

Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)

SECOND EDITION

Edited by

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I. Background

The PICC are designed to be an ‘elaboration of an international restatement of general principles of contract law’.¹ They attempt to meet the perceived need for a harmonization of the law of international commercial contracts (see paras 2–6 below) in a fashion that avoids some of the problems that more traditional tools of harmonization have met with in the past (see paras 7–13 below).

1. Perceived need for harmonization of the law of international commercial contracts

For more than a century, but particularly since the end of the Second World War, the volume of international trade has grown spectacularly. At the same time, most **cross-border transactions** are still governed by a **domestic contract law**, the contract law that is applicable under the respective conflict of laws rules. It is widely believed that this is undesirable for at least three reasons.

First, divergences of domestic laws potentially lead to an **increase in the parties’ transaction costs**.² The complexity of national conflict of laws regimes can make it difficult for the parties to predict which contract law will be applicable to their transaction. The applicable law can be established by specialists, but this is often costly and time-consuming. Furthermore, national contract laws differ in their content, and sometimes substantially so. At least one of the parties to an international contract is therefore faced with a law with which it is not entirely familiar. As a consequence,

¹ Governing Council of UNIDROIT, ‘Introduction to the 1994 Edition’ in UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2010* (2010) xxii.

² See eg P Behrens, ‘Voraussetzungen und Grenzen der Rechtsfortbildung durch Rechtsvereinheitlichung’ (1986) 50 *RabelsZ* 19, 21; J Basedow, ‘A Common Contract Law for the Common Market’ (1996) 33 *CML Rev* 1169, 1181–1184; R Sappideen, ‘Harmonizing International Commercial Law Through Codification’ (2006) 40 *J World Trade* 425; E Carbonara and F Parisi, ‘The Paradox of Legal Harmonization’ (2007) 132 *Public Choice* 367, 373.

this party normally has greater difficulties in predicting its legal position before concluding a contract, and also thereafter in the event of potential litigation. Again, costs for additional legal advice may have to be incurred and the parties' dealings may be slowed down.

4 Secondly, the divergences of domestic contract laws can lead to a **distortion of competition** between businesses established in different states. A business that is subject to a particular legal requirement under its domestic law, such as a long limitation period for claims arising out of defective performance, is disadvantaged compared to a business that is governed by a law with less stringent requirements, such as a shorter limitation period (assuming the conflict of laws regimes in both cases lead to the applicability of the law of the provider of the performance). Even if the contract law under which the second party operates allows for the contractual modification of limitation periods, this party will only be able to negotiate a shorter limitation period if it provides some compensation.³ Distortion of competition, as is well known, leads to inefficiencies and thus impedes overall growth.

5 Thirdly, many **domestic contract laws are not suitable for international transactions**.⁴ The problem is certainly less pressing today than it used to be in the 1960s and the 1970s.⁵ Yet, national rules that are not entirely fit for the purpose of cross-border contracting persist. This holds true not only for emerging countries, such as Russia,⁶ but is even acknowledged with regard to highly sophisticated and long-established contract laws that are frequently chosen by the parties to cross-border transactions, for example those of Switzerland⁷ and the Scandinavian jurisdictions.⁸ National contract laws are first and foremost designed for internal contracts. Only rarely do they provide specific rules for the particularities of international contracts, such as the problems arising from the parties being based in different time zones or speaking different languages. They do not normally contain solutions for specific types of contract or instruments that are commonly used in international trade, such as *turnkey contracts*, *letters of intent*, or similar. There are other deficiencies: national notice and limitation periods might be inappropriately short for international trade, domestic formal requirements might impede the desired speed of international transactions, the allocation of risk between the parties might have to be assessed differently because the distances covered and the combinations of means of transport at an international level are usually different, etc.

³ The example is borrowed from Basedow (n 2 above) 1174–1175.

⁴ R David, 'The International Unification of Private Law' in R David (ed), *International Encyclopedia of Comparative Law, vol II: The Legal Systems of the World—Their Comparison and Unification*, ch 5 (1971) para 15; N Blackaby et al, *Redfern and Hunter on International Arbitration* (5th edn, 2009) 200; KP Berger, *The Creeping Codification of the Lex Mercatoria* (2nd edn, 2010) 19–20, 26–29.

⁵ For a balanced discussion, see LG Radicati di Brozolo, 'The UNIDROIT Principles and the Courts' (2012) 26 *Dir comm int* 943, 959–961.

⁶ AS Komarov, 'The UNIDROIT Principles of International Commercial Contracts: A Russian View' [1996] *ULR* 247, 250.

⁷ Examples are provided by F Vischer, 'The Relevance of the UNIDROIT Principles for Judges and Arbitrators in Disputes Arising out of International Contracts' (1998/1999) 1 *EJLR* 203, 231 n 11; F Dessemontet, 'L'utilisation des Principes UNIDROIT dans le cadre de la pratique contractuelle et de l'activité arbitrale—L'exemple de la Suisse' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 159, 161–162; I Schwenzer, 'Who Needs a Uniform Contract Law, and Why?' (2013) 58 *Vill LRev* 723, 726–727.

⁸ For an example from the Scandinavian Sale of Goods Act, see O Lando, 'The *Lex Mercatoria* in International Commercial Arbitration' (1985) 34 *ICLQ* 747, 753, 754.

Whether there are **economic benefits to be derived from a unification or harmonization of contract law** is by no means clear. It is frequently argued that the potential reduction of transaction costs is easily offset by other factors: first, an increase in the implementation and adaptation costs incurred by business people and lawyers who need to familiarize themselves with the new law; secondly, a decline in competition between domestic legal systems which, in its present form, is said to incentivize lawmakers to adapt and update inefficient contract rules; and, thirdly, a loss of other non-quantifiable assets, such as the cultural diversity associated with legal divergences.⁹ Be that as it may, it is a widely held view amongst business people¹⁰ and political decision makers that a harmonization of contract laws would improve overall economic performance. The General Assembly of the UN, when establishing the United Nations Commission on International Trade Law (UNCITRAL) in 1966, did so on the basis of ‘its conviction that divergences arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade’.¹¹ 6

2. Tools of harmonization

Traditionally, the harmonization of private law has been achieved by the conclusion of bilateral and multilateral **international treaties** or conventions (or uniform laws appended to conventions¹²). These are implemented by the contracting states and become integral parts of the respective domestic law. Prominent examples include the 1883 Paris Convention for the Protection of Industrial Property,¹³ the 1929 Warsaw Convention on International Carriage by Air,¹⁴ the 1930 Uniform Law for Bills of Exchange and Promissory Notes,¹⁵ 7

⁹ See eg JS Hobhouse, ‘International Conventions and Commercial Law: The Pursuit of Uniformity’ (1990) 106 LQR 530; M Boodman, ‘The Myth of Harmonization of Laws’ (1991) 39 Am J Comp L 699; GP Miller, ‘The Legal-Economic Analysis of Comparative Civil Procedure’ (1997) 45 Am J Comp L 905, 916–918; A Ogus, ‘Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law’ (1999) 48 ICLQ 405, 415–418; C Ott and H-B Schäfer, ‘Die Vereinheitlichung des europäischen Vertragsrechts—Ökonomische Notwendigkeit oder akademisches Interesse’ in C Ott and H-B Schäfer (eds), *Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen* (2002) 203, 223–230. See also the general thrust of the various contributions collected in J Smits (ed), *The Need for a European Contract Law: Empirical and Legal Perspectives* (2005).

¹⁰ See the views of European in-house counsel on the potential for facilitating cross-border transactions by way of introducing a European or even global contract law: S Vogenauer, ‘Perceptions of Civil Justice Systems in Europe and their Implications for Choice of Forum and Choice of Contract Law: An Empirical Analysis’ in S Vogenauer and C Hodges (eds), *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law* (forthcoming 2015). See also S Vogenauer and S Weatherill, ‘The European Community’s Competence to Pursue the Harmonisation of Contract Law—an Empirical Contribution to the Debate’ in S Vogenauer and S Weatherill (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (2006) 105, 130–132.

¹¹ General Assembly Resolution 2205 (XXI) of 17 December 1966, Establishment of the United Nations Commission on International Trade Law, reprinted as Annex I to UNCITRAL (ed), *The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law* (2013 edn) 31. This is echoed in the third paragraph of the Preamble to the CISG.

¹² For the subtle differences in normative force, see E Bergsten, ‘Methodological Problems in the Drafting of the CISG’ in A Jansen and O Meyer (eds), *CISG Methodology* (2009) 5, 13–17.

¹³ (Paris, 20 March 1883, as last revised at Stockholm on 14 July 1967, and as amended on 28 September 1979) (www.wipo.int/treaties/en/text.jsp?file_id=288514).

¹⁴ Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 12 October 1929, as amended at The Hague, 1955) (www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/doc.html).

¹⁵ Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) (www.jus.uio.no/lm/bills.of.exchange.and.promissory.notes.convention.1930/doc.html).

the 1931 Uniform Law for Cheques,¹⁶ and, after the Second World War, the CMR, the UN Convention on the Carriage of Goods by Sea ('Hamburg Rules'),¹⁷ and the CISG.¹⁸ Treaties are binding on the contracting states, and they provide for a strong degree of uniformity.

8 Nevertheless, certain **disadvantages of harmonization by way of international treaties** are widely recognized.¹⁹ To begin with, such treaties are negotiated by the representatives of national governments who have to reach unanimity. This does not always lead to optimal outcomes, because negotiators have a strong incentive to promote the solutions of their own laws: the export of a country's laws contributes to that country's cultural hegemony and translates into an advantage for its businesses. Because of the difficulties in reaching a compromise, international conventions often contain reservations or opt-outs in favour of one or more of the contracting states—which diminish the desired uniformity—or they are not even ratified by a sufficient number of states and never come into force. Furthermore, as an international treaty leads to a loss of national sovereignty, the contracting states usually try to confine this loss by circumscribing the scope of application of the treaty as closely as possible. Conventions in the area of contract law are therefore fragmentary and remain confined to particular types of transaction, such as sales, leasing, factoring, or assignment. Thus they contain, for example, provisions on the allocation of risk and on the duties of the parties, but lack background or default rules relating to general contract law issues, such as formation, validity, interpretation, or computation of damages. Finally, conventions are notoriously inflexible because their revision necessitates another round of negotiations and ratifications. Their capacity for subsequent amendments that adapt them to the rapidly changing international business environment is therefore extremely limited.

9 As a reaction to the weaknesses of treaty law, intergovernmental and private organizations have promoted the use of **model laws** (*lois-type*) for the harmonization of international trade law from the 1980s onwards. Following the example of the UCC in the USA, such model laws provide rules for a certain type of transaction or a certain area of law. A model law is negotiated by governments, but it does not need to be ratified. It rather leaves it to the states to adopt it as it stands, to ignore it completely, or to adopt it in part and make any amendments and modifications that are considered desirable in the interests of the respective state. The most important instance at the transnational level is the 1985 UNCITRAL Model Law on International Commercial Arbitration²⁰ which has been adopted, at least in part, by a huge number of countries all over the world. Other examples include model laws in the fields of procurement²¹ and electronic commerce.²² Whilst such

¹⁶ Convention on the Unification of the Law relating to Cheques (Geneva, 19 March 1931).

¹⁷ (Hamburg, 31 March 1978) (www.uncitral.org/pdf/english/texts/transport/hamburg/hamburg_rules_e.pdf).

¹⁸ For conventions prepared by UNIDROIT, see para 15 below.

¹⁹ J Kropholler, *Internationales Einheitsrecht: Allgemeine Lehren* (1975) 94–98; H Kronke, 'International Uniform Commercial Law Conventions: Advantages, Disadvantages, Criteria for Choice' [2000] ULR 13.

²⁰ (New York, 21 June 1985, as amended in 2006) (www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf).

²¹ UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment (New York, 15 June 1994) (www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf).

²² UNCITRAL Model Law on Electronic Commerce (New York, 12 June 1996) (www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf).

instruments provide a high degree of flexibility, they obviously do so at the expense of full uniformity of results.

This applies even more to so-called ‘legislative guides’ that offer non-binding standards of ‘best practice’ to assist national governments in elaborating policies and drafting legislation. Examples include the 2004 UNCITRAL Legislative Guide on Insolvency Law,²³ the 1998/2007 UNIDROIT Guide to International Master Franchise Arrangements,²⁴ the 2004 OECD Principles of Corporate Governance,²⁵ and the 2007 UNCITRAL Legislative Guide on Secured Transactions.²⁶

More recently, the focus has therefore shifted to **non-legislative means of harmonization** or unification of private law, frequently referred to as ‘soft law’. International organizations and interested business constituencies elaborate non-binding sets of rules based on existing commercial practices which the parties can incorporate into their contracts. These include international trade terms and other provisions codifying trade custom and usage, such as the INCOTERMS and the UCP 600, and also model contracts and model standard contract forms, such as the ICC model contracts on sales, commercial agency, and distributorship,²⁷ the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works,²⁸ and the Conditions of Contract for Works of Civil Engineering of the International Federation of Consulting Engineers.²⁹ Such attempts to capture what is sometimes called ‘international commercial custom’ or the ‘modern *lex mercatoria*’ can be adapted to the changing needs of commerce, and with regard to those sets of terms that have been elaborated by business organizations there is a presumption that businesses know best what rules are appropriate for their transactions. However, there are lingering doubts about the impartiality of such sets of rules to the extent that they have been elaborated by particular trade associations that represent the interests of their members. Moreover, from the perspective of harmonization of contract law, the major drawback of such instruments is that they are, like international treaties, usually confined to specific types of contract and do not contain the necessary general background rules.

