The relevance of the UNIDROIT Principles in investment arbitration

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Abstract
This article aims at ascertaining the role and relevance of the UNIDROIT Principles of International Commercial Contracts (PICC) in investment arbitration. The PICC are ‘a non-legislative codification or “restatement” of the law of international commercial contracts in general’ produced by a group of independent academics and experts representing all of the major legal systems of the world. The PICC are assumed to be particularly apt to be used as applicable law in international commercial disputes that are to be solved by arbitration, as opposed to national courts of law. A sub-set of these international arbitrations arise in the context of investment disputes; and while many of the rules governing the applicable law to this sub-set are similar to commercial arbitration, there are also key distinctions. This article will look specifically at the sources that regulate which law is applicable in investment arbitration in general. An analysis of these sources will show that, to varying degrees, investment arbitration is open to the application of sources such as ‘rules of law’ and international law, independently or in combination with national law (which under certain circumstances can include the PICC). Using a comprehensives set of investment arbitration cases referencing the PICC, this article will assess to what extent the PICC have been or may be used as ‘rules of law’ that govern the dispute, as a source of international law, as corroboration of international law, as corroboration of national law or as a correction of national law.

Keywords: UNIDROIT, PICC, investment arbitration, applicable law, international law

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I. Introduction

The International Institute for the Unification of Private Law’s (UNIDROIT) Principles of International Commercial Contracts (PICC) were first published in 1994,\(^1\) with a second and third edition published in 2004\(^2\) and 2010,\(^3\) respectively. The PICC are ‘a non-legislative codification or “restatement” of the law of international commercial contracts in general’\(^4\) produced by a group of independent academics and experts representing all of the major legal systems of the world and operating under the auspices of an inter-governmental organization: UNIDROIT.\(^5\) The function of the PICC is explained in the preamble:

These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators.\(^6\)

The PICC are assumed to be particularly apt to be used as applicable law in international commercial disputes that are to be solved by arbitration, as opposed to national courts of law. Arbitral tribunals enjoy a larger flexibility in selecting the applicable law than courts of law do since they are often empowered to apply sources from the wider range of ‘rules of law,’ as opposed to courts who usually need to select a State law.\(^7\)

Investment arbitration is a different form from arbitration, although it sometimes takes place under the same procedural rules as commercial arbitration (for example, when the claimant initiates an ad hoc investment arbitration under the United Nations Commission on International Trade Law’s UNCITRAL Arbitration Rules).\(^8\) Investment arbitration claims can arise under a contract, treaty, national legislation, or some combination of the three. Since investment arbitration is a mechanism for solving disputes between foreign investors and the

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\(^2\) For the 2004 version of the PICC, see <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2004> accessed 15 June 2014 [PICC 2004].

\(^3\) For the 2010 version of the PICC, see <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010> accessed 15 June 2014 [PICC 2010].


\(^6\) PICC 2010 (n 3) preamble.

\(^7\) Ibid preamble, Comment 4a.

host State, it is mainly aimed at ascertaining whether the host State has violated its obligations regarding the protection of foreign investment. Depending on the claim, these obligations can arise under public international law, national law, or under both international and national law simultaneously. Investment arbitration, thus, has much in common with commercial arbitration, but it has an additional public international law dimension.

In order to ascertain the role and relevance of the PICC in investment arbitration, it is first necessary to look at the sources that regulate which law is applicable in investment arbitration in general. An analysis of these sources will show that, to varying degrees, investment arbitration is open to the application of sources such as ‘rules of law’ and international law, independently or in combination with national law (section II). It is also necessary to examine the extent to which the PICC may be assimilated to ‘rules of law’ that govern the dispute (section III), may be applied as a source of international law (section IV.1), as a corroboration of international law (section IV.2), as a corroboration of national law (section V.1), or as a correction of national law (section V.2). This analysis will be supported by empirical research verifying the actual cases where the PICC have been referred to or used. The comprehensive set of investment arbitration cases referencing the PICC show that they have been used as ‘rules of law’ applicable to the dispute in one case, as a source of international law in one case, as a corroboration of international law in three cases, and as a corroboration of national law in five cases. There are also a number of cases where the PICC are not relied on by the tribunal but appear only as a restatement or summary of the parties’ pleadings.

