
The relevance of the UNIDROIT Principles of International Commercial Contracts in international investment arbitration

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Abstract

The UNIDROIT Principles of International Commercial Contracts (PICC) have played a relatively unnoticed role in investment arbitration so far. A closer look at actual jurisprudence demonstrates, however, that the PICC are not only invoked by parties, but are also increasingly relied upon by investment tribunals as supportive reasoning even though they are usually not applicable law in a technical sense.

Keywords: UNIDROIT Principles of International Commercial Contracts (PICC), ICSID, investment arbitration, general principles of law, bilateral investment treaties (BITs), international investment agreements (IIAs)

I. Introduction

The International Institute for the Unification of Private Law's (UNIDROIT) Principles of International Commercial Contracts (PICC)¹ were first adopted in 1994 as 'general rules for international commercial contracts'² and revised in 2004³ and 2010.⁴ Since then they have been frequently relied upon in international commercial arbitration. However, surprisingly few awards under the

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¹ International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts* (Transnational 1994) <<http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994>> accessed 30 June 2014 [PICC 1994].

² Ibid Preamble.

³ For the 2004 version of the PICC, see <<http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2004>> accessed 15 June 2014 [PICC 2004].

⁴ For the 2010 version of the PICC, see <<http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>> accessed 15 June 2014 [PICC 2010].

International Centre for Settlement of Investment Disputes (ICSID) and other investment awards rely upon the PICC. This may be explained by the prevalence of so-called treaty arbitration over contract arbitration—that is, the fact that in most cases claims are brought on the basis of bi- or multilateral investment treaties and not on the basis of contracts between investors and host States.⁵ Thus, the substantive claims usually relate to breaches of international investment protection standards, such as fair and equitable treatment, full protection and security, non-discrimination obligations such as most-favoured-nation and national treatment or claims for uncompensated expropriation.

Nevertheless, a close scrutiny of investment awards reveals that tribunals rely on concepts codified in the PICC even in situations where treaty breaches have been invoked. Apparently, investment tribunals are willing to view them as expressions of ‘transnational law’.⁶ As transnational law, they are often relied upon to corroborate some general principles even where they are not technically applicable contract law. Some commercial contract principles of the PICC are apparently general enough to justify reliance in both a contractual and a treaty-governed relationship between investors and host States.

II. The PICC as applicable law in investment cases

The PICC are applicable law when chosen by the parties expressly or implicitly—for example, through references to general principles of law, *lex mercatoria*, or usages.⁷ This was explicitly endorsed in *Lemire v Ukraine*,⁸ in which an ICSID tribunal cited the PICC preamble, stating that a reference to general principles of law or to *lex mercatoria* may lead to the application of the PICC.⁹ But such a clear choice in favour of the PICC is rare, if not in-existent, in investment cases. The *Lemire* case can figure, however, as an example of a ‘negative choice’ of the PICC through the exclusion of a specific national law.

The *Lemire* tribunal explicitly stressed this possibility of an application of the PICC as a result of a negative choice of law where the parties cannot agree on a specific national law. It held:

When negotiating the Settlement Agreement, the parties evidently gave thought to the issue of applicable law, and were apparently unable to reach an agreement to apply

⁵ See only G Van Harten and M Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’ (2006) 17 *European Journal of International Law* 121; A Rigo Sureda, *Investment Treaty Arbitration: Judging under Uncertainty* (CUP 2012).

⁶ Cf *Joseph Charles Lemire v Ukraine*, ICSID Case no ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) para 109 [*Lemire*]: ‘It is impossible to place the UNIDROIT Principles—a private codification of civil law, approved by an intergovernmental institution—within the traditional sources of law. The PICC are neither treaty, nor compilation of usages, nor standard terms of contract. They are in fact a manifestation of transnational law.’

⁷ M Scherer, ‘Preamble II The Use Of the PICC In Arbitration’ in Vogenauer and Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (OUP 2009) 87.

⁸ *Lemire* (n 6).

⁹ *Ibid* para 110: ‘As the Preamble to the Principles states, they ‘shall be applied when the parties have agreed that their contract be governed by them’ and they ‘may be applied when the parties have agreed that their contract be governed by ‘general principles of law’, the ‘lex mercatoria’ or the like’.

either Ukrainian or US law. In this situation, what the parties did was to incorporate extensive parts of the UNIDROIT Principles into their agreement, and to include a clause which authorises the Tribunal either to select a municipal legal system, or to apply the rules of law the Tribunal considers appropriate. Given the parties' implied negative choice of any municipal legal system, the Tribunal finds that the most appropriate decision is to submit the Settlement Agreement to the rules of international law, and within these, to have particular regard to the UNIDROIT Principles.¹⁰