In view of the difficulties encountered with the types of instrument mentioned in the previous paragraphs, there is increasing support for another non-legislative means of harmonization: **restatements of private law** at an international level. The idea was apparently first mooted in the 1960s in the context of European private law.³⁰ Soon it was promoted for international uniform law in general.³¹ The vision was modelled on the United States

²³ (New York, 25 June 2004) (www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf), with a model law in Annex III.

²⁴ UNIDROIT, *Guide to International Master Franchise Arrangements* (2nd edn, 2007).

²⁵ (www.oecd.org/dataoecd/32/18/31557724.pdf).

²⁶ (www.uncitral.org/pdf/english/texts/security-ig/e/09-82670_Ebook-Guide_09-04-10English.pdf).

²⁷ ICC, *ICC Model International Sale Contract* (1997); ICC, *ICC Model Commercial Agency Contract* (2nd edn, 2002); ICC, *ICC Model Distributorship Contract: Sole Importer–Distributor* (2nd edn, 2002).

²⁸ (New York, 14 August 1987) (www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf).

²⁹ FIDIC, *Conditions of Contract for Works of Civil Engineering Construction* (4th edn, 1987).

³⁰ According to O Meyer, *Principles of Contract Law und nationales Vertragsrecht: Chancen und Wege für eine Internationalisierung der Rechtsanwendung* (2007) 73, the first author to make this suggestion was G van Hecke, ‘Intégration économique et unification du droit privé’ in *De Conflictu Legum: Bundel opstellen aangeboden aan Roeland Duco Kollwijn en Johannes Offerhaus, ter gelegenheid van hun zeventigste verjaardag* (1962) 198, 207–208. See also David (n 4 above) para 180.

³¹ See the contribution of R David in UNIDROIT (ed), *IVth Meeting of the Organizations concerned with Unification of Law = (1967–1968) Unification of Law: Yearbook II* 254.

Restatements of the Law, sets of rules which are prepared and periodically revised by academics and practitioners under the auspices of the American Law Institute and which codify in a systematic manner a variety of areas of law that are traditionally dealt with by state common law, rather than by legislation. It was hoped that such non-official and non-binding instruments would present the relevant rules in a uniform structure and uniform terminology and that they might thus serve as a first step towards later legislative harmonization. At the level of European contract law, such an attempt was made with the elaboration of the PECL from the 1980s onwards. At a global level, two sets of international restatements were elaborated by UNIDROIT: the Principles of Transnational Civil Procedure³² and, in the area of international commercial contracts, the PICC. The PICC explicitly label themselves as a ‘restatement’ and emphasize that they ‘are not a binding instrument’.³³

- 13 The **advantages and disadvantages of harmonization by way of a restatement** are obvious.³⁴ Restatements avoid the tortuous negotiation and ratification process of international treaties and they can be flexibly adapted to the changing conditions of international commercial practice.³⁵ They promote party autonomy. The parties are only bound by them if they choose to be bound, and they can deviate from them whenever they wish to do so.³⁶ This, of course, undermines the restatements’ avowed aim of unification or harmonization of the law. Furthermore, the restatements are, in legal terms, nothing more than declarations by private bodies of scholars who have no democratic or other legitimacy to engage in lawmaking. This is particularly important as the ‘restatements’ do not in fact simply *restate* the law in the sense of merely reproducing existing rules and usages: a pure ‘restatement’ of contract rules from different legal systems on a given issue in a single provision is only possible if these rules produce similar outcomes—as is frequently the case between the contract laws of the states of the USA. Where such a commonality does not exist—as is frequently the case between the contract laws of the different jurisdictions of the world—the elaboration of a single rule on the issue in question necessarily involves policy decisions and departures from the existing law in at least one of these jurisdictions and therefore promotes changes in the law.³⁷ As long as such lawmaking is not legitimized by governments and legislatures that endorse a restatement by implementing, issuing, or promulgating it as binding law, the acceptance of a restatement depends solely on its persuasive authority, which is freely admitted by UNIDROIT.³⁸

³² American Law Institute and UNIDROIT, *ALI/UNIDROIT Principles of Transnational Civil Procedure* (2004). These Principles and their Comments were published in book form (2006) and in [2004] ULR 758 (www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf).

³³ Governing Council of UNIDROIT (n 1 above) xxii, xxiii.

³⁴ See, on the one hand, HD Gabriel, ‘The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference’ (2009) 34 *Brooklyn J Int’l L* 655; on the other hand, R Herber, ‘“Lex mercatoria” und “Principles”—gefährliche Irrlichter im internationalen Kaufrecht’ [2003] *IHR* 1, 4–9 (soft law instruments, eg the PICC, as ‘dangerous atmospheric ghost lights’).

³⁵ EA Farnsworth, ‘Closing Remarks’ (1992) 40 *Am J Comp L* 699, 700.

³⁶ But see below, Art 1.5 paras 5–7 for the notion of ‘mandatory rules’ in the PICC.

³⁷ According to the Governing Council of UNIDROIT (n 1 above) xxiii, such rules ‘embody what are perceived to be the best solutions, even if still not yet generally adopted’. See also MJ Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, 2005) 24, 46–47. For a detailed discussion and further references, see below, Preamble I paras 1–8.

³⁸ Governing Council of UNIDROIT (n 1 above) xxiii; cf para 12 above. For criticism, see eg C Kessedjian, ‘Une exercise de rénovation des sources du droit des contrats du commerce international: Les Principes proposés par l’UNIDROIT’ [1995] *Rev crit dr int privé* 641; H Raeschke-Kessler, ‘Should an Arbitrator in an International Arbitration Procedure Apply the UNIDROIT Principles?’ in *Institute of International Business*

II. Genesis

The idea of a restatement of international commercial contract law was first voiced on the occasion of the fortieth anniversary of UNIDROIT, the Institut international pour l'unification du droit privé (or International Institute for the Unification of Private Law). UNIDROIT was founded as an auxiliary organ of the League of Nations in Rome in 1926.³⁹ It took up its work on 30 May 1928. Following the demise of the League, it was re-established as an independent intergovernmental organization on the basis of a multilateral agreement, the UNIDROIT Statute, on 15 March 1940. At the time of writing, 63 states have acceded to the Statute. The member states are from all five continents and represent a wide variety of political, economic, and legal backgrounds. They are represented in the General Assembly, the ultimate decision-making body of the Institute that determines the Institute's budget and approves its work programme. This programme is drawn up by the Governing Council of UNIDROIT, which consists of one *ex officio* member, the President of the Institute, and 25 elected members, typically eminent judges, practitioners, academics, and civil servants. The day-to-day work of the Institute is conducted by the Secretariat under the guidance of the Secretary-General.⁴⁰ It is carried out in the working languages of the Institute, English and French, the official languages of UNIDROIT being English, French, German, Italian, and Spanish.⁴¹

The purposes of UNIDROIT are 'to examine ways of harmonising and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law, inter alia by preparing 'drafts of laws and conventions with the object of establishing uniform internal law'.⁴² The most important achievements of UNIDROIT include its 1949 Draft Convention Regarding the Contract of International Carriage of Goods by Road,⁴³ which became the starting point of the deliberations culminating in the CMR,⁴⁴ its involvement in the early stages of the preparation of a uniform sales law that led to the 1964 Hague Sales Laws (ULIS and ULF) and ultimately developed into the CISG, the Ottawa Conventions on International Factoring and International Financial Leasing,⁴⁵ a convention against international trafficking in cultural property,⁴⁶ the Cape Town Convention on International

Law and Practice (ed), *UNIDROIT Principles for [sic] International Commercial Contracts: A New Lex Mercatoria?* (ICC publication no 490/1) (1995) 167, 171.

³⁹ For an overview of the history and structure of UNIDROIT, see P Widmer, 'The International Institute for the Unification of Private Law: Shipyard for World-Wide Unification of Private Law' (1998/1999) 1 EJLR 181. See further Kropholler (n 19 above) 57–59; H Kronke, 'UNIDROIT' in J Basedow, KJ Hopt, and R Zimmermann (eds), *Max Planck Encyclopedia of European Private Law*, vol II (2012) 1723; and the website of UNIDROIT (www.unidroit.org), which also contains a list of the member states.

⁴⁰ Arts 5, 6, 8, and 11 of the Statute of UNIDROIT, as amended on 26 March 1993 (www.unidroit.org/about-unidroit/institutional-documents/statute).

⁴¹ Art 10 of the Statute of UNIDROIT (n 40 above).

⁴² Art 1 of the Statute of UNIDROIT (n 40 above). For a complete overview of the activities of UNIDROIT up to 2009, see L Peters, 'UNIDROIT' in R Blanpain (ed), *Max Planck Encyclopedia of Public International Law*, vol X (2013) 137, paras 15–45; H Kronke, 'Ziele—Methoden—Kosten—Nutzen: Perspektiven der Privatrechtsharmonisierung nach 75 Jahren UNIDROIT' [2007] JZ 1149.

⁴³ (1949) Study XXIII—Doc 14.

⁴⁴ The CMR was ultimately adopted under the aegis of the UN Economic Commission for Europe in 1956.

⁴⁵ UNIDROIT Convention on International Factoring (Ottawa, 28 May 1988) (www.unidroit.org/english/conventions/1988factoring/convention-factoring1988.pdf); UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988) (www.unidroit.org/english/conventions/1988leasing/convention-leasing1988.pdf).

⁴⁶ UNIDROIT Convention on Restitution of Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995) (www.unidroit.org/instruments/cultural-property/1995-convention).

Interests in Mobile Equipment,⁴⁷ the Convention on Substantive Rules for Intermediated Securities,⁴⁸ and model laws on franchise disclosure and leasing.⁴⁹

- 16 **First steps towards a 'restatement' of international commercial contract law** were initiated by the Secretary-General of UNIDROIT, Mario Matteucci, at a conference on 23 April 1968.⁵⁰ He suggested the creation of a non-binding 'body of rules reflecting the common principles that can be extracted from the case law of the various countries' and which might then constitute 'the first step towards a uniform code', possibly to be transformed into a convention at a later stage.⁵¹ Following a preliminary inquiry of the Secretariat⁵² and a preliminary study by a Romanian law professor, Tudor Popescu, in May 1970,⁵³ the Governing Council decided in 1971 that the work programme of the Institute should include an attempt to unify the general law of contract 'with a view to a progressive codification of the law of contractual obligations'.⁵⁴ This work programme was approved by the member states of UNIDROIT.⁵⁵
- 17 Thereafter, a **Steering Committee** was established and charged with the task of conducting a feasibility study. It consisted of Professors René David (Paris), Clive M Schmitthoff (London), and Tudor Popescu (Bucharest), so that the civil law, the common law, and the socialist legal tradition were represented. The Committee advised that the project be limited to what it perceived to be the most important issues of general contract law: general provisions, formation, interpretation, validity, performance (including prescription and novation), non-performance, damages, unjust enrichment and restitution, and proof.⁵⁶ In order to accelerate the initiative, it was subsequently decided to give priority to the topics of formation, interpretation, validity, performance and non-performance.⁵⁷
- 18 Nevertheless, progress was very slow⁵⁸ until a special **Working Group** was established in 1980. Initially, its members were still charged with the 'Progressive Codification of International Trade Law'; only in 1985 was the initiative renamed to 'Preparation of Principles for International Commercial Contracts'.⁵⁹ The Working Group was composed of distinguished lawyers representing the major legal systems of the world, but all sitting in their personal capacity and not expressing or representing the views of their respective

⁴⁷ UNIDROIT Convention on International Interests in Mobile Equipment (Cape Town, 16 November 2001) (www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf).

⁴⁸ UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva, 9 October 2009).

⁴⁹ UNIDROIT Model Franchise Disclosure Law (Rome, 25 September 2002) (www.unidroit.org/english/modellaws/2002franchise/2002modellaw-e.pdf); UNIDROIT Model Law on Leasing (Rome, 13 November 2008) (www.unidroit.org/english/documents/2008/study59a/s-59a-17-e.pdf).

⁵⁰ For a detailed insider's account of the matters covered in the following paragraphs, see Bonell (n 37 above) 27–56. See also Governing Council of UNIDROIT (n 1 above) xxii; Meyer (n 30 above) 75–79.

⁵¹ See the statement made in the discussion following a paper by R David (n 31 above), and taking up a suggestion made therein, by M Matteucci, in UNIDROIT (ed), *IVth Meeting of the Organizations concerned with Unification of Law* = (1967–1968) *Unification of Law: Yearbook II* 267, 268–269.

⁵² 'Progressive Codification of the Law of International Trade: Note of the Secretariat of the International Institute for the Unification of Private Law (UNIDROIT)' (1968–1970) *UNCITRAL Yearbook I* 285.