9 It is also possible to have a dispute in a relationship where a contract exists, and yet the claim is not a claim for breach of contract but for breach of treaty.
10 Joseph Lemire v Ukraine, ICSID Case no ARB/06/18, Award (28 March 2011) [Lemire II].
11 Petrobart v Kyrgyz Republic, SCC Arbitration, Award (29 March 2005) [Petrobart].
12 Eureko v Poland, Ad Hoc UNCITRAL Arbitration, Partial Award (19 August 2005) [Eureko]; Gemplus & Talsud v Mexico ICSID Cases ARB(AF)/04/3 and ARB(AF)/04/4, Award (16 June 2010) [Gemplus]; El Paso Energy v Argentina, ICSID Case no ARB/03/15, Award (31 October 2011) [El Paso].
13 AIG Capital Partner & CJSC Tema Real Estate v Kazakhstan, ICSID Case no ARB/01/6, Award (7 October 2003) [AIG]; African Holding Company & Société Africaine de Construction au Congo v La République Démocratique du Congo, ICSID Case no ARB/05/21, Sentence sur les Délitaires de Compétence et la Recevabilité (29 July 2008) [African Holding]; Sax v City of Saint Petersburg, Ad Hoc UNCITRAL Arbitration, Award (30 March 2012) [Sax]; Mohamed Abdulmohsen Al-Kharafi & Sons v Libya, Ad Hoc Arbitration, Award (22 March 2013) [Al-Kharafi]; Suez, Societé General de Aguas de Barcelona & Vivendi Universal v Argentina & AWG Group v Argentina, ICSID Case no ARB/03/19 and Ad Hoc UNCITRAL Arbitration, Decision on Liability, Separate Opinion (30 July 2010) [Suez].
14 This category of cases is not analysed in this article, but includes the following cases: Meerapfel Söhne v La République Centrafricaine, ICSID Case no ARB/07/10, Sentence Arbitrale (12 May 2011) [Söhne]; Italy v Cuba, Ad Hoc Arbitration, Preliminary Award (15 June 2005); Azurix v Argentina, ICSID Case no ARB/01/12, Decision on Annulment (1 September 2009) [Azurix]; PSEG Global v Turkey, ICSID Case no ARB/02/05, Decision on Jurisdiction (4 June 2004) and Award (19 January 2007) [PSEG]; Ioannis Kardassopoulos & Ron Fuchs v Georgia, ICSID Case nos. ARB/05/18 and ARB/07/15, Award (3 March 2010) [Fuchs]; SGS Société Générale de Surveillance v Paraguay, ICSID Case no ARB/07/29, Award (10 February 2012) [SGS]; AMTO v Ukraine, SCC Arbitration no 080/2005, Award, (26 March 2008) [AMTO]. There is also one case where the
II. The law applicable to investment arbitration

The main types of investment arbitration include: International Centre for the Settlement of Investment Disputes (ICSID) arbitrations under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)\(^\text{15}\) or the ICSID Additional Facility Rules;\(^\text{16}\) ad hoc arbitrations according to the UNCITRAL Arbitration Rules; and proceedings under institutional arbitration rules promulgated by various international commercial arbitration centres,\(^\text{17}\) such as the International Chamber of Commerce (ICC),\(^\text{18}\) the Stockholm Chamber of Commerce (SCC),\(^\text{19}\) or the London Court of International Arbitration (LCIA).\(^\text{20}\) The proper use of the PICC in the context of investment arbitration requires a careful analysis of which law is applicable to the dispute in each of these types of arbitration. The result of this analysis will vary according to the conflict rules contained in the applicable arbitration rules and the choice of law clauses, if any, in the instrument of consent (that is, the contract, treaty, or national legislation).

If the rules on the applicable law are not complied with and the arbitral tribunal determines to apply sources that it is not empowered to apply, the award runs the risk of being annulled or refused enforcement. These consequences are regulated by different sources depending on the legal framework for the award, but the effects are similar. Awards administered under the ICSID Convention may be annulled under Article 52,\(^\text{21}\) and some awards have actually been annulled

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\(^{16}\) ICSID Additional Facility Rules (10 April 2006) <http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf> accessed 15 June 2014. These rules can be applied in ‘conciliation or arbitration proceedings for the settlement of investment disputes between parties one of which is not a Contracting State or a national of a Contracting State.’