The case arose from an alleged violation of a settlement agreement that was embodied in an earlier ICSID Additional Facility award in 2000.¹¹ The claimant in the second case alleged a breach of the settlement agreement, which was not explicitly governed by any domestic law. Rather the agreement contained a reference to the ICSID Additional Facility Rules, which empowered the tribunal to apply '(a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable.'¹² The *Lemire* tribunal felt empowered to apply the rules of international law directly and in this context, particularly the PICC, since the settlement agreement contained an extensive chapter called 'Principles of Interpretation and Implementation of the Agreement', which included clauses that were reproduced, 'with very light linguistic adjustments, from the 1994 UNIDROIT Principles.'¹³

As a result, the *Lemire* tribunal used the PICC in particular for the purpose of interpreting the settlement agreement.¹⁴ It noted:

Claimant has emphasized Clauses 20 ('*good faith and fair dealing in international business*'), 22 ('*common intent of the Parties*'), 23 (especially reference to '*preliminary negotiations*') and 26 (non-performance to include '*improper performance or late performance*') as well as Articles 1.7 and 4.1 of the 1994 UNIDROIT Principles. Respondent has referred to Clause 27 of the Settlement Agreement, pursuant to which the Settlement Agreement '*constitutes the entire agreement between the Parties on the subject matter hereof and supersedes all prior correspondence, negotiations and understandings between them with respect to the matters covered herein*'. Ukraine also relies on Article 5.5 of the 1994 UNIDROIT Principles ('*the way in which the obligation is expressed in the contract*') as the primary factor in determining the scope of an obligation.¹⁵

On this basis, the tribunal concluded that the actual text of the settlement agreement would prevail over any expectations of the parties.

¹⁰ Ibid para 111.

¹¹ *Joseph Charles Lemire v Ukraine*, ICSID no ARB (AF)98/1, Award on Agreed Terms (18 September 2000).

¹² ICSID Additional Facility Rules (10 April 2006) Art 54 <http://icsbid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf> accessed 15 June 2014 .

¹³ *Lemire* (n 6) para 108.

¹⁴ Ibid para 112: 'The parties have discussed the principles of interpretation to be applied to the Settlement Agreement. This issue is extensively dealt with in Clauses 20 through 26 of the Agreement.'

¹⁵ Ibid para 113 [emphasis in original].

As to the substance of the dispute, the *Lemire* tribunal equally relied on various PICCs. For instance, it invoked the estoppel/*venire contra factum proprium* principle enshrined in Article 1.8 of the 2004 PICC¹⁶ to argue that the claimant was not entitled to invoke a specific contractual breach because he had appeared to condone with it earlier.¹⁷ It further relied upon the PICC in order to determine the content of a best efforts obligation in the settlement agreement whereby Ukraine had stipulated its best possible efforts to consider in a positive way the application radio frequencies. The tribunal invoked the definition of a best efforts obligation in Article 5.1.4 of the 2004 PICC¹⁸ in order to conclude that a mere delay in procuring the licences did not constitute a violation of the obligation.¹⁹

Also in the final award on the quantum,²⁰ the *Lemire* tribunal briefly relied on the PICC when it referred to the method to calculate compensation for a lost chance. Invoking Article 7.4.3(2) of the PICC,²¹ it stated:

Compensation for a lost chance is admissible, and is normally calculated as the hypothetical maximum loss, multiplied by the probability of the chance coming to fruition. To take the example given in the Official Comment to the UNIDROIT Principles: '[T]he owner of a horse which arrives too late to run in a race as a result of delay in transport cannot recover the whole prize money, even though the horse was the favourite'. In this example, the owner must be satisfied with compensation proportionate to the probability of the win.²²

The *Lemire* case can serve as a prime example of an ICSID tribunal heavily relying on the PICC. However, it is obviously also underscoring the initial assumption that the relevance of the PICC will be particularly high in contract cases.

III. The PICC as a supporting argument in investment cases

Even when the PICC are not applicable in a technical sense, they may be invoked by the parties and even relied upon by tribunals as providing supporting arguments for a particular interpretation. A close scrutiny of a number of investment awards demonstrates that this is a more frequent phenomenon. In *African*

¹⁶ PICC 2004 (n 3) Art 1.8: 'A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment'.

¹⁷ *Lemire* (n 6) para 135: 'Mr. Lemire did not require a second examination, and Ukraine reasonably understood that Claimant felt satisfied with the first examination, and consequently did not carry out a second one. Mr. Lemire cannot now retrace and argue that Respondent defaulted on its contractual obligations.'

¹⁸ PICC 2004 (n 3) Art 5.1.4: 'To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances'.

¹⁹ *Lemire* (n 6) para 157–9.

²⁰ *Lemire* (n 6) Award (28 March 2011).

²¹ PICC 2010 (n 4) Art 7.4.3(2): 'Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.'