⁵³ (1970) Study L—Doc 1.

⁵⁴ (1971) CD 50, p 93: 'essai d'unification portant sur la partie générale des contrats (en vue d'une *codification progressive du droit des obligations* "ex contractu")' (original emphasis).

⁵⁵ (1971) *Unification of Private Law (UPL)* 22nd Assembly (Minutes of the meeting of the General Assembly on 26 October 1971), pp 14, 17, 18.

⁵⁶ (1974) Study L—Doc 7.

⁵⁷ (1979) Study L—Doc 16.

⁵⁸ For an interim account, see MJ Bonell, 'The UNIDROIT Initiative for the Progressive Codification of International Trade Law' (1978) 27 *ICLQ* 413.

⁵⁹ (1985) CD 64—Doc 14, pp 10–37.

governments. As a result, the meetings of the Group were much less politicized than, for example, the negotiations leading towards the CISG.⁶⁰ At the beginning, there were 21 members, but ultimately 17 lawyers from 14 different countries participated throughout the project.⁶¹ All of them were experts in contract law and international trade law. Most of them were academics; only the Australian participant was a practitioner. The Russian member was the President of the Court of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry.

The **Chairman** of the Working Group was Professor **Michael Joachim Bonell**, an expert in commercial and comparative law.⁶² Bonell, a native of South Tyrolia, had been a consultant with UNIDROIT since 1978 and a member of the Italian delegation to the diplomatic conference for the adoption of the CISG in 1980. He went on to hold chairs at the University of Camerino (1980–1982), the Catholic University of Milan (1983–1986), and the University of Rome I ('La Sapienza') (since 1986). His appointment as Chairman gave a tremendous boost to the project, and it is fair to say that the PICC are very much the product of his tireless efforts.

The **working pattern of the Group** was based on the appointment of *rapporteurs*, members of the Group who took over responsibility for one of the topics to be covered. The *rapporteurs* conducted preliminary comparative studies and prepared drafts of the black letter rules and the Official Comments that were going to accompany these rules. The drafts were produced in English, the working language of the Group, but they were phrased with a view to subsequent translations into the other official languages of UNIDROIT. The Working Group discussed the drafts during semi-annual meetings that lasted for a week. They were then revised by the *rapporteurs*, and after a second reading the Group solicited advice on individual points from external experts, again mostly law professors.⁶³ However, the Working Group did not adhere to formal consultation mechanisms, such as hearings with interest groups, lobbyists, or other stakeholders. Contrary to the usual procedure followed by UNIDROIT, the PICC were at no stage submitted to a committee of government experts; indeed, governments were not involved at all in their preparation.⁶⁴ Some issues on which the Working Group found it difficult to reach consensus were submitted for a decision of the Governing Council. After a third and final reading by the Working Group, the text was forwarded to the Editorial Committee in February 1994. This Committee streamlined and finalized the drafting. It was chaired by the eminent American contract lawyer Edward Allan Farnsworth. When the Governing Council was invited to adopt the final draft in May 1994,⁶⁵ some members of the Council declined to give their formal approval.⁶⁶ This was not so much due

⁶⁰ EA Farnsworth, 'The American Provenance of the UNIDROIT Principles' (1998) 72 *Tulane LRev* 1985, 1989.

⁶¹ The members of the Working Group are listed in UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2010* (2010) xxvi–xxvii.

⁶² A curriculum vitae is available at the UNIDROIT webpage (www.unidroit.org/overview-principles-2010/309-instruments/commercial-contracts/unidroit-principles-2010/unidroit-principles-2010-history/780-michael-joachim-bonell-curriculum-vitae).

⁶³ See the list in UNIDROIT (n 61 above) xxviii–xxix.

⁶⁴ R Goode, H Kronke, and E McKendrick, *Transnational Commercial Law: Text, Cases, and Materials* (2007) para 6.18.

⁶⁵ (1994) CD (73) 8, p 3.

⁶⁶ For what follows, see the minutes of the discussions in (1994) CD (73) 18, pp 10–22, particularly at pp 11–13 (Loewe), 16 (Collaço and Plantard), 18 (Putzeys), and 19 (Sen); cf also R Loewe,

to objections as to the substance, apart from some concerns about the articles that deviated from corresponding provisions of the CISG; rather, it was argued that the Council had not been given sufficient time to examine the final draft in its entirety and that the UNIDROIT Statute, on a narrow interpretation, did not permit a formal ‘approval’ of ‘soft law’ instruments.⁶⁷ In order to obtain unanimity, the Council ultimately concluded that it ‘would not formally approve the Principles but rather authorise their publication’ and simply ‘decided on the publication and widest possible distribution of the Principles’.⁶⁸ Such a procedure was not explicitly provided for in the UNIDROIT Statute, it had never before been applied,⁶⁹ and it did not amount to a formal endorsement by the UNIDROIT member states—thus enabling subsequent critics to seize on this point in order to question the legitimacy of the PICC.⁷⁰

- 21 Yet, given the specific **legal nature** of the PICC, the absence of formal approval or endorsement by the UNIDROIT member states hardly mattered: they were designed as a ‘soft law’ instrument, a strictly ‘academic’ or ‘private codification’ which, although developed under the auspices of an international organization, is not, as such, binding in any state.⁷¹ As a result, the PICC are not a source of law in the traditional sense.⁷² Nevertheless, as suggested in their Preamble, they may apply to a given transaction in a variety of scenarios. For example, the parties can agree to have their contract governed by the PICC.⁷³ In most cases, such an agreement will only be recognized in the context of international commercial arbitration since state courts are normally precluded by their domestic conflict of laws rules from applying non-state law. Most state courts will, however, interpret such purported ‘choice of law’ clauses as incorporation by reference, and so treat the PICC as terms of the contract.⁷⁴ Arbitral tribunals may also apply the PICC when the parties have subjected their contract to ‘general principles of law’, the ‘*lex mercatoria*’, or similar sets of rules to govern the contract (or indeed have been completely silent on choice of law issues).⁷⁵ Moreover, courts and tribunals may interpret and develop international uniform law and national contract law regimes in the light of the PICC.⁷⁶ Finally, national and international legislators are free to turn to the PICC as potential model rules for domestic law reform.⁷⁷

‘Kaufrechtsübereinkommen—Lückenfüllung durch nichtamtliche Kodifikationen’ in K-H Thume (ed), *Transport- und Vertriebsrecht 2000: Festgabe für Rolf Herber* (1999) 7, 8.

⁶⁷ Art 14 of the Statute of UNIDROIT (n 40 above) only provides for the approval of texts for consideration by governments, with a view to their submission to a diplomatic conference for adoption; nor do the various purposes of UNIDROIT listed in Art 1 of the Statute envisage the formal approval of a soft law measure.

⁶⁸ (1994) CD (73) 18, p 22.

⁶⁹ Widmer (n 39 above) 190 speaks of a ‘rather unorthodox procedure of adoption’.

⁷⁰ Kessedjian (n 38 above) 652; Raeschke-Kessler (n 38 above) 171–173. *Contra*, with reference to the procedural legitimacy provided by the working methods of UNIDROIT, Berger (n 4 above) 91–92; D Oser, *The UNIDROIT Principles of International Commercial Contracts* (2008), 103, 158. The issue is less significant today since the second and third versions of the PICC were formally approved by the Governing Council (see paras 26 and 30 below).

⁷¹ Governing Council of UNIDROIT (n 1 above) xxiii. See above, para 13.

⁷² A seminal account of this position can be found in C-W 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; see also below, Preamble I paras 1–9.

⁷³ cf paragraph 2 of the Preamble.

⁷⁴ See below, Preamble I paras 30–77.

⁷⁵ cf paragraph 3 of the Preamble; see below, Preamble II paras 1–42.

⁷⁶ cf paragraphs 5–6 of the Preamble; see below, Preamble I paras 108–140.

⁷⁷ cf paragraph 7 of the Preamble; see below, Preamble I paras 143–167.

The **first edition of the PICC** was finally published in all the official languages of UNIDROIT later in 1994,⁷⁸ and it was soon translated into 17 other languages. It covered formation, validity (especially problems arising from defects of consent), interpretation, terms, and performance of contracts, as well as remedies for non-performance (see para 33 below). Additional provisions were devoted to definitions and general principles applying across all the issues covered. A lengthy Preamble clarified that the scope of the PICC was restricted to international commercial contracts and spelt out the various purposes which the instrument was designed to achieve (see para 21 above).

The drafters drew inspiration from a wide variety of **sources**. They analysed the **contract laws of the major jurisdictions of the world**. In doing so, they almost exclusively relied on the legislation and the case law of Western legal systems, without necessarily giving priority to the civil law or the common law tradition. Regard was usually had to the contract laws of the USA (with frequent references to the UCC and the Restatement 2d Contracts), England, France, Germany, and Italy. But the contract laws of smaller jurisdictions were influential as well, particularly those that were in the process of being codified, such as the Netherlands (1992) and Quebec (1994). In the early years of the project, particular attention was also paid to the statutes on international trade law that had been enacted by various socialist countries.⁷⁹ This was certainly done for political reasons, but also because these Trade Acts were relatively modern at the time and represented rare examples of national legislation that was specifically designed for international transactions, rather than domestic ones. Unfortunately, it is not always easy to track down the sources of individual articles of the PICC because the Official Comments 'systematically refrain from referring to national laws in order to explain the origin and rationale of the solution retained',⁸⁰ and if they exceptionally provide some guidance, they do so only by relatively opaque references to 'many', 'most', or 'some' legal systems. For an instrument the acceptance of which depends exclusively on its persuasive authority (see para 13 above), this seems to be a missed opportunity.⁸¹

Existing **international instruments in the area of contract law** constituted the second major body of sources for the PICC. The Working Group paid particular attention to the CISG: 'to the extent that, the UNIDROIT Principles address issues also covered by the CISG, they follow the solutions found in that Convention, with such adaptations as were considered appropriate to reflect the particular nature and scope of the Principles'.⁸² However, such departures were 'exceptional',⁸³ and the influence of the CISG on the PICC has been described as 'substantial, even pervasive'.⁸⁴ It is all the more visible because

⁷⁸ UNIDROIT, *Principles of International Commercial Contracts (official texts of the black letter rules in English, French, German, Italian and Spanish)* (1994).

⁷⁹ See eg (1974) Study L—Doc 7, p 2. See also below, Preamble I para 16.

⁸⁰ Governing Council of UNIDROIT (n 1 above) xxiii. See also Bonell (n 37 above) 68.

⁸¹ In a similar vein, J Basedow, 'Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts' [2000] ULR 129, 131–132.

⁸² Governing Council (n 1 above) xxiii, with a footnote highlighting the following provisions: Arts 1.9, 1.10, 2.1.2, 5.1.7, and 7.2.2 (numbering adapted to take into account the revisions made in the 2004 edition of the PICC). For an example, see (1991) PC—Misc 15, p 9.

⁸³ Bonell (n 37 above) 306.

⁸⁴ HM Flechtner, 'The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law' in F Ferrari (ed), *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences* (2003) 169, 176–181, 187. See also Bonell (n 37 above) 331–334 and the synopsis below, in Appendix I to this Commentary. For a detailed analysis of similarities and differences between the CISG and the PICC (and the UCC), see HD Gabriel, *Contracts for the Sale of Goods: A Comparison of US and International Law* (2nd edn, 2009) 25–294.

the drafters of the PICC, when borrowing from the CISG, deviated from their general policy of non-disclosure of their sources and made explicit reference to the CISG in the Official Comments.⁸⁵ The work of the Group was also informed by the parallel elaboration of the PECL by the Commission on European Contract Law which was chaired by Professor Ole Lando and published its first results in 1995. Apart from Professors Bonell and Lando, there were three other scholars who were members of both the PICC Working Group and the PECL Commission (Professors Drobnig, Hartkamp, and Tallon), so there was a constant exchange of ideas.⁸⁶

- 25 From the point of view of pure theory, the **methodology employed by the Working Group** is certainly open to criticism. Despite the assertion that the drafters gave ‘special attention’ to non-legislative instruments, such as standardized trade terms or model contracts elaborated by international organizations,⁸⁷ the influence of such instruments is barely visible, so the PICC do not live up to the claim of being an ‘authentic expression of what is usually called “lex mercatoria”’.⁸⁸ Because of their almost exclusive reliance on Western models, the PICC do not do justice to their ambition to elaborate a ‘global contract law’, and it may be expected that their application in non-Western jurisdictions will give rise to certain difficulties.⁸⁹ Moreover, given the avowed aim of the PICC to be a ‘restatement’, the comparative research that preceded some of the drafts was fairly sketchy. As has been said before, some of the articles of the PICC can hardly be said to represent ‘common principles’ (see para 13 above). For example, the decision not to introduce a requirement of ‘consideration’ or *cause* for the validity of the contract (Art 3.1.2) is a substantial deviation from English and French law. On the other hand, Art 7.2.4 on judicial penalties is the adoption, for better or worse, of a peculiarity of French law. Sometimes such borrowing can be traced back to the nationality of the *rapporteur* who, in that particular case, was not willing to detach himself from his own legal background and favoured the solution of his own jurisdiction.⁹⁰ As neither the black letter rules nor the Official Comments explain whether the Working Group had to make choices, what they were, and why they were made in a particular way, it is difficult to verify the claim that these choices indeed represent ‘best solutions’.⁹¹ This lack of transparency, justified by the need to emphasize ‘the international character’ of the PICC,⁹² potentially undermines the credibility of the entire project.⁹³ Having said this, given the magnitude of the task, the wealth of material that needed to be digested, and the state of comparative law on many questions of contract law, it is hard to see how the Working Group could have completed the project without adopting a pragmatic approach. The sources of individual articles and the policy reasons behind their adoption can usually be traced by looking into the *travaux préparatoires* which were published in an exemplarily transparent fashion.