\(^{17}\) There are other institutions that have been used in investment arbitration, but only in rare instances. One exception to this rule is investment arbitrations administered by the Permanent Court of Arbitration (PCA). While the PCA does have its own arbitration rules, disputes to date have been governed according to the UNCITRAL Arbitration Rules instead. See PCA 2012 Arbitration Rules <http://www.pca-cpa.org/show file.asp?fil_id=2309> accessed 15 June 2014.


\(^{21}\) ICSID Convention (n 15) art 52.
because they have been rendered on the basis of a law different from the applicable law. For example, in *Klöckner v Cameroon*, the ad hoc annulment committee determined that, while the tribunal had properly identified the applicable law to the dispute, it did not apply this law and instead based its decision on a ‘broad equitable principle without establishing its existence in positive law.’ A similar analysis was presented by the ad hoc annulment committee in *Amco v Indonesia*, where the issue was not the incorrect determination of the law governing the dispute, but, rather, the tribunal’s failure to apply an essential provision of that law. Even though these particular annulment decisions have been criticized, and some later annulments committees have created a higher threshold for annuling an award based on the application of a law that is not the applicable law, there is no doubt that application of the wrong law could still lead to annulment of the award on the ground that the tribunal manifestly exceeded its powers.

If an award is not rendered under the ICSID Convention but, rather, under the UNCITRAL Arbitration Rules or the institutional arbitration rules for international commercial arbitration (such as the ICC, the SCC, or the LCIA), it will be subject to the annulment rules contained in the arbitration law of the award’s state of origin and to the restrictions to enforcement contained in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Application of a law that is not applicable may, under certain circumstances, be a ground for setting aside the award or refusing enforcement.

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23 *Klöckner v Cameroon* (*Klöckner*), ICSID Case no ARB/81/2, Decision on Annulment (3 May 1985) para 79.

24 Schreuer (n 22) art 42, para 19.

25 *Amco v Indonesia*, ICSID Case no ARB/81/1, Decision on Annulment (16 May 1986) [*Amco*].

26 Ibid para 23


28 ICSID Convention (n 15) art 52(1)(b); see, eg, Schreuer and others (n 22) art 42, para 19.

29 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 June 1959, 7 ILM 1046 (1968) [*New York Convention*]

30 In the context of arbitral awards subject to the New York Convention and the grounds under which an arbitral award can be set aside or refused enforcement for misapplying the proper law, see Giuditta Cordero-Moss, *International Commercial Contracts* (CUP 2014) chapter 5, ss 3.3.1–3.3.3.
1. ICSID arbitration

If the dispute is subject to the ICSID Convention, the rule on the applicable law is to be found in Article 42(1) of the Convention. It states:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.31

If the parties to a contract or treaty have not made an explicit choice of law, they may be deemed to have made an implicit choice of law. The circumstance where the claimant invokes protection under a treaty is often considered in case law as an implicit choice of international law.32 Failing an explicit or implicit choice of law by the parties, Article 42(1) contains a default mechanism to determine the applicable law, which is found in its second sentence. The dichotomy between ‘rules of law’33 that may be chosen by the parties and ‘law’34 that may be applied by the tribunal in the absence of a choice by the parties is intentional. The provision gives the parties the power to choose from a wider scope of sources: not only a national law but also other sources—for example, soft law or even a combination of a national law with other such sources (see section V later in this article).

