comparisons between the New Contract Law and the PICC, see Z Yuqing and H Dhanhan, 'The New Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts: a Brief Comparison' [2000] ULR 429; Xi (this note) 112–118; Z Yuejiao, *Harmonization of contract law and its impacts on China's contract law* (2007) part 4.2 (www.uncitral.org/pdf/english/congress/Zhang.pdf).

375 S Jiang, 'Guo Ji Shang Shi He Tong Tong Ze Yu Wo Guo He Tong Fa De Wan Shan [The UNIDROIT Principles and the Perfection of Chinese Contract Law]' (2001) Dui Wai Jing Mao Shi Wu [Practices in Foreign Economic Relations and Trade] Issue 8 p 12; Y Zhang, 'Yi Bu Xian Dai, Tong Yi Zi He Tong Fa---Jie Pin "Guo Ji Shang Shi He Tong Tong Ze 2004 [A Modern and Unified Contract Law: Introduction to and Comment on the UNIDROIT Principles 2004]' [2005] Beijing Zhong Cai [Beijing Arbitration] Issue 4 pp 57–64.

376 Letter (n 348 above); Le Net, 'Rules of Interpretation of Contracts under the UNIDROIT Principles and their Possible Adoption in Vietnamese Law' [2002] ULR 1017. A scholar is currently working on a potential use for Indonesian law reform: see (2007) CD (87) 2, p 22.

377 Bonell (n 9 above) 269 n 22.

378 AS Komarov, 'The UNIDROIT Principles of International Commercial Contract: A Russian View' [1996] ULR 247, 248; AG Doudko, 'Hardship in Contract: The Approach of the UNIDROIT Principles and Legal Development in Russia' [2000] ULR 483; JF Bourque and JS Roure, 'Introducing international standards to central and eastern Europe: the role of model international trade contracts' in European Bank for Research and Development (ed), *Law in Transition: Central Asia* (2003) 2–8 (http://ebrd.com/pubs/legal/lit031.pdf); Skala (n 291 above) 119, 120.

379 Skala (n 291 above) 120.

380 Doudko (n 378 above): Skala (n 291 above) 122–124.

381 AM Rabello and P Lerner, 'The UNIDROIT Principles of International Commercial Contracts and Israeli Contract Law' [2003] ULR 601, 606.

382 Sychold (n 279 above) 149.

383 R Sutton, 'Commentary on "Codification, Law Reform and Judicial Development": Appendix – Tentative Scheme for a Draft Code' (1996) 9 JCL 204–205.

2. Contract drafting

140 For the 2004 edition of the PICC, contract drafting was proposed as an explicit purpose named in the Preamble.[384] The suggestion was rejected because changes were to be kept to a minimum, but their role in contract drafting was acknowledged and is explicitly listed in the Official Comment.[385] The PICC can help contract drafting in various ways: as actual model terms, as a checklist for relevant issues, as a baseline of what is considered fair, and as vocabulary for a neutral terminology. For incorporation of the PICC into a contract, see para 33 above.

141 The use of the PICC as **actual model terms** is not listed in the Official Comment. Indeed, in formulating the 2004 edition of the PICC, the word 'guide' was preferred to that of 'model'.[386] In view of this modest aspiration, it seems a stretch to view the PICC as a codification of best contractual practices.[387] The use of the PICC as actual model terms is in tension both with their general nature and their character.[388] The PICC are written as background law for actual contracts rather than as a model for those contracts themselves or as a codification of current contract practice;[389] their often general and open-ended style is frequently not in accordance with the needs for specificity and accuracy in actual contracts. Particularly unfit are general rules like those on *force majeure* that give the adjudicator a great level of discretion.[390] By contrast, specific individual provisions may well be good models for contract terms (such as Arts 6.1.9–6.1.10, 6.1.14–6.1.17, and 7.4.9),[391] especially where the PICC contain rules specifically aimed at international contracts (see para 25 above).[392]

142 The PICC can serve as a **checklist for relevant issues**. This encompasses issues to be dealt with in the contract, especially those specific to international contracts.[393] However, the fact

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[384] (2003) Study L – Doc 85, p 7 (section II A 1): 'They may serve as a model in drafting contracts'. See generally Petz (n 4 above) 84–89.