⁸⁵ Governing Council of UNIDROIT (n 1 above) xxiii and Bonell (n 37 above) 68; cf n 54 above.

⁸⁶ For a comparison of the two instruments in their original versions, see A Hartkamp, ‘The UNIDROIT Principles for [*sic*] International Commercial Contracts and the Principles of European Contract Law’ (1994) 2 ERPL 341.

⁸⁷ Bonell (n 37 above) 48.

⁸⁸ MJ Bonell, ‘Das UNIDROIT-Projekt für die Ausarbeitung von Regeln für internationale Handelsverträge’ (1992) 56 RabelsZ 274, 287.

⁸⁹ See below, Preamble I para 16. ⁹⁰ For an example, see below, Art 5.1.9 paras 5, 11.

⁹¹ Governing Council of UNIDROIT (n 1 above) xxiii (see n 37 above).

⁹² Governing Council of UNIDROIT (n 1 above) xxiii (see n 80 above). See also Bonell (n 37 above) 68.

⁹³ This has been frequently criticized: see the references cited by Meyer (n 30 above) 80 n 313 who offers a defence of the drafters’ approach at 80–81.

In 1997, the Governing Council of UNIDROIT initiated work on an enlarged, **second edition of the PICC**.⁹⁴ A new Working Group was established, comprising 17 members from 16 countries. Apart from a Justice at the Supreme Court of Ghana, an Attorney at Law at the Egyptian Supreme Court, and a Judge at the Federal Court of Australia, they were all academics with particular expertise in international commercial law, sometimes combined with long experience in arbitration practice.⁹⁵ Ten of them had already been members of the original Working Group. Once again, the Group was chaired by Professor Bonell and the Editorial Committee was supervised by Professor Farnsworth. In contrast to the original version, the new edition was **formally approved by the Governing Council** in April 2004;⁹⁶ this was not, however, intended to change the non-binding character of the instrument. It was published in all the official languages of UNIDROIT and translated into ten further languages. It replaced and superseded the 1994 edition of the PICC. In choosing a title for the new edition, UNIDROIT opted simply to label the PICC with the year of publication, as the ICC does with its successive versions of the INCOTERMS,⁹⁷ rather than follow the model of the American Law Institute and designate them the 'PICC 2d', or similar.

The **extent of the changes** was considerable. On the one hand, it was not considered necessary to make major amendments to the existing provisions,⁹⁸ because a survey undertaken by the Secretariat showed widespread satisfaction with the content of the 1994 edition.⁹⁹ Thus only one black letter rule was substantially amended,¹⁰⁰ two new paragraphs (paragraphs 4 and 6) were added to the Preamble, and some of the Official Comments were substantially revised. On the other hand, the coverage of the PICC was significantly extended by the inclusion of five additional topics: authority of agents, contracts for the benefit of third parties, set-off, limitation periods, and also assignment of rights, transfer of obligations, and assignment of contracts. Furthermore, two new rules dealing with inconsistent behaviour (Art. 1.8) and release by agreement (Art 5.1.9) were inserted. As a result, the number of articles in the PICC increased from 120 to 185 and the numbering of some of the existing articles changed, particularly in Chapters 2 and 5.¹⁰¹

The **working pattern of the new Group** closely followed the example of its predecessor, with only one exception: a number of representatives of international organizations with an interest in the unification of commercial law (UNCITRAL, the ICC International Court of Arbitration, the Swiss Arbitration Association, and the Milan Chamber of

⁹⁴ (1997) CD (76) 17, p 24. See also the preceding Secretariat Memorandum: (1997) CD (76) 8.

⁹⁵ The members of the second Working Group are listed in UNIDROIT (n 61 above) x–xi.

⁹⁶ (2004) CD (83) 24, item 7(c).

⁹⁷ cf International Chamber of Commerce (ICC), *Incoterms 2010: ICC Rules for the Use of Domestic and International Trade Terms* (2010).

⁹⁸ For a complete list of the changes, see Governing Council of UNIDROIT, 'Introduction to the 2004 Edition' in UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2010* (2010) xvi. See also 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, 17–31; R Zimmermann, 'The UNIDROIT Principles of International Commercial Contracts 2004 in Comparative Perspective' (2006) 21 Tul Eur & Civ L Forum 1, 8–28; T Probst, 'The UNIDROIT Principles of International Commercial Contracts 1994 and 2004: A Brief Introduction with a Synoptic Overview' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 17.

⁹⁹ (1997) CD (76) 7, para 6: only 10 per cent of the respondents made critical comments as to the content. For more detail on this survey, see para 49 below.

¹⁰⁰ Art 2.8(2) of the 1994 edition became Art 1.12 of the 2004 edition.

¹⁰¹ Arts 2.1 and 5.1 of the 1994 edition became Arts 2.1.1 and 5.1.1 of the 2004 edition, etc.

National and International Arbitration) were formally invited to attend as ‘observers’ and actively participated in the deliberations of the Working Group.¹⁰² For the most part, the Group relied on the same bodies of **national and international sources** which had inspired the 1994 edition. As far as the impact of other international instruments is concerned, the Chapters on assignment and limitation periods were strongly influenced by UN conventions other than the CISG,¹⁰³ and the Section on agency was largely modelled on an existing UNIDROIT convention.¹⁰⁴ The PECL, whose Parts II and III were elaborated more or less in parallel with the new edition and were published in 2000 and 2003, also played an enhanced role. Overall, the 2004 edition of the PICC and the PECL displayed substantial similarities. It is estimated that roughly two-thirds of their provisions correspond.¹⁰⁵

- 29 Preparations for a **third edition of the PICC** started as soon as the Governing Council of UNIDROIT approved the 2004 version. The Council recommended that the PICC become an ongoing project within the work programme of the Institute and instructed the Secretariat to conduct a wide-ranging consultation on whether to expand the PICC to cover additional topics.¹⁰⁶ On the basis of the results, the Governing Council determined in 2006 which areas might be considered, and the Working Group, renewed in 2005 under the chairmanship of Professor Bonell, ultimately decided which of the topics to pursue and which *rapporteur* to nominate for each. The Working Group now consisted of 20 members from 18 countries, half of whom had been involved in the formulation of the 2004 edition,¹⁰⁷ and it adopted more or less the same working pattern employed in the preparation of the previous editions.¹⁰⁸ However, the circle of invited observers was considerably enlarged to 20: the institutions that had been represented in the preparation of the 2004 edition were joined by the Hague Conference on Private International Law, the Government of the Republic of Korea, further arbitral institutions (the London Court of International Arbitration, the German Arbitration Institution, the Arbitration Court of the Hungarian Chamber of Commerce and Industry, and the Cairo Regional Center for International Commercial Arbitration), as well as many other national and supranational organizations and bodies with an interest in cross-border contract law (the China International Economic and Trade Arbitration Commission, the Emirates International Law Center, the American Law Institute, the Private International

¹⁰² Bonell (n 98 above) 6.

¹⁰³ UN Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001) (www.uncitral.org/pdf/english/texts/payments/receivables/ctc-assignment-convention-e.pdf); UN 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).

¹⁰⁴ UNIDROIT Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983) (www.unidroit.org/english/conventions/1983agency-convention1983.pdf).

¹⁰⁵ Bonell (n 98 above) 33; 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, 81. For detailed comparison of the PICC and the PECL, see Bonell (n 98 above) 31–38; O Remien, ‘Die UNIDROIT-Prinzipien und die Grundregeln des Europäischen Vertragsrechts: Ein vergleichender Blick’ in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 65.

¹⁰⁶ (2004) CD (83) 24, p 12. For further detail on the genesis of the 2010 edition of the PICC, see the Introduction to the first edition of this Commentary, paras 42–44.

¹⁰⁷ The members are listed at UNIDROIT (n 61 above) x–xi.

¹⁰⁸ (2006) Study L—Doc 99, para 33. For further detail on the procedure followed by the Working Group, see S Vogenauer, ‘The UNIDROIT Principles of International Commercial Contracts at Twenty: Experiences to Date, the 2010 Edition, and Future Prospects’ [2014] ULR 481, 490–491.

Law Group of the American Society of International Law, the New York City Bar, the Arizona-based National Law Center for Inter-American Free Trade, the Brazilian Branch of the International Law Association, the Institute for Transnational Arbitration of the Center for American and International Law in Washington DC, the Study Group for a European Civil Code, the Groupe de Travail Contrats Internationaux, and the Space Law Committee of the International Bar Association).¹⁰⁹

The Governing Council proceeded to the **formal adoption** of the 2010 edition at its 90th session in Rome on 10 May 2011,¹¹⁰ and the instrument was published the following month. Despite publication actually falling in 2011, UNIDROIT clung to the originally envisaged year of publication for the title of the revised edition. Apart from the five official languages of UNIDROIT, the PICC are available in Arabic, Chinese, Greek, Hungarian, Japanese, Persian, Portuguese, Romanian, Russian, and Ukrainian.¹¹¹

Yet again, the edition introduced **far-reaching changes**.¹¹² These included 26 new articles on illegality, conditions, the plurality of obligors and obligees, and the unwinding of failed contracts by restitution of what has been received. The new provisions also necessitated a few other minor consequential amendments of the existing text. The instrument now contains 211 articles across 11 Chapters. Significantly, the new black letter rules for the first time explicitly spell out that the PICC do not only apply to ‘contracts to be performed at one time’ (Art 7.3.6) but also to ‘contracts to be performed over a period of time’ (Art 7.3.7).

III. Structure, presentation, and style

The mode of **presentation of the PICC** betrays the influence of the US Restatements of the Law that have served as a template for the PICC (see para 12 above). The PICC consist of a Preamble (with an official footnote that suggests two texts for choice of law clauses) and 211 articles, the so-called ‘**black letter rules**’. These read like ordinary legislative provisions in a domestic contract law act or in an international convention. Despite being non-binding and notwithstanding their lack of authoritative force, they structurally resemble a codification that attempts to provide a complete and coherent set of rules for the area of general contract law. Each black letter rule is followed by one or more **Official Comments**. They explain the background and the reasons for adopting the rule and its potential applications. In some cases, they go beyond a mere explanation of the rule and broaden or restrict the scope of the rule, sometimes so as to preserve its simplicity and clarity, sometimes as a compromise solution when the Working Group was unable to reach full consensus on its content.¹¹³ Some of the Official Comments are interspersed with **Illustrations**, hypothetical fact patterns that are designed to show how the rule

¹⁰⁹ cf UNIDROIT (n 61 above) xi–xiii.

¹¹⁰ (2011) CD (90) 18, para 41; ‘90th Session of the Governing Council—Rome, 9–11 May 2011: Summary Conclusions’ [2011] ULR 942 (item no 4).

¹¹¹ (www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010).

¹¹² For an overview, see MJ Bonell, ‘The UNIDROIT Principles 2010: An International Restatement of Contract Law’ [2011] *Dir comm int* 881; M Fontaine, ‘Présentation générale des Principes Unidroit relatifs aux contrats du commerce international. Apports de la troisième édition de 2010’ in G Keutgen (ed), *Les principes Unidroit relatifs aux contrats de commerce international (éd. 2010) et l’arbitrage* (2011) 17; Vogenauer (n 108 above) 492–512.

¹¹³ See below, Art 1.6 para 24.

might operate in practice. The Official Comments and the Illustrations were elaborated simultaneously with the black letter rules, and the drafters regarded them as an ‘integral part of the Principles’.¹¹⁴ In their entirety, the rules, the Comments, and the Illustrations constitute the ‘integral version’ of the PICC. This version is available in book form¹¹⁵ and online.¹¹⁶ As opposed to the US Restatements of the Law (and also to the PECL), the PICC do not contain comparative notes which provide guidance as to the sources of inspiration for the black letter rules (see para 23 above).