Absent a choice by the parties (explicit or implicit), the tribunal is bound to apply a national law—the national law of the host State or another national law that may be determined as being applicable by the conflict rules of the host State’s. The national law applied by the tribunal, however, has to be corrected with international law (see section IV later in this article).35 Thus, international law may be applied directly as a result of the parties’ choice (Article 42(1), first sentence) or in addition to a national law if the parties have not made a choice (Article 42(1), second sentence).36 The distinction between the first sentence and the second sentence in Article 42(1) as a basis for the application of international law does not seem to have a significant impact on the scope of application of international law. Irrespective of the basis for the application of international law, national law and international law each have a different role and ambit.37 A contract-based claim may apply international law as a corrective of

31 ICSID Convention (n 15) art 42(1).
32 On the issue of an implicit choice of international law in the context of ICSID arbitrations, see Schreuer (n 22) art 42, paras 33–6, 89–95.
33 ICSID Convention (n 15) art 42(1), first sentence.
34 Ibid art 42(1), second sentence.
35 ‘Most commentators, writing on this aspect of Art 42(1) [the relationship of international law to national law], agreed that the function of international law was to close any gaps in domestic law as well as to remedy any violations of international law that may arise through the application of host State law.’ Schreuer (n 22) art 42, para 205.
37 Many investment tribunals have acknowledged the distinct roles of national and international law in investment arbitration. See, eg, Azurix (n 16) paras 65–68; El Paso (n 15) paras 128–41; Santa Elena v Costa Rica, ICSID Case no ARB/96/1, Award (17 February 2000) para 40 [Santa Elena]
national law to the extent that application of national law would lead to a violation of public international law obligations of the State or may apply it in case of gaps in the national law.\textsuperscript{38} Claims based on a treaty will directly apply international law because violation of a treaty is a matter that can be dealt with only on the basis of international law rules.\textsuperscript{39}

However, it is also possible for a treaty-based claim to arise out of a contractual relationship between a foreign investor and the host State. In these situations, a tribunal may apply both national law and international law to different aspects of the dispute. For a claim based on legislation of the host State (for example, an investment law or a mining law), national law (the legislation itself) is directly applicable, but as the legislation becomes subject to an international arbitration tribunal (usually through an ICSID arbitration clause embedded in the legislation), international law also has a role to play.\textsuperscript{40} In addition to Article 42(1), an ICSID arbitration can also be administered by the ICSID Additional Facility Rules if one of the parties to the dispute is not a contracting State or national of a contracting State to the ICSID Convention.\textsuperscript{41} In these cases, the applicable law will be determined in accordance with Article 54(1). Article 54(1) corresponds to Article 42(1) of the ICSID Convention but is slightly different in its configuration. Article 54(1) states:

\begin{quote}
The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall 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.\textsuperscript{42}
\end{quote}

Article 54(1) empowers the parties to choose the applicable ‘rules of law.’ If the parties have not made a choice, the tribunal shall apply the law determined by the conflict-of-law rules that it considers applicable and by such rules of international

\textsuperscript{38} Parra (n 37) 6.

\textsuperscript{39} Ibid 8.

\textsuperscript{40} In determining the applicable rules of interpretation for an ICSID arbitration based on national legislation, the tribunal in Tribunal in Tidewater stated: ‘Should the Tribunal apply national rules of interpretation or the international rules of interpretation? It is the Tribunal’s view that the Investment Law being a municipal legal instrument susceptible to having effects on the international plane, both national rules of interpretation and international rules of interpretation have their role to play.’ Tidewater v Venezuela, ICSID Case no ARB/10/5, Decision on Jurisdiction (8 February 2013) para 81 [Tidewater].

\textsuperscript{41} ICSID Additional Facility Rules (n 16).

\textsuperscript{42} Ibid art 54(1).
law as the tribunal considers applicable. The main difference between Article 54(1) and Article 42(1) lies in the formulation of the criteria to identify the applicable national law, but the result of the application of these criteria should be the same in most situations.

2. UNCITRAL arbitration

If the dispute is subject to ad hoc arbitration and the parties to the contract or the international investment agreement (IIA) have made reference to the UNCITRAL Arbitration Rules, the applicable law will be determined according to Article 35(1) of these rules. Article 35(1) of the UNCITRAL Arbitration Rules states: ‘The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.’ The main rule in the first sentence of Article 35(1) is essentially the same as in the first sentence in Article 42(1) of the ICSID Convention: the parties have the autonomy to choose which ‘rules of law’ shall govern their dispute. This choice of applicable law in investment arbitration will generally be provided for in a contract or in the relevant treaty.