[385] (2003) Study L – Misc 25, para 593; Off Cmt 8 to Preamble, p 7; viewed as the most important use by parties, at least in the short term, by Kahn (n 21 above) 49.

[386] (2003) Study L – Misc 25, paras 583 (Date-Bah) and 586 (Schlechtriem: 'check-list').

[387] B Kozolchyk, 'The UNIDROIT Principles as a model for the unification of the best contractual practices in the Americas' in UNIDROIT (ed), *The UNIDROIT Principles: a Common Law of Contracts for the Americas?* (1998) 93, 109–114.

[388] EA Farnsworth, 'An American View of the Principles as a Guide to Drafting Contracts' in Institute of International Business Law and Practice (ed), *UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?* (ICC publication no 490/1) (1995) 85, 87–88; V Gaymer, 'The UNIDROIT Principles as a Guide for Drafting Contracts: A View from an International Commercial Lawyer' ibid 95, 99.

[389] M Fontaine, 'The UNIDROIT Principles: An Expression of Current Contract Practice?' [2002] ICC Int'l Ct Arb Bull, Special suppl 95.

[390] Farnsworth (n 388 above) 90–91.

[391] M Fontaine, 'Les Principes UNIDROIT, guide de la rédaction des contrats internationaux' in Institute of International Business Law and Practice (ed), *UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?* (ICC publication no 490/1) (1995) 73, 76; H van Houtte, 'The UNIDROIT Principles as a Guide for Drafting Contracts' ibid 115, 119; P Kahn, 'Les Principes UNIDROIT comme droit applicable aux contrats internationaux' in MJ Bonell and F Bonelli (eds), *Contratti commerciali internazionali e Principi UNIDROIT* (1997) 39, 52–54.

[392] Fontaine (n 391 above) 79–80.

[393] eg ibid 77; Farnsworth (n 388 above) 91–92; van Houtte (n 391 above) 120, insofar like van Houtte (n 31 above) 8; G de Nova, 'The UNIDROIT Principles as a Guide for Drafting International Contracts' in

that the PICC themselves are incomplete even for matters of general contract law and exclude matters of special contract law (see para 17 above) restricts their use in this regard.[394] In addition, the rules on offer and acceptance can be useful, not for the content of the contract (since such rules are rarely agreed upon) but as a checklist, during the formation stage, of issues to be considered in the drafting of offers and acceptances.[395]

143 The PICC can also provide a **baseline of what is considered fair** in international contracts irrespective of the laws of specific countries.[396] This means that whoever wants terms in the contract deviating from the PICC bears the burden of argument and may, to prevail, have to make concessions on other issues, either in contract terms or with respect to the price.

144 Finally, the PICC can give **terminological guidance** in two respects. First, their use of neutral concepts (see para 15 above) can help parties to avoid terms with specific meanings in their own legal systems. Second, the fact that they exist in multiple languages can help in translating concepts and providing common understanding of terms used in contracts.[397]

145 Although the PICC have been proposed as a model for **model contracts** developed with a view to specific contracts, they are too vague and contain too many open-ended rules to adequately fulfil such a purpose. Their use is that of a general background for specific model contracts, to be referred to and, where necessary, incorporated in part. They can also provide a valuable uniform vocabulary for the otherwise disparate model contracts that exist.[398] Some PICC provisions have been received in this way in model contracts prepared by the ICC,[399] UNCITRAL, and the ITC;[400] more uniformity would be desirable.