- 33 The **structure of the PICC** was relatively straightforward in the 1994 edition. The black letter rules were divided into seven Chapters, two of which were in turn subdivided into two or four Sections. Chapter 1 contained a few ‘General Provisions’ that set out, very much in the tradition of an *Allgemeiner Teil* or *titre préliminaire*, some of the guiding principles of contract law, the main guidelines for the interpretation of the PICC, and some basic definitions. Each of the following Chapters covered one of the most important topics of general contract law, following a chronological order from the making of the contract to its performance or the remedies in the event of non-performance. Chapter 2 dealt with formation, Chapter 3 with validity, Chapter 4 with interpretation, Chapter 5 with content, Chapter 6 with performance (subdivided into ‘Performance in general’ and ‘Hardship’), and Chapter 7 with non-performance (subdivided into ‘Non-performance in general’, ‘Right to performance’, ‘Termination’, and ‘Damages’). The only contentious issue was the relationship between the Chapters on ‘Content’ and ‘Performance’. The respective provisions were originally contained in a single draft Chapter on ‘Performance’, and it is not entirely clear according to which criteria they were eventually separated.¹¹⁷
- 34 The **2004 edition** further added to the somewhat confusing structure of this area of the PICC by placing the new Section 5.2 on contracts for the benefit of third parties between the parts dealing with content (the new Section 5.1) and performance (Chapter 6) and by squeezing the new provision on release into the Section on content (Art 5.1.9). The other changes introduced in 2004 did not necessarily contribute to the systematic coherence of the PICC either. Lumping the new provisions on authority of agents together with those on formation in a new Chapter 2 on ‘Formation and authority of agents’ seems less than compelling. It has also been commented that the new Chapters 8–10 on ‘Set-off’, ‘Assignment of Rights’, ‘Transfer of Obligations, Assignment of Contracts’, and ‘Limitation Periods’ ‘appear to be somewhat inorganically tacked on to the preceding Chapters’.¹¹⁸ It seems that the main concern of the drafters was to maintain the original numbering of the articles and Chapters of the 1994 edition, even at the expense of systematic consistency.¹¹⁹
- 35 The changes introduced by the **2010 edition** could be accommodated more easily. The rules on illegality were inserted as a new Section in the Chapter on ‘Validity’ (Section 3.3). The exiting provisions in this Chapter were split up into Sections 3.1 (‘General provisions’) and 3.2 (‘Grounds for avoidance’). The articles dealing with conditions became a

¹¹⁴ UNIDROIT (n 61 above) 401. See also Bonell (n 37 above) 62.

¹¹⁵ UNIDROIT (n 61 above). There is also a French and an Italian version: UNIDROIT, *Principes d’UNIDROIT relatifs aux contrats du commerce international 2010* (2010); UNIDROIT, *Principi Unidroit dei contratti commerciali internazionali 2010* (2012). Translations into Chinese, Indonesian, Persian, Spanish, and Ukrainian are in the making: (2012) CD (91), 3, para 3.

¹¹⁶ (www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf); (www.unidroit.org/french/principles/contracts/principles2010/integralversionprinciples2010-f.pdf).

¹¹⁷ M Fontaine, ‘Content and Performance’ (1992) 40 *Am J Comp L* 645, 645–646.

¹¹⁸ Zimmermann (n 98 above) 30–31. ¹¹⁹ Bonell (n 37 above) 60.

free-standing Section in Chapter 5 which is now entitled ‘Content, Third party rights and Conditions’ (Section 5.3). The rules on plurality of obligors and obligees were attached at the end of the instrument where they constitute the new Chapter 11. Restitution in the case of failed contracts was dealt with by way of amendment of existing articles in Chapters 3 and 7. Overall, these changes necessitated some significant renumbering of articles, particularly in Chapter 3. In order to facilitate the tracking down of references to earlier editions, the new integral version helpfully contains a table of correspondence of the provisions of the three editions.¹²⁰

The **style of drafting** of the PICC resembles that of civilian codes, rather than that of Anglo-American statutes. The layout of the articles is clear, the sentences are short. The PICC were drafted with the aim of formulating rules ‘that will not only be understood by lawyers but also by the businessmen they represent’.¹²¹ As with most legal texts, this attempt will probably be in vain. But the language of the PICC is simple, concise, immensely readable, and at times even elegant.¹²² The high quality of the drafting becomes particularly apparent once it is compared to other instruments in the field of transnational contract law.¹²³ However, as is well known, brevity and elegance tend to come at the expense of precision. The number of provisions that are framed at a high level of generality is astonishing even by civilian standards. According to a Swiss scholar, roughly 30 per cent of the articles of the 1994 edition referred to the individual ‘circumstances of the case’ or used vague and ambiguous terms like ‘good faith and fair dealing’ or ‘reasonableness’. By comparison, only 10 per cent of the provisions of the Swiss Code of Obligations consist of similar ‘standards’, ‘general clauses’, or ‘open-ended norms’.¹²⁴ This may simply be a result of the drafting process adopted for the PICC. As has been observed with regard to other instruments aimed at harmonizing or unifying private law, the use of vague language facilitates compromise between diverging solutions, and the drafters of such measures soon come to the point where reaching consensus on an issue becomes more important than the substantive outcome. Such language also tends to prevail in instruments drafted by academics rather than practitioners, the former typically being somewhat less obsessed with legal certainty and more willing to leave final answers to the process of adjudication.¹²⁵

From this perspective, open-ended provisions are attractive because they possess ‘enough flexibility to permit a judge or arbitrator to use common sense in applying them so as to avoid an arbitrary or unfair result’.¹²⁶ Other observers will rather be worried that the discretion conferred on the decision maker is too broad, so that the application of the PICC is unpredictable and legal certainty is diminished—although recent research casts doubt on the widely held assumption that the enactment of a greater number of

¹²⁰ ‘Table of correspondence of the articles of the 1994, 2004 and 2010 editions of the Unidroit Principles’ in UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2010* (2010) xxxi. See also in this Commentary, p cclxxix.

¹²¹ Hartkamp (n 86 above) 343. In a similar vein, Bonell (n 37 above) 23: ‘drafted in clear and simple language so as to permit any educated person, even if not a trained lawyer, easily to understand them’.

¹²² See also the assessment of Remien (n 105 above) 74.

¹²³ For a comparison of Arts 5.2.1–5.2.6 PICC and Arts II.-9:301–II.-9:303 DCFR, see S Vogenauer, ‘Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?’ (2010) 6 ERCL 143, 165–168.

¹²⁴ F Dasser, ‘Vertragsrecht ohne Vertragstypenrecht?’ in H Honsell et al (eds), *Aktuelle Aspekte des Schuld- und Sachenrechts: Festschrift für Heinz Rey zum 60. Geburtstag* (2003) 203, 213.

¹²⁵ cf S Vogenauer, ‘Drafting and Interpretation of a European Contract Law Instrument’ in G Dannemann and S Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (2013) 82, 97, with further references to the UCC and the CISG.

¹²⁶ Farnsworth (n 35 above) 700. Professor Farnsworth was one of the most influential drafters of the PICC.

more detailed rules necessarily leads to more predictable outcomes than the promulgation of a relatively small number of broadly phrased principles.¹²⁷ In any event, the PICC provide provisions of varying levels of detail. Many of them reach a degree of specificity that closely resembles that of other modern private law codifications. Not all of the ‘UNIDROIT Principles’ are therefore ‘principles’ in the jurisprudential sense.¹²⁸ Many of them are straightforward and clear-cut ‘rules’ that operate in an all-or-nothing fashion.¹²⁹ The **legal terminology** used is deliberately neutral. Where possible, the drafters avoided using terms of art that are peculiar to any given legal system. This was meant to facilitate the uniform and autonomous interpretation of the PICC throughout the world.¹³⁰

IV. Content

- 38 The scope of the PICC is defined by paragraph 1 of the Preamble, according to which they ‘set forth general rules for international commercial contracts’.¹³¹ In this Introduction, it is only possible to highlight some of the **characteristic traits** of the PICC. The precise content of their black letter rules is discussed in detail in the following parts of this Commentary.
- 39 The **basic underlying ideas** of the PICC are freedom of contract, *pacta sunt servanda*, party autonomy, the observance of good faith and fair dealing, informality, openness to commercial usages, and the policy to keep the contract alive wherever possible (*favor contractus*).¹³²
- 40 The latter three principles are indicative of a characteristic feature of the PICC: they are **tailored to meet the special needs of international commerce**. A number of specific rules are also designed to implement this general policy.¹³³ Art 1.12(3) deals with parties that are based in different time zones. Art 4.7 recognizes that many international contracts are drawn up in more than one language. Arts 6.1.9, 6.1.10, 7.4.12, and 8.2 take account of the problem that many international transactions are conducted on the basis of different currencies, some of which might not be freely convertible. The problem addressed by Art 7.4.9(2) is the absence in some countries of an average short-term lending rate from banks to prime borrowers that could be used in determining the rate of interest for failure to pay money. Arts 6.1.14–5.1.17 concern public permission requirements affecting the valid conclusion or the performance of the contract which can be found in many jurisdictions. Art 2.1.14 favours the upholding of contracts with terms deliberately left open. Art 5.2.3 covers the typical situation involving so-called ‘Himalaya clauses’. The standard of good

¹²⁷ See the large-scale study undertaken by members of the Law Reform Commission of Victoria (Australia) which examines, inter alia, the PICC: MP Ellinghaus and EW Wright, ‘The Common Law of Contracts: Are Broad Principles Better than Detailed Rules? An Empirical Investigation’ (2005) 11 Texas Wesleyan LRev 399, 420.

¹²⁸ For an explanation of the title of the instrument, see below, Preamble I paras 12–13.

¹²⁹ For a (non-exhaustive) list, see KP Berger, ‘The Relationship Between the UNIDROIT Principles of International Commercial Contracts and the New *lex mercatoria*’ [2000] ULR 153, 156. For an example of a clear ‘bright-line rule’, see below, Art 2.1.12 para 2.

¹³⁰ Governing Council of UNIDROIT (n 1 above) xxiii; Bonell (n 37 above) 23, 65–66. For the principle of autonomous interpretation, see below, Art 1.6 paras 5–8. For an example of the use of neutral terminology, see below, Introduction to Section 6.2 paras 1–2.

¹³¹ See below, Preamble I paras 10–28.

¹³² Bonell (n 37 above) 87–172. See also below, Art 1.6 para 25.

¹³³ For an overview, see Bonell (n 37 above) 48–56.

faith and fair dealing in Art 1.7 is that of ‘good faith and fair dealing *in international trade*’ (emphasis added).

Some of the examples mentioned in the previous paragraph suggest that a substantial number of the black letter rules are **modern and innovative**. For instance, whilst most domestic contract law codifications neglect the formation of contract, Chapter 2 of the PICC provides a detailed set of rules on offer and acceptance, it clarifies that this traditional mechanism does not necessarily have to apply in the world of international commercial contracts, it contains a provision on merger clauses, and it even includes specific rules concerning the negotiation process. The Official Comments frequently refer to means of electronic communication. Other examples of the innovatory character of the PICC include the provisions on hardship and Arts 6.1.7 and 6.1.8 on payment by cheque and by funds transfer. It should be noted, however, that these rules usually belong to the group of articles that do not represent ‘restatements’ of general principles of international commercial law (see para 13 above). They are the results of policy decisions of the Working Group that chose them because they were thought to ‘embody what in the light of the special needs of international trade are perceived to be the best solutions, even if these solutions still represent a minority view’.¹³⁴

But in at least one respect the PICC seem to be steeped in the third quarter of the twentieth century, the time when most of their drafters received their professional socialization. The PICC display a certain emphasis on **social welfarism** that has, for better or worse, gone out of fashion, that seems to sit uneasily with their focus on commercial law, and that will not necessarily appeal to hard-nosed merchants. Although the PICC do not authorize adjudicators to strike down abusive, unconscionable, or substantively unfair contract terms, they contain a number of provisions that are designed to protect parties with less experience and inferior bargaining power, such as the prohibition on invoking grossly unfair exemption clauses (Art 7.1.6), the reduction of grossly excessive penalty clauses (Art 7.4.13), the avoidance of the contract in cases of gross disparity (Art 3.2.7), the *contra proferentem* rule (Art 4.4), and the ineffectiveness of surprising standard terms (Art 2.1.20). The latter three provisions are explicitly mentioned in the Official Comments as ‘articles intended to protect the economically weaker or less experienced party’.¹³⁵ This emphasis on ‘contractual justice’ and ‘the search for a contractual equilibrium’ which, according to the drafters, is designed ‘to bring a new sense of morality to contract law’¹³⁶ has been justified with the argument that the ‘optimistic assumption’ that business people are experienced and competent professionals does not hold, and that they rather ‘may have different levels of education and skill and are no less likely than the rest of humanity to yield to the temptation to exploit the weaknesses or needs of others’.¹³⁷ It remains to be

¹³⁴ Bonell (n 37 above) 24, see also *ibid* 46–47.

¹³⁵ Off Cmt 1 to Art 2.1.20, p 68. For a comprehensive overview of the various mechanisms of the PICC designed to limit unbridled freedom of contract, see EM Belsler, ‘Die Inhaltskontrolle internationaler Handelsverträge durch internationales Recht: Ein Blick auf die Schranken der Vertragsfreiheit nach *UNIDROIT Principles*’ [1998] *Jahrbuch junger Zivilrechtswissenschaftler* 73, 81–101; see also M Fontaine, ‘Les Principes d’Unidroit et la protection de la partie faible’ in K Boele-Woelki and W Grosheide (eds), *The Future of European Contract Law: Essays in Honour of Ewoud Hondius* (2007) 183.