Unlike the ICSID Convention, however, the default mechanism in Article 35(1) of the UNCITRAL Arbitration Rules—absent the parties’ explicit or implicit choice of law—does not refer to international law. Also under the UNCITRAL Arbitration Rules, the dichotomy between the parties’ power to choose ‘rules of law’ and the tribunal’s restriction to apply a national ‘law’ is intentional. As opposed to tribunals acting under the ICSID Convention, tribunals subject to the UNCITRAL Arbitration Rules do not have the possibility of applying international law as a corrective of the applicable national law unless the parties have instructed them to do so. As we have seen in section II.1 earlier in this article, the circumstance where the claimant invokes protection under a treaty is often considered in case law as an implicit choice of international law. Therefore, even a tribunal acting under the UNCITRAL Arbitration Rules may apply international law.

3. Institutional arbitration

If the dispute is subject to the arbitral rules of a commercial arbitration institution (such as the ICC, the SCC, or the LCIA), the applicable law will be determined in accordance with the relevant provision in the respective arbitration rules or in the applicable arbitration law. While there are limited examples of IIAs that refer disputes to these international commercial arbitration institutions, they do exist.

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43 These can include bilateral investment treaties (BITs), plurilateral investment treaties (PITs), and free trade agreements with investment chapters (FTAs).
44 UNCITRAL Arbitration Rules (n 8).
46 Cordero-Moss (n 30) chapter 5, s 3.5.3.
and each of these three institutions has administered investment disputes in the past. There are many similarities among the applicable law provisions provided for in institutional arbitration rules and also a few key distinctions between these rules and the applicable law rules in the ICSID Convention and the UNCITRAL Arbitration Rules.

Turning to the applicable law provisions of these institutions, Article 21(1) of the ICC Arbitration Rules states: ‘The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.’ Article 22(1) of the SCC Arbitration Rules states: ‘The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate.’ Article 22(3) of the LCIA Arbitration Rules states:

The Arbitral Tribunal shall decide the parties’ dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal determines that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.

All three of these institutional arbitration rules can be distinguished from the ICSID Convention and the UNCITRAL Arbitration Rules in that they permit the tribunal—absent an explicit or implicit choice by the parties—to apply both ‘law’ or ‘rules of law’ that the tribunal considers appropriate. As was seen earlier, the ICSID Convention and the UNCITRAL Arbitration Rules require the tribunal—absent an explicit or implicit choice by the parties—to apply a ‘law’ (that is, national law), and, in the case of the ICSID Convention, this ‘law’ can be corrected by ‘rules of international law.’ Thus, an investment arbitration governed by institutional commercial arbitration rules will allow the tribunal a broader discretion in deciding the appropriate law than would a tribunal administered under the ICSID Convention or the UNCITRAL Arbitration Rules.

4. Choice-of-law provisions in investment arbitration

Whether an arbitral tribunal is constituted according to ICSID, UNCITRAL, or institutional arbitration rules, the main rule is that the parties may choose the law applicable to the dispute. In investment arbitration, choice-of-law provisions can be found in a contract, treaty, or national legislation. An example of an investment arbitration where a contract with the host State contained an explicit choice of law is the ad hoc UNCITRAL arbitration of Zeevi Holdings v Bulgaria. The
tribunal held that ‘[i]n Section 14.1 of the PA [privatization agreement] the Parties have agreed that the PA “shall be governed by and construed in accordance with the laws of Bulgaria.” Therefore, concerning the merits of the case the law of the Republic of Bulgaria will be applied.’

A choice of law may also be contained in the host State’s legislation. Investment legislation regulates investment activity that is carried out in that particular State, and it is quite natural that investment activity carried out in that State falls within the scope of application of that legislation. Therefore, the choice-of-law provision in host State investment legislation often refers to the applicable scope of the legislation. An example of such a provision can be found in Venezuela’s Investment Law. Article 2 states:

This Law-Decree shall apply both to investment already existing in the country at the time it comes into force, and to investments made afterwards, as well as to investors in one or the other. The provisions hereof shall not, however, apply to any controversy, claim or difference arising from occurrences or actions that took place before the effective date hereof.