²² *Lemire* (n 6) Award (28 March 2011) para 251 [emphasis in original].

Holding Company v Democratic Republic of the Congo,²³ a dispute about the non-payment of fees for a construction contract, an ICSID tribunal relied on the PICC in addition to the applicable domestic law of the host State. It denied jurisdiction in a dispute between a US company and the Democratic Republic of the Congo because it found that the dispute had arisen before the US investor had acquired the claim from a Belgian company. The respondent had raised two jurisdictional objections that involved the PICC. It had argued (i) that no construction contract had been concluded or, in the alternative, that it had been invalid because it had not been in writing and (ii) that the dispute had arisen when the construction company was not yet a US national for purpose of the application of the Congo–USA bilateral investment treaty (BIT).

The *African Holding Company* tribunal unanimously rejected the first challenge because it found that under Congolese law and according to the 2004 PICC²⁴ that the contract did not have to be in writing.²⁵ It further held, again expressly referring to the PICC,²⁶ that the conduct of the parties sufficiently evidenced the existence of a construction contract. In this regard, the tribunal expressly stated:

*On parvient à la même conclusion en examinant l'affaire sous l'angle des Principes d'UNIDROIT visés plus haut, en particulier du fait qu'aux termes de l'article 2.1.1, un contrat peut aussi se déduire du comportement des parties qui indique suffisamment leur accord, ce qui est tout à fait le cas ici bien qu'aucun texte écrit n'ait été produit.*²⁷

With regard to the second jurisdictional objection, the tribunal's majority upheld the respondent's *ratione temporis* objection. Crucial was the question at what point in time had the dispute emerged. According to the respondent this had been when the price for the completed construction project had not been paid in the 1990s. According to the claimant, this had occurred only when the respondent had expressed its intention not to pay the full amount at a later stage when the claim was already transferred to the African holding company. Central to the tribunal's discussion was an interpretation of Article 7.1.1 of the 2004 PICC defining non-performance.²⁸ According to the majority, any failure by a party

²³ *African Holding Company of America, Inc and Société Africaine de Construction au Congo SARL v Democratic Republic of the Congo*, ICSID Case no ARB/05/21, Award (29 July 2008) [*African Holding Company*].

²⁴ PICC 2004 (n 3) Art 1.2: 'Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.'

²⁵ *African Holding Company* (n 23) para 32: 'En outre, les contrats ne doivent pas nécessairement être conclus par écrit aux termes de la législation congolaise ou du droit international. En fait, l'article 1.2 des Principes d'UNIDROIT relatifs aux contrats du commerce international dispose expressément qu'un contrat ne doit pas nécessairement être conclu ou constaté par écrit et qu'il peut être prouvé par tous moyens, y compris par témoins.'

²⁶ PICC 2004 (n 3) Art 2.1.1: 'A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.'

²⁷ *African Holding Company* (n 23) para 35.

²⁸ PICC 2004 (n 3) Art 7.1.1: 'Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.'

to perform its obligations under the contract, including defective performance and late performance, was sufficient for a non-performance. It thus held that the dispute had arisen when the Congolese failed to pay the contractually stipulated price for the construction contract²⁹ and thus declined to exercise jurisdiction.

The dissenting arbitrator took issue with this conclusion, stressing that Article 7.1.1 of the 2004 PICC merely defined non-performance, not, however, the existence of a dispute.³⁰ He expressly demanded a reading of Article 7.1.1 of the PICC in the context of other PICC provisions, in particular, Article 7.1.5(1), according to which in a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance, and Article 7.1.4 dealing with the right to a cure by the non-performing party.³¹ In his view, these provisions demonstrated that it was up to the party entitled to payment to decide whether and when to transform the other party's failure to perform its obligations into an actual dispute.³² Since the claimant companies formally reacted only when the respondent expressly announced its intention not to pay the full amount due some time after 2000, when the Belgian company was controlled by the African holding company, the tribunal should have exercised jurisdiction over the dispute.

Another recent investment award where the PICC were prominently invoked and relied upon as supporting argument is the recent *Al-Kharafi v Libya* case.³³ This ad hoc tribunal imposed the second highest damages award in the history of investment arbitration to date. The tribunal extensively addressed Article 7.4.2 of the 2010 PICC³⁴ in order to support its reasoning that the claimant was entitled to

²⁹ *African Holding Company* (n 23) para 121: 'Le Tribunal conclut à cet égard que la nature du différend concerne le fait que des travaux ont été exécutés sous contrat et que leur coût n'a pas été réglé pendant une longue période de plus de quinze ans. Que la RDC ait officiellement refusé de payer ou ait gardé le silence, est sans importance pour la nature du différend. Le fait est que la RDC a manqué à ses obligations aux termes du contrat, ce qui se rattache donc à une situation d'inexécution envisagée à l'article 7.1.1 des Principes d'UNIDROIT. Aux termes de ce même article, l'inexécution comprend l'exécution défectueuse ou tardive. En outre, le fait que la RDC offrait de renégocier les créances et de ne payer qu'une fraction de leur valeur ne peut pas être assimilé à un refus officiel. Même si la RDC avait accepté de payer, et n'a en fait pas payé, la nature du différend serait toujours restée la même: avant comme après la date critique : le montant des travaux exécutés n'a pas été réglé.'