¹³⁶ PA Crépeau and EM 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) 39, 44, 53, 77, 139. Bonell (n 37 above) 127 n 103 also speaks of an ‘ethical or “moralistic” ambition’ of the PICC; Berger (n 129 above) 159 and 162 welcomes the ‘transition to a new form of contractual morality in international business’ and the ‘“social” control of transnational commercial contracts’.

¹³⁷ Bonell (n 37 above) 151–152; see also Belsler (n 135 above) 93.

seen whether overburdening the PICC with this kind of moralistic rhetoric will contribute to their acceptance in commercial practice. It certainly prepares the ground for exaggerated claims that the PICC are a manifestation of ‘consumer law mentality’ and thus ‘do not appear to reflect international commercial practice’.¹³⁸

- 43 Some of the rules and doctrines listed in the previous paragraph are alien to most common law jurisdictions and therefore shed doubt on the claim that the PICC represent a **neutral and balanced set of rules** which bridges the divide between legal traditions, particularly between the common law and the civil law.¹³⁹ Other examples include the far-reaching general obligation to act in good faith (Art 1.7), the liability for breaking off pre-contractual negotiations in bad faith (Art 2.1.15), the lack of a consideration requirement (Art 3.1.2), interpretation of the contract in the light of the pre-contractual negotiations and the subsequent conduct of the parties (Art 4.3), the textbook-like distinction between the duty to achieve a specific result and the duty of best efforts (Arts 5.1.4 and 5.1.5), the general exclusion of liability for *force majeure* events (Art 7.1.7), the general right to require specific performance (Art 7.2.2), and the enforceability of penalty clauses (7.4.13). Thus, suggestions that the instrument displays a certain bias towards the common law¹⁴⁰ seem to be as misguided as reproaches that the PICC represent a victory of the civil law tradition.¹⁴¹ Lawyers from most French law-inspired legal systems, for example, would find the possibility of a binding contract being formed without *cause* (Art 3.1.2) at least as foreign as the exercise of termination and avoidance rights by mere notice (Arts 7.3.2 and 3.2.11) and the order of performance that is suggested in Art 6.1.4.¹⁴² Overall, it is therefore true to say that the PICC reflect a neutral compromise across legal traditions, even if individual rules are bound to be more familiar to lawyers from a specific background.

Reception

- 44 On the occasion of the publication of the second edition of the PICC in 2004, the Governing Council of UNIDROIT boldly asserted that the ‘**success in practice** of the UNIDROIT Principles over the last ten years has surpassed the most optimistic expectations’.¹⁴³ This

¹³⁸ See J Dalhuisen, *Dalhuisen on Transnational, Comparative, Commercial, Financial and Trade Law*, vol I (5th edn, 2013) 311 and vol II (5th edn, 2013) 132 n 258, who, referring to the ‘rougher justice in the commercial sphere’ where ‘parties are left to their own devices to a greater extent’ (vol I 309), makes the same point over and over again: vol I 27 n 50, 28 n 56, 46 (‘many of the rules seem to come straight from domestic consumer laws’), 310, 326 and vol II 11, 131 (‘consumer law thinking drifting into professional dealings’), and more often at 131–136. For an attempt at a more nuanced perspective, see Vogenauer (n 123 above) 172–175.

¹³⁹ cf Governing Council of UNIDROIT (n 1 above) xxiii: ‘a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied’.

¹⁴⁰ See eg Loewe (n 66 above) 8–9.

¹⁴¹ See eg the incorrect contention that the PICC in general, and Art 4.3 in particular, ‘reflect the French philosophy of interpretation, which is altogether different from English law’ in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, [39] (see below, Art 4.3 para 6).

¹⁴² For the latter point and the proximity of Art 6.1.4 and § 234 Restatement 2d Contracts (USA), see Fontaine (n 112 above) 22.

¹⁴³ Governing Council of UNIDROIT (n 98 above) xvii. For a similar assessment, see Bonell (n 37 above) 264 and, more recently, Governing Council of UNIDROIT, ‘Introduction to the 2010 Edition’ in UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2010* (2010) vii, viii; MJ Bonell, ‘The UNIDROIT Principles of International Commercial Contracts: Achievements in Practice and Prospects for the Future’ (2010) 17 Aust ILJ 177, 178. In a similar vein, S Lake, ‘An Empirical Study of the UNIDROIT

assessment is open to debate. Its validity very much depends on whether the observer tends to see the glass half full, rather than half empty.

The PICC have certainly been well received in **academic circles**.¹⁴⁴ They have been the subject of numerous conferences, seminars, and colloquia all over the world. The International Academy of Comparative Law, for example, devoted a special section to the PICC at its XVth International Congress at Bristol in 1998, inviting national reporters from around the globe to assess the compatibility of the PICC with their domestic laws.¹⁴⁵ Over the years, the PICC have generated a substantial amount of literature, although this is mostly concerned with the more theoretical and jurisprudential aspects of their legal nature and their applicability, rather than with the substance of their provisions.

Furthermore, the PICC are also beginning to play a role in **legal education**, albeit only a peripheral one at this point.¹⁴⁶ For example, student competitors in the Annual Intercollegiate Negotiation Competition, sponsored by the Japan Commercial Arbitration Association, among others, have been mooted hypothetical cases based on the PICC since 2002. In 2012, the organizers hosted teams from 19 universities in Japan, Australia, and, for the first time, China.¹⁴⁷ The annual Willem C Vis Commercial Arbitration Moot has also required participants to have recourse to the PICC in recent years.

Perhaps most importantly, the PICC have exerted considerable influence on an impressive number of **legislative reforms of contract laws** both at the national and at the transnational level.¹⁴⁸ The PICC have achieved worldwide status as background law for the general law of contracts.¹⁴⁹ This is no doubt helped by the fact that UNIDROIT actively promotes the dissemination and the application of the PICC,¹⁵⁰ including assistance to governments or supranational organizations that intend to use the PICC as a model for legislation.

The use of the PICC by **courts and arbitral tribunals** is much harder to assess.¹⁵¹ UNIDROIT maintains the Unilex database which attempts comprehensive coverage of all decisions and awards referring to the PICC.¹⁵² Up to 2006, all the material is also available in hard copy.¹⁵³ At the time of writing, almost exactly two decades after the instrument

Principles—International and British Responses’ [2011] ULR 669, 691, 703 (‘overwhelming’, ‘resounding’, and ‘tremendous success’).

¹⁴⁴ For an overview of academic praise and criticism, see Bonell (n 37 above) 174–180, 264–267.

¹⁴⁵ The proceedings are collected in MJ Bonell (ed), *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts* (1999).

¹⁴⁶ See eg the survey results of A Rogowska, ‘The UNIDROIT Principles and PECL: Experiences in English Academic Circles’ [2011] ULR 867; A Rogowska, ‘Teaching the CISG at U.K. Universities—an Empirical Study of Frequency and Method of Introducing the CISG to U.K. Students in the Light of the Desirability of the Adoption of the CISG in the U.K.’ in I Schwenzer and L Spagnolo (eds), *Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference* (2011) 131.

¹⁴⁷ (www.negocom.jp/eng). ¹⁴⁸ See below, Preamble I paras 143–167.

¹⁴⁹ For the idea of a ‘background law’, see R Michaels, ‘Umdenken für die UNIDROIT-Prinzipien—Vom Rechtswahlstatut zum Allgemeinen Teil des transnationalen Vertragsrechts’ (2009) 73 *RebelsZ* 866; S Vogenauer, ‘Interpretation of the UNIDROIT Principles of International Commercial Contracts by National Courts’ in H Snijders and S Vogenauer (eds), *Content and Meaning of National Law in the Context of Transnational Law* (2009) 157.

¹⁵⁰ See eg (1994) CD (73) 18, p 22; (2004) CD (83) 2, pp 8–9; (2006) Study L—Doc 99, paras 2–8; (2006) Study L—Misc 25, paras 6–33.

¹⁵¹ For a detailed overview, see below, Preamble I paras 108–140 and Preamble II *passim*. See also Meyer (n 30 above) 103–328.

¹⁵² (www.unilex.info/dynasite.cfm?dssid=2377&dsmid=14311). The database is a joint project by UNIDROIT, the Italian National Research Council, and the University of Rome I (‘La Sapienza’).

¹⁵³ MJ Bonell, *The UNIDROIT Principles in Practice: Caselaw and Bibliography on the UNIDROIT Principles of International Commercial Contracts* (2nd edn, 2006).

was first published, the database lists a mere 198 decisions of state courts and 189 arbitral awards in which the PICC have been cited. The majority of these references is to Art 1.7 (duty of the parties to act in accordance with good faith and fair dealing), Chapter 4 (interpretation of contracts), Section 7.3 (termination of the contract in the event of a breach), and Section 7.4 (damages).¹⁵⁴ The overall figures are hardly overwhelming, even if it is accepted that the number of awards referring to the PICC is in fact greater than those reported because most awards are not published for reasons of confidentiality. Professor Bonell estimates that the total number of ICC awards referring in one way or another to the PICC amounts to an average of 15 per year.¹⁵⁵ However, these references have to be looked at carefully. An analysis of the first 104 arbitral awards listed in the Unilex database shows that in 24 of these cases, the application of the PICC was rejected or it was not clear from the published excerpts whether the PICC had any bearing on the outcome of the case. In 21 arbitrations, the PICC were used in order to supplement a domestic law or an international instrument; in 34, they were employed as an aid to the interpretation of the applicable domestic or international law. Only in 25 cases were the PICC dealt with as the applicable law, mostly as the only law, sometimes also in combination with another domestic or international law.¹⁵⁶ This small, latter group of awards is the one where substantial discussion of provisions of the PICC can be expected. In most other cases, tribunals mention them as obiter dicta, usually simply to confirm a result reached via a different route, for example by applying the applicable domestic contract law. The majority of references to the PICC can therefore be regarded as merely gratuitous, decorative, or ornamental: they do not have a direct impact on the decisions on the merits. The situation is similar in state courts.¹⁵⁷ Another more recent empirical analysis provides even more sobering data. It established that, as of 31 August 2011, only six court decisions and 11 arbitral awards had been rendered with regard to a contract that was governed by the PICC.¹⁵⁸ Yet another study identified all the published awards since 1951 in which a non-national legal standard of a commercial nature, such as 'general principles of law and international trade', 'international commercial law', or the PICC, actually made a difference to the outcome of the case. The survey yielded 39 cases where the parties had expressly or implicitly chosen a non-national legal standard (not necessarily the PICC) and 38 cases where the tribunal had

¹⁵⁴ Bonell (n 153 above) xviii–xix. See also the figures presented by E Jolivet, 'L'harmonisation du droit OHADA des contrats: l'influence des Principes d'UNIDROIT en matière de pratique contractuelle et d'arbitrage' [2008] ULR 127, 142 n 33 and by A Mascareño and E Mereminskaya, 'The Making of World Society Through Private Commercial Law: The Case of the UNIDROIT Principles' [2013] ULR 447, 467–469.

¹⁵⁵ MJ Bonell, 'Preface to the Second Edition' in MJ Bonell, *The UNIDROIT Principles in Practice* (n 153 above) xi, xi–xii, relying on information provided by the ICC Ct Arb.

¹⁵⁶ A Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im europäischen Privatrecht* (2009) 532 n 290.

¹⁵⁷ For a detailed analysis confirming this assessment, see below, Art 1.7 paras 23–25.

¹⁵⁸ E Finazzi Agrò, 'The Impact of the UNIDROIT Principles in International Dispute Resolution in Figures' [2011] ULR 719, 722–723. For a more extensive overview, see E Finazzi Agrò, 'The Impact of the UNIDROIT Principles in International Dispute Resolution: An Empirical Analysis' (2011) 44 UCC LJ 77, 99–121. Nearly 160 further decisions were added to Unilex between August 2011 and August 2014, and the vast majority of those are listed under the rubric 'UNIDROIT Principles as a means of interpreting domestic law'; none concerns a case where the PICC served as the applicable law. For the dearth of US case law, see HD Gabriel, 'An American Perspective on the 2010 UNIDROIT Principles of International Commercial Contracts' (2013) 77 *RabelsZ* 158, 160.

applied such a standard if the parties had failed to choose the applicable law or had chosen a national law.¹⁵⁹

Business people and practitioners have also been slow to embrace the PICC. The Secretariat of UNIDROIT launched a formal survey on the use in practice of the PICC in 1996. About 13 per cent of the 208 respondents had at least once expressly chosen the PICC as the applicable contract law; nearly six out of ten respondents had used the PICC in the course of contract negotiations. However, these figures have to be read bearing in mind that the questionnaire had only been sent to persons 'who had shown a particular interest in the UNIDROIT Principles during their preparation and/or after their publication'.¹⁶⁰ An independent survey conducted in 1997 amongst 124 practitioners from the Florida Bar with particular expertise in international law and 100 judges sitting on civil matters in the Florida Circuit Court came to the conclusion that the 'current status of the knowledge of... the UNIDROIT Principles is not encouraging'. Only one practitioner expressed a 'fairly strong' familiarity with the PICC, whilst 15 per cent claimed to have 'reasonable familiarity'. Only one had used them, and another two had seen them in form contracts. None of the judges had ever heard a case involving the PICC, although nearly all of them said they would apply them if asked by the parties.¹⁶¹ Perhaps it would have been overly optimistic to expect a different result only three years after the publication of the first edition of the PICC. However, an online survey conducted amongst 236 individuals, mostly from the USA,¹⁶² two-thirds of them practitioners and roughly a quarter of them legal academics, between August 2006 and May 2007 showed that only 20 per cent of the practitioners surveyed felt 'thoroughly' or 'moderately' familiar with the PICC¹⁶³ and that almost two-thirds of the US practitioners never addressed the PICC in their contracts.¹⁶⁴ Of the 17 judges participating in the survey, only one had ever dealt with the PICC.¹⁶⁵ A similar picture emerges from an analysis of the 3,955 cases filed with the ICC Court of Arbitration between 2000 and 2006. Only in one instance had the parties expressly chosen the PICC. In 21 further cases they had chosen some non-national legal standard of a commercial nature that would have enabled the tribunal to apply the PICC.¹⁶⁶ European businesses and practitioners seem to be particularly reluctant to subject their contracts to the PICC, as is evidenced by two surveys conducted by the Oxford Institute of European and Comparative Law. The first was conducted amongst 100 in-house counsel of European businesses in 2008: while nearly 40 per cent of the

¹⁵⁹ F Dasser, 'Mouse or Monster? Some Facts and Figures on the *lex mercatoria*' in R Zimmermann (ed), *Globalisierung und Entstaatlichung des Rechts, vol II: Nichtstaatliches Privatrecht—Geltung und Genese* (2008) 129, 131, 142–145.