For IIAs, explicit choice-of-law provisions are the exception and not the rule. When they are included, they often allow the arbitrators to apply a wide array of rules and principles that can include, *inter alia*, ‘the provisions of the agreement,’ ‘the law of the contracting state party to the dispute,’ and ‘rules of international law.’ For example, the Australia–Argentina Bilateral Investment Treaty (BIT) includes an applicable law provision that permits the tribunal to apply the terms of the treaty, the law of the host State, and relevant principles of international law:

The arbitration tribunal shall make its decision in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, the rules on conflict of laws which the tribunal considers applicable, the terms of any specific agreement concluded in relation to the particular investment involved and the relevant principles of international law.

A second example of an explicit applicable law provision can be found in the Portugal–Turkey BIT, which permits the tribunal to apply the terms of the treaty (which may be considered an implicit choice of international law) and national law: ‘The arbitration shall be based on: (a) the provisions of this Agreement; (b) the national laws and regulations of the Contracting Party in whose territory the

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52 *Venezuelan Decree of Law for the Promotion & Protection of Investments*, Official Gazette no 5, 390 (22 October 1999) [unofficial English translation].
53 For an overview of IIAs including choice-of-law provisions, see Banifatemi (n 37) 197.
54 Ibid 197–8.
56 Parra (n 37) 13.
investment was made, including the rules relative to conflicts of law. Finally, three commonly invoked plurilateral investment treaties (PITs) all include explicit choice-of-law provisions that require arbitrators to apply international law to the exclusion of national law. These provisions can be found in the Energy Charter Treaty (ECT), the North American Free Trade Agreement, and the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR), respectively:

• A Tribunal established under paragraph 4 shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

• A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

• Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

While there are certainly a number of examples of explicit choice-of-law provisions in IIAs, it is more frequent for there to be no mention of the applicable law in the IIA. In these cases, the jurisprudence seems to indicate that reference to an investment treaty may be deemed to be an implicit choice of international law and is sufficient to involve international law as a corrective in addition to the national law.

Where there is no choice of law provision provided by the parties to the dispute, and if no implicit choice may be assumed, arbitrators will be guided by the applicable law provisions in the arbitration rules governing the dispute, as explained in sections II.1 to II.3 earlier in this article, and it is in these circumstances that the difference in the various arbitration rules becomes crucial in the determination of the applicable law (and especially in the context of whether

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57 Agreement between the Portuguese Republic and the Republic of Turkey on the Reciprocal Promotion and Protection of Investments (19 February 2001) art 10(4) [Portugal–Turkey BIT].
60 Central America–Dominican Republic-United States Free Trade Agreement (5 August 2004) art 10(22) [CAFTA-DR].
61 A comprehensive list of IIAs without explicit choice of law provisions is beyond the scope of this article. However, for a sample of such treaties, See, eg, Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments (27 June 1992) [USA–Egypt BIT]; Treaty between the Federal Republic of Germany and the Federal Republic of Ethiopia Concerning the Encouragement and Reciprocal Protection of Investments (9 August 2005) [Germany–Ethiopia BIT]; Agreement between the Government of Australia and the Government of the People’s Republic of China on the Reciprocal Encouragement and Protection of Investments (11 July 1988) [Australia–China BIT]; Agreement between the Government of the Republic of Indonesia and the Government of the Republic of Cuba Concerning the Promotion and Protection of Investments (19 September 1997) [Indonesia–Cuba BIT]. See also Banifatemi (n 37) 197–9.
62 Parra (n 37) 11–13; see also Schreuer (n 22) art 42, paras 33–6.
there are situations where arbitrators may have the discretion of applying the PICC to the dispute).

**III. The PICC as ‘rules of law’ chosen by the parties**

The PICC are meant to be a restatement of transnational contract law and are a combination of generally acknowledged principles of contract law and best rules based on extensive comparative research. They are considered to be part of the *lex mercatoria* and may be chosen by the parties to govern their contract, although under certain circumstances they may turn out to be insufficient to govern a contract to the exclusion of any national law. In all of the applicable law provisions detailed in the previous section, the parties are free to choose ‘rules of law’ to govern their disputes. There is little doubt that the PICC may be considered to be ‘rules of law’ that may be chosen by the parties to govern their dispute, whether the arbitration is subject to the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules, or institutional arbitration rules (for example, the ICC, SCC, or LCIA). In the context of the ICSID Convention, the expression ‘rules of law’ in the first sentence of Article 42(1) allows for a selection of a wide array of rules that could include: a national law, international law, a combination of more than one law, a selection of certain parts of a system of law, or rules not belonging to a national legal system (for example, codes of conduct).