³⁰ *African Holding Company* (n 23) Dissenting Opinion de Witt Wijnen (14 July 2008) para 20: 'Il est vrai que, selon cette disposition, la non-exécution par une partie englobe également l'exécution défectueuse ou tardive. Mais là n'est pas le problème. Le problème est de savoir si la non-exécution peut être identifiée à un « différend ».'

³¹ Ibid: 'Le chapitre 7 des Principes d'UNIDROIT, qu'on le lise à la lettre ou dans l'esprit, prouve le contraire. Par exemple, l'article 7.1.5(1), dispose : « En cas d'inexécution, le créancier peut notifier au débiteur qu'il lui impartit un délai supplémentaire pour l'exécution de ses obligations. » D'autres dispositions (telles que l'article 7.1.4) indiquent de même que la non-exécution ne constitue pas nécessairement et automatiquement un différend.'

³² Ibid para 21: 'Dans les faits et d'un point de vue juridique, c'est au créancier qu'il appartient de décider si (et quand) il choisit de transformer en différend la non-exécution de son obligation par son débiteur.'

³³ *Mohamed Abdulmohsen Al-Kharafi & Sons Co v Libya and others*, Final Arbitral Award (22 March 2013) [Mohamed Abdulmohsen Al-Kharafi].

³⁴ PICC 2010 (n 4) Art 7.4.2: '(1) The aggrieved party is entitled to 'full compensation' for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm. (2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.'

full compensation under Libyan law. With regard to this provision, the tribunal found that it included lost profits.³⁵ It then stressed that Article 7.4.3(3) of the PICC³⁶ gave it broad discretion to determine the actual amount of damages.³⁷

In *Petrobart v Kyrgyzstan*,³⁸ a Stockholm Chamber of Commerce tribunal held that various acts of State intervention in judicial proceedings at the national level constituted a violation of the fair and equitable treatment standard of Article 10(1) of the Energy Charter Treaty, but did not amount to an indirect expropriation.³⁹

In assessing the interest due on the claims it accepted, which were for goods delivered and not paid, the tribunal explicitly resorted to the PICC as an appropriate international rule for a treaty-based interest claim,⁴⁰ though it erroneously referred to them as principles under the United Nations Commission on International Trade Law (UNCITRAL) and not as the UNIDROIT PICC:

The Arbitral Tribunal finds Petrobart entitled to interest on that part of its claims which the Arbitral Tribunal has considered well-founded, i.e. the claim for payment for delivered goods. This claim is based on the Treaty and is therefore a claim under international law. In accordance herewith, the interest should, in the Arbitral Tribunal's opinion, be based on international rather than national rules. The Arbitral Tribunal considers the UNCITRAL Principles of International Commercial Contracts, relied on by Petrobart, to be an appropriate basis for determining the interest.⁴¹

³⁵ *Mohamed Abdulmohsen Al-Kharafi* (n 33) 370: 'Whereas the UNIDROIT Principles of International Commercial Contracts (2010 edition) of the International Institute for the Unification of Private Law establish, in their Art 7.4.2, the right of the creditor to 'full compensation' for harm sustained as a result of the non-performance, with such harm including both any loss which it suffered and any gain of which it was deprived' [emphasis added].

³⁶ PICC 2010 (n 4) Art 7.4.3: '(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty. (2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence. (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.'

³⁷ *Mohamed Abdulmohsen Al-Kharafi* (n 33) 371: 'Whereas Art 7.4.3 (3) of the UNIDROIT Principles of International Commercial Contracts (2010 edition) provides that where the amount of damages cannot be established with a sufficient degree of certainty, the assessment will remain at the discretion of the court.'

³⁸ *Petrobart Limited v The Kyrgyz Republic*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration no 126/2003, Award (29 March 2005).

³⁹ Energy Charter Treaty 34 ILM 360 (1995).

⁴⁰ PICC 2004 (n 3) Art 7.4.9: '(1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused. (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.'

⁴¹ *Ibid* 88.