¹⁶⁰ (1997) CD (76) 7, para 1. See also MJ Bonell, 'The UNIDROIT Principles in Practice: The Experience of the First Two Years' [1997] ULR 34; MJ Bonell, 'The UNIDROIT Principles: First Practical Experiences' (1998/1999) 1 EJLR 193, 197–198.

¹⁶¹ MW Gordon, '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, 368–369, 374.

¹⁶² Sixty-eight per cent of the respondents were based in California, Florida, Hawaii, Montana, or New York; 22 per cent were based in one of 19 other US jurisdictions; 10 per cent were based in one of 16 foreign jurisdictions.

¹⁶³ PL Fitzgerald, 'The International Contracting Practices Survey Project' (2008) 27 J L & Com 1, 7, and 43.

¹⁶⁴ Fitzgerald (n 163 above) 16 and 70. Foreign practitioners reported slightly greater use of the PICC, but the number of respondents in this category was too low to produce statistically relevant results.

¹⁶⁵ Fitzgerald (n 163 above) 19 and 79. ¹⁶⁶ Dasser (n 159 above) 140–141.

respondents had, when conducting a cross-border transaction, at least once agreed that the contract be governed by the PICC or had incorporated the PICC into their contracts, only 4 per cent of the respondents claimed that they had done this 'often'.¹⁶⁷ These numbers dropped to 24 and 1 per cent, respectively, in the second survey which established the attitude towards the PICC amongst 380 in-house counsel and legal counsel to European businesses in 2012.¹⁶⁸ A different survey of 100 UK practitioners generated only three that had ever used the PICC. However, the same survey found somewhat more widespread use of the PICC amongst 70 practitioners outside the UK (presumably comprising both Europeans and others): 31 per cent of these had at least once chosen the PICC as the law applicable to a contract or applied them as an arbitrator where the parties had chosen the '*lex mercatoria*' or similar, or had not made any choice of law; 29 per cent had used the PICC at least 'sometimes' as a guide to drafting contracts.¹⁶⁹ Some receptiveness for the PICC in a non-European context was also established in another survey conducted by a member of the Working Group which had prepared the 2010 edition of the PICC. He found that all of the 36 practitioners and arbitrators plus eight in-house counsel from Brazil who had been questioned were aware of the PICC. Some 55 per cent had used them as a drafting tool, and roughly 30 per cent had already chosen them as the applicable law at least once.¹⁷⁰ An earlier survey that had gone beyond Europe and established the responses of 639 practitioners (in-house counsel of major companies, attorneys specializing in arbitration, arbitrators, or similar) from 51 countries had found that 13 per cent had used the PICC in arbitration proceedings, 11 per cent in the drafting of contracts, and 8 per cent in contractual negotiations.¹⁷¹ In view of such figures, it seems premature to speak of an unqualified success story with regard to the use of the PICC in transnational contracting and the resolution of international commercial disputes.¹⁷²

VI. Outlook

1. Substantive changes

- 50 In the wake of the 2010 edition of the PICC **no imminent fundamental revision** of the PICC is to be expected. There is, after all, little left to cover in the realm of general contract law. However, the new triennial work programme of UNIDROIT for 2014–2016 highlights two discrete areas for potential activities in the field of international commercial

¹⁶⁷ Vogenauer (n 10 above): 4 per cent had made such a choice 'often', 13 per cent 'occasionally', and 20 per cent 'almost never'.

¹⁶⁸ S Vogenauer and A Wulf, 'The Use of Optional Instruments in European Contract Law' (forthcoming): 1 per cent had chosen or incorporated the PICC 'often', 7 per cent 'occasionally', 16 per cent 'rarely' or 'almost never', and 75 per cent 'never'.

¹⁶⁹ Lake (n 143 above) 672 (with graph 3) and 676 (with graph 7).

¹⁷⁰ L Gama Jr, 'Prospects for the UNIDROIT Principles in Brazil' [2011] ULR 613, 645–649.

¹⁷¹ KP Berger et al, 'The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Practice' in KP Berger (ed), *The Practice of Transnational Law* (2001) 91, 105, 159 (the survey was conducted in 1999 and 2000).

¹⁷² However, H Kronke, 'Principles Based Law and Rule Based Law: The Relevance of Legislative Strategies for International Commercial Arbitration' in H Kronke and K Thorn (eds), *Festschrift für Bernd Hoffmann* (2011) 1002, 1006 speaks of the PICC's 'by now generally acknowledged, almost routine, use in international commercial arbitration, be it as the law chosen by the parties (still the exception) be it as the parties' or the arbitral tribunal's best substitute where no law was chosen or in case of otherwise dysfunctional and unsatisfactory solutions, as gap-filler, persuasive argument or, generally, source of inspiration'.

contracts. First, it is suggested that harmonized rules for cross-border **multilateral contracts** should be developed; that is, rules for contracts entered into by more than two parties which are frequently made with a view to establishing a new entity, for example joint venture agreements.¹⁷³

Secondly, it is proposed to revisit the general idea of adopting a more coherent approach throughout the PICC to issues particularly arising in the context of long-term contracts and, more specifically, of adding a rule on **termination 'for unjust cause'**.¹⁷⁴ It had originally been intended to tackle this issue in the revision leading up to the 2010 edition. The respective draft article was modelled on § 314 German Cc and covered situations in which none of the currently available mechanisms bite; that is, scenarios that cannot be qualified as either fundamental non-performance (Art 7.3.1 PICC), *force majeure* (Art 7.1.7 PICC), or change of circumstances (Art 6.2.2 PICC). The Working Group considered termination for unjust cause at their annual meetings from 2007 to 2009. In 2008, they decided that any such provision would have to be framed as narrowly as possible, and in the following year they agreed to drop the proposal altogether, given that a mechanism of this kind was completely alien to the French and Anglo-American legal traditions. Nevertheless, the Working Group did not rule out the possibility of addressing this question in a later revision.¹⁷⁵

Another deliberate gap in the general contract law regime of the PICC 2010 is the lack of rules on **capacity** (Art 3.1.1). In international trade, however, the parties are normally legal entities rather than natural persons, and it seems wise for the PICC to restrain themselves and leave the question of capacity to the applicable national law. In contrast, it would be very easy to implement a rule on the **capitalization of interest** along the lines of Art 17:101 PECL, and there is every indication that this would meet a genuine need in practice.

It would be considerably more controversial to introduce rules on controlling the **content of standard terms** with regard to their substantive unfairness, as frequently suggested. It is true that such controls can be justified in commercial law as much as in consumer law, since they are primarily concerned with the correction of partial market failure rather than the protection of the weaker party.¹⁷⁶ At present, the absence of rules on policing standard terms in the PICC might have an unexpected result if the parties choose the PICC to govern their contract (and couple this choice with an arbitration clause), designate a particular national law as a 'backup law' for issues outside the scope of the PICC, and this law provides for the substantive control of standard terms: since the PICC deal with standard terms in quite some detail (Arts 2.1.19–2.1.22) the policing of such terms can hardly be said to be outside the scope of the instrument; and given that the relevant national rules on content control are normally considered national rather than international mandatory rules, they do not apply to such a contract.¹⁷⁷ Be that as it may, it is not clear that it would

¹⁷³ (2013) CD (92) 13, paras 8–10; (2013) AG 72 (9), para 22.

¹⁷⁴ (2013) CD (92) 9; (2013) CD (92) 13, paras 6–7; (2013) AG 72 (9), para 22.

¹⁷⁵ F Dessemontet, 'Sanctity of Contracts vs. Termination for Cause: Why is UNIDROIT Afraid of the Big Bad § 314 BGB?' in A Büchler and M Müller-Chen (eds), *Private Law: National—Global—Comparative—Festschrift für Ingeborg Schwenzer zum 60. Geburtstag*, vol I (2011) 395.

¹⁷⁶ A Hartkamp, 'Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope' [2003] ULR 81, 88; Zimmermann (n 98 above) 29–30.

¹⁷⁷ This is suggested (with regard to German law as a background law) by E Brödermann, 'The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice—the Experience of a German Lawyer' [2011] ULR 589, 604–605.

be wise for UNIDROIT to adopt a mechanism for controlling standard terms. Consensus about the exact standard of control would be difficult to achieve on the transnational level, as can be seen from the ongoing discussions around a European contract law. Moreover, there is a real danger that such rules would prove fatal to the acceptance of the PICC in practice—acceptance on which the PICC, as an ‘optional instrument’, rely more heavily than do national legal systems. It seems that many parties to international commercial contracts favour contract laws that do not subject standard terms to judicial scrutiny as to their fairness. Thus, for example, some big German companies notoriously choose foreign laws, notably Swiss law, to govern their international contracts in order to avoid the strict controls on exclusion clauses in their standard terms which apply under German law. More generally, Swiss law is a popular choice in international contracting because it makes no provision for control of standard terms in commercial contracts; for the same reason, English law is often chosen by parties even where neither one has any connection to England.¹⁷⁸ It might even be argued that the PICC do not need a specific provision on policing the fairness of standard terms because the possibility of avoiding or adapting a contract in cases of gross disparity (Art 3.2.7) normally provides similar, and in some cases even broader, protection to the aggrieved party.¹⁷⁹

- 54 UNIDROIT might also consider expanding the scope of the PICC **beyond general contract law**. Of course, some of the Chapters added in the 2004 and 2010 editions can also have an extra-contractual dimension and have the potential of being applied to other types of obligation as well (set-off, assignment of rights, transfer of obligations, limitation periods, and plurality of obligors and of obligees).¹⁸⁰ However, more than a decade ago, the then Secretary-General of UNIDROIT ruled out ‘for our generation’ the possibility of going further and developing the PICC into a global private, or at least patrimonial, law covering issues of delict or tort, unjustified enrichment or restitution, and personal property.¹⁸¹ He was also opposed to devising rules for specific types of contract and, rather, suggested tackling ‘border-line issues which some would undoubtedly define as “non-contractual” or even “regulatory”’.¹⁸²

2. Promoting the use of the PICC in legal practice

- 55 Rather than amending the black letter rules of the PICC, the current focus of UNIDROIT seems to be on promoting the use of the PICC in legal practice. A variety of suggestions have been made to this effect. One is for UNCITRAL to enact a formal recommendation to draw on the PICC in the **interpretation and supplementation of the CISG**.¹⁸³ As a result, the use of the PICC for one of their avowed purposes (that is, as a means to interpret and supplement international uniform law) would be expected to increase. So

¹⁷⁸ s 27 Unfair Contract Terms Act 1977. For further references, see S Vogenauer, ‘Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence’ (2013) 21 ERPL 13, 21, 36, 63–67.

¹⁷⁹ Belser (n 135 above) 90–96.

¹⁸⁰ See below, Preamble I para 21. For the problems that might arise from broadening the scope of the PICC, see Bonell (n 98 above) 29–31.

¹⁸¹ Kronke (n 42 above) 1156.

¹⁸² H Kronke, ‘Opening of the Colloquium’ in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (2007) 13, 15.