3. Mediation

146 Although the PICC do not contain rules specific to alternative dispute resolution (with the exception of Art 10.7), they have been proposed as a **model for solutions in mediation** because of their emphasis on good faith.[401] Their utility is limited. Mediation takes place usually in view of both the background of applicable law and in view of non-legal principles; the PICC, as non-applicable legal rules, are neither. However, based on their model nature and insofar as they codify what is generally considered fair, they can provide a helpful

Institute of International Business Law and Practice (ed), *UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?* (ICC publication no 490/1) (1995) 129.

394 Beraudo (n 128 above); de Nova (n 393 above) 133–134.

395 Farnsworth (n 388 above) 89–90.

396 Fontaine (n 391 above) 77–79; van Houtte (n 391 above) 120.

397 ibid.

398 K Razumov, 'Les contrats commerciaux internationaux et les nouveaux Principes UNIDROIT: la pratique contractuelle commerciale russe' in Institute of International Business Law and Practice (ed), *UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?* (ICC publication no 490/1) (1995) 105, 110–111.

399 Mourre and Jolivet (n 110 above) 280–289; F Bortolotti, 'Reference to the UNIDROIT Principles in Contract Practice and Model Contracts' [2005] ICC Int'l Ct Arb Bull, Special suppl 57, 61–63.

400 ibid 63–64; Vulliéty (n 260 above) 303–313.

401 JF Smith, 'Mediation and the Principles of UNIDROIT' in Instituto de Investigaciones Jurídicas (ed), *Contratación Internacional: Comentarios a los Principios sobre los Contratos Comerciales Internacionales del UNIDROIT* (1998) 237, 247–250.

additional baseline. In addition, some of their rules may be helpful to mediators seeking specific solutions.

4. Legal education

147 Use in legal education is mentioned as an explicit additional purpose in the Official Comment,[402] but it actually **transcends all three purposes**. Obviously, the PICC can be used in teaching to all purposes (see paras 1–8 above): as a result of comparative law (the restatement function), as a potentially optimal set of rules (the model function), and as a possible reference by judges or parties in actual matters (the effective law purpose). It is with regard to the last purpose that their use in education is most necessary: they will not be used unless young lawyers learn about them.[403] In addition, UNIDROIT is taking active measures to promote and disseminate the PICC.[404] For a long time, the PICC were not widely taught in many countries,[405] but this appears to be changing with regard to courses in law schools[406] and to consideration in student textbooks.[407]

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[402] Off Cmt 8 to Preamble, p 7.

[403] Bonell (n 9 above) 260–261, 369.

[404] (2006) Study L – Doc 99, paras 2–8; (2006) Study L – Misc 25, paras 6–33.

[405] eg R Goode, 'Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law' (2001) 50 ICLQ 751, 764; for the USA see MJ Gordon, 'Part II: Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges' (1998) 46 Am J Comp L, Suppl 361, 364–367.

[406] See already the very optimistic list of law schools in MJ Bonell, 'The UNIDROIT Principles in Practice: The Experience of the First Two Years' [1997] ULR 34, 36–37; see also Bonell (n 9 above) 267 n 13: 'since then their number has been increasing'. For national examples, see J Lookofsky, 'Denmark' in MJ Bonell (ed), *A New Approach to International Contracts: The UNIDROIT Principles of International Contracts* (1999) 71, 72; M Fontaine, 'Belgium' ibid 55, 63; B Fauvarque-Cosson, 'France' ibid 95, 99 n 12; F de Ly, 'Netherlands' ibid 203, 205–206; C Hultmark, 'Sweden' ibid 308 (n 118 above); Mikelenas (n 367 above); (2006) Study L – Misc 25, paras 10 (Russia – Komarov), 11 (Japan – Uchida), 18 (Québec – Crépau), 24 (USA – Garro), 31 (Italy – Alpa); Le Net (n 376 above) 1028–1030.

[407] eg EA Farnsworth, *Farnsworth on Contracts* (2nd edn, 2001); R Goode et al, *Transnational Commercial Law* (2007); Malinvaud (n 357); H Beale et al, *Ius Commune Casebooks on the Common Law of Europe: Cases, Materials and Text on Contract Law* (2002).