However, it correctly referred to the PICC when determining the interest rate in the *dispositif* of the award.⁴² In *AIG Capital v Kazakhstan*,⁴³ the tribunal used, *inter alia*, Article 7.4.8 of the PICC⁴⁴ to underline the broad acceptance of the ‘duty to mitigate damages’ by the aggrieved party not only in national, but also in international, law. It continued by stating that this principle is ‘frequently applied by international arbitral tribunals when dealing with issues of international law’.⁴⁵

Another question dealt with in the PICC, whether one of the parties could rely on the exception of non-performance (*exceptio non adimpleti contractus*), was addressed in 2005 by the ad hoc tribunal in *Eureko v Poland*,⁴⁶ though it expressly avoided to decide whether the exception of non-performance was a maxim of interpretation or a rule of international law.⁴⁷ The claimant had argued, *inter alia*, that it had a right to raise claims that had been covered by a former mutual waiver agreement because Poland had allegedly not complied with it. In *Eureko*’s opinion, this entitled it to invoke the exception of non-performance. The tribunal endorsed the *exceptio* as contained in Article 7.1.3 of the PICC,⁴⁸ but it stressed that it only applied to cases of conditional or simultaneous performance ‘if the other party is not willing and able to perform.’⁴⁹ Since the parties had simultaneously performed their waiver agreement by ending and not merely suspending all claims,⁵⁰ the tribunal could not identify any non-performance justifying the resubmission of the waived claims.

In *Gemplus & Talsud v Mexico*,⁵¹ an ICSID tribunal dealt with lost profits as an element of compensation. The claimants had argued that, although not necessarily an element in determining the market value of shares, lost profit was commonly provided in conjunction with compensation in contractual contexts such as in the CISG⁵² and in Article 7.4.2 of the PICC⁵³. The tribunal referred to

⁴² Ibid: ‘The Kyrgyz Republic shall pay to Petrobart one million one hundred thirty thousand eight hundred fifty-nine United States dollars (USD 1,130,859) with interest thereon at an annual rate to be determined in accordance with Article 7.4.9 of the UNIDROIT Principles of International Commercial Contracts as from 25 December 1998 until payment is made.’

⁴³ *AIG Capital Partners, Inc and CJSC Tema Real Estate Company v Republic of Kazakhstan*, ICSID Case no ARB/01/6, Award (7 October 2003) [AIG].

⁴⁴ PICC 2004 (n 3) Art 7.4.8: ‘(1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party’s taking reasonable steps. (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.’

⁴⁵ AIG (n 43) para 10.6.4.

⁴⁶ *Eureko v Poland*, UNCITRAL Partial Award (19 August 2005) para 167 [*Eureko*].

⁴⁷ Ibid para 177.

⁴⁸ PICC 2004 (n 3) Art 7.1.3: ‘(1) Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance. (2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.’

⁴⁹ *Eureko* (n 46) para 178.

⁵⁰ Ibid para 180.

⁵¹ *Gemplus & Talsud v Mexico*, ICSID Cases ARB(AF)/04/3 and ARB(AF)/04/4, Award (16 June 2010) [*Gemplus*].

⁵² United Nations Convention on Contracts for the International Sale of Goods 19 ILM 668 (1980) [CISG].

⁵³ PICC 2004 (n 3) Art 7.4.2; *Mohamed Abdulmohsen Al-Kharafi* (n 33); *Gemplus* (n 51) para 12-10.

the PICC for the general proposition that lost profit was an accepted and well-established component in assessing compensation.⁵⁴ Explicit reference was made to Article 7.4.3 of the PICC,⁵⁵ emphasizing the ‘reasonable degree of certainty’ required for establishing compensation for future harm notwithstanding the possibility to act *ex aequo et bono* where uncertainty prevailed. The tribunal found the principle of ‘loss of chance’ or ‘opportunity’ to be recognized among many domestic legal systems. Highlighting English case law, the tribunal stated that it was unnecessary to analyse and illustrate these general principles from other national legal systems because first, these principles were ‘broadly re-stated in the UNIDROIT Principles’ and, second, there was no doubt ‘that similar principles form part of international law, as expressed in the ILC Articles.’⁵⁶

The tribunal in *El Paso Energy v Argentina*⁵⁷ took a similar stance when assessing the defence of Argentina, stating the measures taken were a ‘necessary’ result of a ‘state of emergency’ and, thus, an exception of the BIT in question. Relying on the VCLT⁵⁸ in interpreting the relevant provision of the BIT,⁵⁹ the tribunal referred to Article 25(2) of the ILC’s Draft Articles on State Responsibility.⁶⁰ It reached the intermediate conclusion that the principle preventing a State from invoking an exception due to necessity when said State contributed to the situation of necessity in the first place was a general rule of international law. However, the tribunal went on to raise the issue if the rule in question existed as a ‘general principle of law recognized by civilized nations’ in the sense of Article 38(1)(c) of the Statute of the ICJ.⁶¹ It assumed there could hardly be doubt that there was a general principle on the preclusion of wrongfulness in certain situations. As confirmation, the tribunal cited the PICC as ‘a sort of international restatement of the law of contracts reflecting rules and principles applied by the majority of national legal systems.’ It continued by analysing Articles 6.2.2,⁶²

⁵⁴ *Gemplus* (n 51) para 13-88, n 9.