¹⁸³ MJ Bonell, ‘The CISG, European Contract Law and the Development of a World Contract Law’ (2008) 56 Am J Comp L 1, 27.

far, UNCITRAL has only been prepared to recommend the use of the 2004 and 2010 editions of the PICC, ‘as appropriate, for their intended purposes’, and the exact scope of these endorsements is in doubt.¹⁸⁴ It seems, however, that they were not intended to be formal exhortations to adjudicators to fall back on the PICC when the wording of the CISG is ambiguous or incomplete.¹⁸⁵

The PICC will also gain more prominence if parties increase their **choices of the PICC as the law applicable** to their transactions. It is widely believed that there are two major obstacles to such designations.¹⁸⁶ First, many business people and practitioners are not even aware of the existence of the instrument or are not sufficiently familiar with it. As a result, even those practitioners who are aware of the potential benefits of subjecting their contracts to the PICC are rarely able to convince the other party to designate the PICC.¹⁸⁷ UNIDROIT addresses this problem by organizing conferences and workshops all around the globe.¹⁸⁸ Secondly, the existing national conflict of laws rules do not encourage parties to choose the PICC: almost no jurisdiction in the world will fully recognize such a choice as long as the contract provides for dispute resolution in the state courts (see para 21 above).

One possible way of addressing this issue is to convince national legislators to mandate their **state courts fully to acknowledge choice of the PICC** as the law governing a transaction. UNIDROIT is therefore supportive of the recent initiative of the Hague Conference on Private International Law to issue a set of non-binding ‘Principles on Choice of Law in International Commercial Contracts’.¹⁸⁹ Art 3 of the draft Hague Principles envisages the recognition by state courts of choices of ‘rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules’.¹⁹⁰ There are preliminary indications that some states might implement these Principles into their domestic conflicts laws and thus enable their courts to give full effect to choice of the PICC made by the contracting parties.

Moreover, in May 2013 UNIDROIT adopted a set of 11 contractual **model clauses** in order ‘to assist parties’ that intend to make use of the PICC.¹⁹¹ These clauses offer ready-made solutions for parties that wish their contract to be governed by the PICC, that

¹⁸⁴ For references and analysis, see below, Preamble I para 120.

¹⁸⁵ R Sorieul, E Hatcher, and C Emery, ‘Possible Future Work by UNCITRAL in the Field of Contract Law: Preliminary Thoughts from the Secretariat’ (2013) 58 Vill L Rev 491, 494.

¹⁸⁶ This belief is, at least to some extent, supported by the available empirical evidence. ‘Lack of familiarity’ is by far the most frequently cited reason for not applying the PICC or not applying them more frequently; ‘legal character and doubts about enforceability and actions of the courts’ is an important, albeit much less pressing, concern for practising lawyers: Vogenauer and Wulf (n 168 above) at Questions 42B and 43. Berger et al (n 171 above) 110–112, 194 have similar evidence with regard to ‘transnational law’ more broadly; their findings also contradict Michaels (n 149 above) 874, 888 who suggests a third important reason, ie that the PICC with their focus on general contract law are incomplete by comparison to national laws which provide rules on specific types of contract and include mandatory rules.

¹⁸⁷ For a first-hand account, see P Galizzi and V Sartorelli, ‘I Principi UNIDROIT 2010: verso un diritto “globale” dei contratti commerciali internazionali—Roma 17–18 febbraio 2012—I Principi UNIDROIT nella pratica dell’arbitrato internazionale’ (2012) 26 Dir comm int 935, 936, with real-life scenarios where their contracts would have benefited from the use of the PICC at 937–939.

¹⁸⁸ For further references, see Vogenauer (n 108 above) 515.

¹⁸⁹ See below, Preamble I paras 60–62.

¹⁹⁰ Hague Conference on Private International Law: Permanent Bureau, Prel Doc No 6 (March 2014), ‘The Draft Hague Principles on Choice of Law in International Commercial Contracts’ p 11; the PICC are specifically referred to as examples of such ‘rules of law’ in the draft Commentary on Art 3, *ibid*, p 14 (para 3.6).

¹⁹¹ (2012) AG (71) 2, para 18.

wish to incorporate the PICC as terms of the contract, or that wish the PICC to be drawn upon for the purposes of interpreting and supplementing the otherwise applicable law, be it of national or supranational provenance. Some of the model clauses can be employed at the time of making the contract; others are designed for use after a dispute has arisen. The clauses were published as a separate brochure, together with extensive commentary setting out their appropriate use.¹⁹² The Governing Council of UNIDROIT initiated the elaboration of these clauses in the hope that they will make it possible ‘to move beyond academic acceptance of the Principles into the day-to-day world of contract drafting’.¹⁹³

59 Another strategy for overcoming the limitations of domestic conflicts rules is the attempt to **vest the PICC with stronger normative force**.¹⁹⁴ If the PICC were turned into binding domestic rules, they would constitute ‘state law’ and as such be legitimate objects of a choice of law under the existing conflicts regimes. In order to achieve this, UNIDROIT would have to convince as many national legislatures as possible to treat the **PICC as a model law** and comprehensively implement the provisions of the instrument.¹⁹⁵ Choices of the respective national laws would then effectively amount to choices of the PICC.

60 If the PICC were enacted as international uniform law they would apply as such. This might be achieved by adopting them as a **Protocol to the CISG**. They would then be elevated to a kind of ‘general part’ of the Convention. Contracting states of the CISG would, of course, be at liberty to declare a reservation to the Protocol. Such an approach would have to rely on UNCITRAL which has already endorsed the PICC, albeit with unclear import (see para 55 above).¹⁹⁶

61 In the long run, a closer rapprochement between the PICC and the CISG might lead to a kind of **Global Commercial Code**, at first envisaged by Professor Schmitthoff in the 1980s¹⁹⁷ and advocated by Gerold Herrmann, the then Secretary of UNCITRAL, in 2000.¹⁹⁸ Such a Code would include consolidated versions of the CISG and other multilateral treaties (eg the CMR) and non-binding instruments (eg the INCOTERMS and the UCP) in the field of transnational commercial law. The PICC would provide the rules

¹⁹² UNIDROIT, *Model Clauses for Use by Parties of the UNIDROIT Principles of International Commercial Contracts* (2013) (www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses), para 4. For preparatory materials, see (www.unidroit.org/contr-modelclauses-overview). For an overview, see MJ Bonell, ‘Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts’ [2013] ULR 473.

¹⁹³ (2013) CD (91) 15, para 20.

¹⁹⁴ For what follows, see MJ Bonell, ‘Do We Need a Global Commercial Code?’ (2001) 106 Dickinson LRev 87; O Lando, ‘The CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law’ (2005) 53 Am J Comp L 379, 379–384; Bonell (n 183 above) 27–28; Bonell (n 143 above) 181–184; L Nottage, ‘Afterthoughts: International Commercial Contracts and Arbitration’ (2010) 17 Aust ILJ 197, 199–204. See also the comments made by the President of UNIDROIT, Alberto Mazzoni, as reported by V Heutger, ‘The UNIDROIT Principles 2010: Towards a Global Law of International Commercial Contracts (17–18 February 2012) (2012) 20 ERPL 889, 896.

¹⁹⁵ See para 47 above and below, Preamble I paras 143–167.

¹⁹⁶ Decision of the United Nations Commission on International Trade Law, 955th meeting, 3 July 2012, in ‘Report of the United Nations Commission on International Trade Law, Forty-fifth session (25 June–6 July 2012): General Assembly—Official Records, Sixty-seventh session, Supplement No. 17 (A/67/17)’ para 140. See below, Preamble I para 120.

¹⁹⁷ CM Schmitthoff, *Commercial Law in a Changing Economic Climate* (2nd edn, 1981) 30; CM Schmitthoff, ‘The Codification of the Law of International Trade’ [1985] JBL 34, 41–43.

¹⁹⁸ G Herrmann, ‘The Future of Harmonisation and Formulating Agencies: The Role of UNCITRAL’ in I Fletcher, L Mistelis, and M Cremona (eds), *Foundations and Perspectives of International Trade Law* (2001) 28, 36; G Herrmann, ‘The Future of Trade Law Unification’ [2001] IHR 6, 12. See below, Preamble I para 145.

for general contract law issues falling within the scope of the instrument. The Code might be adopted as a convention which would formally incorporate the text of the PICC, albeit with slightly amended wording. Depending on the design of the Code, its provisions would either be mandatory in the sense of precluding the parties from contracting out of it whenever the transaction falls into its scope of application,¹⁹⁹ or applicable unless the parties have excluded its application ('opt out'),²⁰⁰ or applicable whenever the parties have agreed that it should govern their transaction ('opt in'). Although visions of a Global Commercial Code are utopian at this stage, it is not unthinkable that UNCITRAL will pursue the matter at some point. In May 2012, the Swiss government made a formal proposal to UNCITRAL to evaluate the CISG in the light of the needs of international trade and to consider additional steps towards a general global contract law, with a focus on those issues that are already covered by the PICC. The latter instrument was mentioned as an important source of inspiration for such a project.²⁰¹ Despite strong reservations on the part of many of its member states, UNCITRAL did not reject the Swiss proposal out of hand and decided to organize symposiums and other meetings to explore its desirability and feasibility.²⁰² A first conference was held in January 2013, and there were widely diverging views as to whether an extension of the scope of the CISG to the general law of contract would be desirable.²⁰³ However, there was general agreement that if such an extension were to happen, the relevant rules would have to be firmly based on the PICC, and UNCITRAL would have to co-operate closely with UNIDROIT.²⁰⁴

For the time being, however, the **prospects continue to be modest**. The PICC remain what they are: a set of non-binding rules for international commercial contracts that is still relatively rarely applied in practice. It remains to be seen whether the initiatives outlined in the previous paragraphs will increase their use. Yet the potential of the PICC has long been realized with regard to their function as a model for national and supranational law reform, and this continues to be the case. Paradoxically, they have been an important

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¹⁹⁹ As suggested by O Lando, 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law' (2005) 53 *Am J Comp L* 379, 384; *contra* R Goode, 'Rule, Practice and Pragmatism in Transnational Commercial Law' (2005) 54 *ICLQ* 539, 553.

²⁰⁰ As suggested by Bonell (n 194 above) 95; Bonell (n 183 above) 28. See the discussion of the arguments by MJ Bonell and O Lando, 'Future Prospects of the Unification of Contract Law in Europe and Worldwide' [2013] *ULR* 17.

²⁰¹ Note by the UNCITRAL Secretariat, 'Possible future work in the area of international contract law: Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law (8 May 2012, Dok. A/CN.9/758)' (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V12/534/54/PDF/V1253454.pdf?OpenElement>).

²⁰² Report of the United Nations Commission on International Trade Law (n 196 above) paras 127, 132.

²⁰³ The objections of the US government are summarized by K Loken, 'A New Global Initiative on Contract Law in UNCITRAL: Right Project, Right Forum?' (2013) 58 *Vill LRev* 509 and MJ Dennis, 'Modernizing and Harmonizing International Contract Law: The CISG and the UNIDROIT Principles Continue to Provide the Best Way Forward' [2014] *ULR* 114; the Deputy Secretary-General of UNIDROIT also expressed scepticism: A Veneziano, 'The Soft Law Approach to Unification of International Commercial Contract Law: Future Perspectives in Light of UNIDROIT's Experience' (2013) 58 *Vill LRev* 521, 526–527. For a cautiously optimistic position on the part of the UNCITRAL Secretariat, see Sorieul, Hatcher, and Emery (n 185 above) 497–498.

²⁰⁴ M Bridge, 'An Overview of the CISG and an Introduction to the Debate about the Future Convention' (2013) 58 *Vill LRev* 487, 489; HD Gabriel, 'UNIDROIT Principles as a Source for Global Sales Law' (2013) 58 *Vill LRev* 661, 674–680; J Ramberg, 'CISG and UPICC as the Basis for an International Convention on International Commercial Contracts' (2013) 58 *Vill LRev* 681, 690; Schwenzer (n 7 above) 730; Sorieul, Hatcher, and Emery (n 185 above) 498; L Spagnolo, 'Law Wars: Australian Contract Law Reform vs. CISG vs. CESL' (2013) 58 *Vill LRev* 623, 641; Veneziano (n 203 above) 527.

source of inspiration for potential rival instruments that promote the **regional harmonization of general contract law** rather than aiming at the global level. The most prominent of these is the formal proposal for a ‘Common European Sales Law’ (CESL) of the EU Commission which is the product of the Commission’s long-standing ‘European contract law initiative’.²⁰⁵ Other projects for regional harmonization include the draft Uniform Act on Contracts for the OHADA, an alliance of 17 Francophone states in Africa, the drafting of ‘Principles of Asian Contract Law’ (PACL), and the elaboration of ‘Principles of Latin American Contract Law’.²⁰⁶ It would be wise for these projects to adopt the rules and the terminology of the PICC to the greatest extent possible, amending them only where strictly necessary in order to adapt the new instruments to important regional peculiarities or to improve on what are perceived to be clearly inappropriate solutions in the PICC. Given the increasing globalization of trade, regional fragmentation of transnational commercial contract law would seem to be anachronistic and unhelpful.

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²⁰⁵ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law’, 11 October 2001, COM(2011) 635 final. For the background, see G Dannemann and S Vogenauer, ‘Introduction: The European Contract Law Initiative and the “CFR in Context” Project’ in G Dannemann and S Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (2013) 1.

²⁰⁶ See below, Preamble I paras 149–156. For the PACL, see S Han, ‘Principles of Asian Contract Law: An Endeavor of Regional Harmonization of Contract Law in East Asia’ (2013) 58 *Vill LRev* 589.