⁵⁵ PICC 2004 (n 3) Art 7.4.3: ‘(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty. (2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence. (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.’

⁵⁶ *Gemplus* (n 51) para 13-90.

⁵⁷ *El Paso Energy v Argentina*, ICSID Case no ARB/03/15, Award (31 October 2011) [*El Paso Energy*].

⁵⁸ Vienna Convention on the Law of Treaties 1155 UNTS 331 (1969) [VCLT].

⁵⁹ *El Paso Energy* (n 57) paras 614ff.

⁶⁰ ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/83 (2001) Art 25(2): ‘1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity’ [emphasis added].

⁶¹ *El Paso Energy* (n 57) paras 621ff. Statute of the International Court of Justice 59 Stat 1031.

⁶² PICC 2004 (n 3) Art 6.2.2: ‘There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or

7.1.6,⁶³ and 7.1.7⁶⁴ of the 2004 PICC. With respect to the issue at hand, the tribunal found exemptions from liability for non-performance to be excluded under the PICC regime if the party relying on the exemption had been ‘in control’ of the situation or if the permissibility of the exemption would result in ‘gross unfairness’.⁶⁵ Interpreting the BIT in the light of these findings, the tribunal concluded that the exemption did not apply to Argentina.⁶⁶

Another example of a tribunal’s use of the PICC is found in *Sax v City of Saint Petersburg*,⁶⁷ where Article 7.4.9⁶⁸ was quoted to determine the interest rate between rendering of the award and actual payment. However, the tribunal did not rely solely on the PICC but reasoned the ‘average bank short-term lending rate to prime borrowers of the currency in question at the place for payment’ to be a ‘frequently used formula in international arbitration.’⁶⁹ In his separate opinion in *Suez v Argentine Republic*,⁷⁰ Arbitrator Nikken specifically referred to Article 6.2.2 (definition of hardship) of the 2004 PICC⁷¹ and other soft law instruments to

because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.’

⁶³ Ibid Art 7.1.6: ‘A clause which limits or excludes one party’s liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.’

⁶⁴ Ibid Art 7.1.7: ‘(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract. (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt. (4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.’

⁶⁵ *El Paso Energy* (n 57) para 624.

⁶⁶ Ibid para 665.

⁶⁷ *Sax v City of Saint Petersburg (Sax)*, Ad Hoc UNCITRAL Arbitration, Award (30 March 2012) [Sax].

⁶⁸ PICC 2004 (n 3) Art 7.4.9: ‘(1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused. (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment. (3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.’

⁶⁹ *Sax* (n 67) para 811.

⁷⁰ *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case no ARB/03/17 (formerly *Aguas Provinciales de Santa Fe SA, Suez, Sociedad General de Aguas de Barcelona, SA, and InterAguas Servicios Integrales del Agua, SA*), Decision on Liability, Separate Opinion Nikken (30 July 2010) [Suez].

⁷¹ PICC 2004 (n 3) Art 6.2.2; see also PICC 2004 (n 3) Art 6.2.2.

support his assessment that hardship clauses imposing a renegotiation or termination obligations were expressions of the principle of good faith.⁷²

IV. The PICC invoked by the parties

In a number of investment cases, the tribunals did not explicitly rely on the PICC, but they were only invoked by the parties. In a number of cases, the PICC are merely mentioned by the tribunals in their recount of the parties' submissions without subsequently discussing them at all.⁷³ Sometimes, however, it may be difficult to distinguish such cases from those where a tribunal also accepted them since the tribunals may not only recount the parties' arguments but subsequently follow or reject them without explicitly referring to the PICC, but still relying on them in substance. An example of such a situation appears to be the jurisdictional decision of *PSEG v Turkey*.⁷⁴ In this case, the respondent State's argument that a concession contract for the construction and operation of an electricity plant in Turkey had not become legally binding and thus did not yet constitute an investment was rejected by an ICSID tribunal, which viewed the contract as valid and binding and thus constituting an investment in the sense of Article 25 of the ICSID Convention.⁷⁵

The *PSEG* tribunal apparently endorsed the claimant's submission that it was not always necessary to reach an agreement on all of the essential terms of a contract as long as the parties had the intention of forming a contract⁷⁶—a

⁷² *Suez* (n 70) para 48: 'I do not agree with the assumption expressed in the Decision (para 223) that APSF was coerced into acceding to the renegotiation because, had it refused, it could have been accused of violating Article 4.1 of the Concession Agreement, which obligated both sides to 'use all means available to establish and maintain a fluid relationship which would facilitate the discharge of this Concession Agreement.' Rather, I believe that this clause is evidence that the obligation to renegotiate did not have as its sole source the Emergency Law but, rather, the concession contract itself and that APSF could not lawfully refuse to renegotiate (as in fact it did not refuse). Moreover, the international standard for such contracts in the event of 'hardship' aims to impose an obligation on the parties to negotiate an adaptation of the contract to the changed circumstances or the termination of the contract,[note 39] which is moreover, in my opinion, a corollary of the good faith that should prevail in the execution of any contract.' In note 39, he specifically referred to: 'Principles of European Contract Law (developed by the Commission on European Contracts Law), Article 6:111: Change of Circumstances; UNIDROIT Principles of International Commercial Contracts 2004: Article 6.2.2 (Definition of hardship); Article 6.2.3 (Effects of hardship).'

⁷³ See, eg, *Limited Liability Company AMTO v Ukraine*, SCC Award no 80/2005 (26 March 2008) para 34, the claimant invoked Art 7.4.9 of the PICC to support its claim for interest.

⁷⁴ *PSEG Global Inc, The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey*, ICSID Case no ARB/02/5, Decision on Jurisdiction (4 June 2004) [*PSEG Global*].

⁷⁵ *Ibid* para 104. Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 UNTS 159 [ICSID Convention].

⁷⁶ *PSEG Global* (n 74) para 75: 'The UNIDROIT Principles of International Commercial Contracts are invoked by the Claimants in support of their view that it is not always necessary to reach an agreement on all the essential terms of a contract as long as the parties have the intention of forming a contract¹⁶ and the obligation to proceed to negotiate the pending terms in good faith. It is further invoked that civil law systems also allow the parties to leave open many terms of the contract to be determined later in good faith and that, particularly in long-term concession contracts, it is often the case that adjustment clauses will allow for change to basic terms in order to remain within the economic parameters of the contract.'

principle laid down in Article 2.14 of the 1994 PICC.⁷⁷ For its finding that the concession contract was valid and effective, the tribunal relied mainly on Turkish law. In addition, in *Meerapfel v Central African Republic*,⁷⁸ an ICSID tribunal relied on the PICC as a supporting argument to uphold the severability of an arbitration clause even in case the underlying contract is held to be invalid. The claimant had specifically invoked Article 3.16 of the 2004 PICC⁷⁹ on partial avoidance,⁸⁰ while the tribunal identified also other expressions of the principle of the severability of arbitration clauses (*'divisibilité de la clause d'arbitrage'*) in order to conclude that even if the contract may have been void the arbitration clause remained valid and thus constituted a consent to arbitration in writing.⁸¹

In the decision on annulment concerning the final award of *Azurix v Argentina*,⁸² Azurix argued that it was essential to grant tribunals 'the discretion to exercise their own judgement to determine the best manner in which to compensate for harm.' Both common and civil law countries recognized this discretion and also international treaties provided for the 'tribunals discretion in calculating damages.'⁸³ As examples for these treaties, the CISG and specifically Article 7.4.3(3) 2004 PICC were cited.⁸⁴ While the tribunal decided the issue in favour of Azurix, thereby dismissing the application for annulment, it did not rely or cite the PICC in its findings.

The respondent in *Kardassopoulos & Fuchs v Georgia*⁸⁵ relied on the PICC, arguing that recourse may be had to certain documents in interpreting the contract in question. It expressly stated that the PICC provided for regard to be given to 'extrinsic evidence' in the interpretation process.⁸⁶ Although it is not stated in the award, the article in question is Article 2.1.17 of the PICC.⁸⁷ The claimants

⁷⁷ PICC 2004 (n 3) Art 2.14: 'If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by a third person does not prevent a contract from coming into existence.'

⁷⁸ *M Meerapfel Söhne AG v Central African Republic*, ICSID Case no ARB/07/10, Award (12 May 2011) [*M Meerapfel Söhne*].

⁷⁹ PICC (n 3) Art 3.16: 'Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract.'

⁸⁰ *M Meerapfel Söhne* (n 78) para 149: 'L'annulation se limite aux seules clauses du contrat visées par la cause d'annulation, à moins que, eu égard aux circonstances, il ne soit déraisonnable de maintenir les autres dispositions du contrat.'

⁸¹ *Ibid.*, para 155: 'Au regard de ce qui précède, le Tribunal considère que la nullité éventuelle de l'article 2 du Protocole d'Accord relatif aux exonérations fiscales et douanières, pour défaut d'accord préalable du Ministre des Finances, n'aura pas pour effet de vicier le consentement de la Défenderesse relatif à la clause d'arbitrage de l'article 7. C'est la raison pour laquelle, le Tribunal retiendra qu'il existe en fait un consentement écrit et valable à l'arbitrage entre les parties.'

⁸² *Azurix v Argentina*, ICSID Case no ARB/01/12, Decision on Annulment (1 September 2009) para 298(g).

⁸³ *Ibid* para 298(g).

⁸⁴ PICC 2004 (n 3) Art 7.4.3; *Gemplus* (n 51).

⁸⁵ *Ioannis Kardassopoulos & Ron Fuchs v Georgia*, ICSID Case nos ARB/05/18 and ARB/07/15, Award (3 March 2010) [*Ioannis Kardassopoulos*].

⁸⁶ *Ibid* para 288.

⁸⁷ PICC 2004 (n 3) Art 2.1.17: 'A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or

also relied on the PICC but in another context. They identified several principles ‘codified in the UNIDROIT Principles of International Commercial Contracts as evidencing the *lex mercatoria*’ that governed the disputed contract and were qualified to counter respondents’ contract-based arguments.⁸⁸ Other than restating the arguments of the parties, the tribunal did not refer to the PICC in their legal assessment.

Whether interest should accrue from the time when payment was due or from the date the claimant initiated arbitration raised controversy in *SGS Société Générale de Surveillance v Paraguay*.⁸⁹ The claimant relied, *inter alia*, on the ILC Draft Articles on State Responsibility in conjunction with the PICC to support the former argument.⁹⁰ The tribunal agreed with the claimant stating ‘the virtually universal principle of international law and international arbitration practice in the case of a delayed payment of monetary obligations due is to apply interest as of the date payment became due.’⁹¹ However, it only cited the ILC Draft Articles on State Responsibility, not the PICC explicitly.

In *Micula v Romania*,⁹² the claimants relied on Article 8.1 of the PICC⁹³ for establishing lack of jurisdiction by the tribunal concerning the invoked set-off by the respondent. An eligible set-off required the obligation to be between identical parties, therefore, it was not permissible.⁹⁴ The tribunal rejected both claimants’ and respondent’s arguments regarding a set-off on procedural grounds. However, in an *obiter dictum*, the tribunal held the claims would have been also dismissed on the merits because Romania failed to demonstrate the applicability of the relevant (Romanian) substantive law.⁹⁵ The only apposite mentioning of (possibly) applicable law was the claimants reference to the PICC, which the tribunal refrained from elaborating on further.⁹⁶

supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.’

⁸⁸ *Ioannis Kardassopoulos* (n 85) para 308.

⁸⁹ *SGS Société Générale de Surveillance v Paraguay*, ICSID Case no ARB/07/29, Award (10 February 2012).

⁹⁰ *Ibid* para 171.

⁹¹ *Ibid* para 184.

⁹² *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case no ARB/05/20, Award (11 December 2013) [*Iona Micula*].

⁹³ PICC 2010 (n 4) Art 8.1: ‘(1) Where two parties owe each other money or other performances of the same kind, either of them (‘the first party’) may set off its obligation against that of its obligee (‘the other party’) if at the time of set-off, (a) the first party is entitled to perform its obligation; (b) the other party’s obligation is ascertained as to its existence and amount and performance is due. (2) If the obligations of both parties arise from the same contract, the first party may also set off its obligation against an obligation of the other party which is not ascertained as to its existence or to its amount.’

⁹⁴ *Ioan Micula* (n 92) para 1282(b).

⁹⁵ *Ibid* para 1291.

⁹⁶ *Ibid* para 1292.

V. Brief assessment of the role of the PICC in investment law jurisprudence

An analysis of the growing body of investment jurisprudence demonstrates that the initial perception that the use of the PICC is very low may have to be revised. Though often not very readily apparent, parties often invoke them, and tribunals seem to be prepared to rely on them either explicitly or sometimes implicitly by relying on the parties' arguments based on the PICC. In spite of this increased presence of the PICC, it is clear that—compared to international commercial arbitration—they still perform a limited role in investment arbitration. This is certainly a consequence of the relatively minor role that contract arbitration plays in modern investment arbitration.⁹⁷ However, there may also be other socio-legal reasons for this fact. The background of individual arbitrators could be an explanation that should not be underestimated. Where practitioners with a strong commercial arbitration background sit on investment tribunals, it is likely that they are more prone to rely on the PICC than where a panel is composed of public international law specialists.⁹⁸ In this respect, it is interesting to note, however, that the PICC have been used not only to corroborate principles of commercial contracts but also more general principles of law. In a number of cases, the PICC have been relied upon to 'prove' general principles of law that figure prominently as sources of international law. This may point towards an increasing receptiveness of investment arbitration towards the PICC as important buildings blocks evidencing general principles.

⁹⁷ See text at note 5 in this article.

⁹⁸ Cf T Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in Ch Binder and others (eds), *International Investment Law for the Twenty-First Century: Liber Amicorum Christoph Schreuer* (OUP 2009) 724, 725.