According to Christoph Schreuer, it is possible for parties to completely internationalize an investment contract ‘by referring exclusively to international law, to general principles of law or to a set of usages customarily governing like transactions.’ However, he suggests that this is unadvisable because ‘[t]he contacts of the investment activity to various technical provisions of the host State’s law would make such a formula impractical. The law thus chosen may lack the clarity and the technical details that is desirable.’ Similar observations may also be made in respect to the PICC, where their application may turn out to not give a solution to the disputed matter or to give a solution that is too vague and needs concretization.

In the context of investment arbitration, the possibility that an IIA would include an explicit choice-of-law provision referring to the PICC is not excluded, but it is remote (and no IIAs to date have done so). More likely is an investment

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63 PICC 2010 (n 3) preamble, commentary.
64 Cordero-Moss (n 30) ch 2, s 4; chapter 4, s 2.3.
65 This can include the national law of the host State or the national law of a third State. Schreuer (n 22) art 42, paras 24–32.
67 Ibid art 42, para 41.
68 Ibid art 42, para 42.
69 Ibid art 42, para 36.
70 Ibid.
71 Cordero-Moss (n 30) ch 2, s 6.
72 Ibid ch 2, ss 4.2, 4.3
arbitration based on a contract where the parties have chosen the PICC as the applicable law governing their dispute, although choice of the PICC as the exclusive governing law is also quite infrequent in contracts. There is one known investment arbitration (Lemire v Ukraine) where a tribunal directly applied the PICC to the substance of a dispute, but it is unclear on what basis the tribunal applied them.

Lemire v Ukraine is an ICSID arbitration spanning 16 years and resulting in two separate investment treaty cases: Lemire I and Lemire II. In the first case, Lemire I, Ukraine had not yet ratified the ICSID Convention, and so the dispute was administered according to the ICSID Additional Facility Rules. The claim arose out of the USA–Ukraine BIT and concerned unfulfilled promises made by the Ukrainian State in regard to the issuance and operation of certain radio broadcasting licenses. However, Lemire I never reached the merits stage. A settlement agreement was negotiated between the parties, and this agreement was incorporated into a binding final award issued by the tribunal.

The second case, Lemire II, was brought under the ICSID Convention and its rules because Ukraine had ratified the ICSID Convention in the period between the first and second case. While this second case also dealt with the claimant’s radio broadcasting investment, the claims were not exclusively based on the USA–Ukraine BIT but also on the settlement award issued in Lemire I. In its decision on jurisdiction and liability, the tribunal held that Ukraine had violated the fair and equitable treatment (FET) provisions in the BIT but that it had not breached any of its obligations assumed under the settlement agreement. Approximately a year later, the tribunal issued its final award in the case.

For the purposes of this article, the concern is with how the PICC were used and how the arbitrators justified their application as the law governing the dispute. In Lemire I, some provisions of the PICC were reproduced as principles of interpretation that were incorporated into the settlement agreement. The PICC were

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73 Lemire II (n 10).
74 While the tribunal did directly apply the PICC to the settlement agreement, it did not apply them on the basis of an explicit choice of law made by the parties. Rather, the tribunal seems to have held that the application of the PICC were the implicit choice of the parties.
75 Joseph Lemire v Ukraine, ICSID Case no ARB(AF)/98/1), Award (18 September 2000) [Lemire I].
76 Lemire II (n 10).
77 Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment (4 March 1994) [USA–Ukraine BIT].
78 The substantive terms of the settlement agreement required Ukraine, inter alia, to remove all obstacles and barriers relating to Lemire’s radio broadcasting investment. In addition to the substantive requirements, the settlement award also included a section titled ‘Principles of Interpretation and Implementation of the Agreement,’ whose provisions were reproduced—with only slight modification—from the PICC. See Lemire I (n 75) s 3.
79 Ukraine ratified the ICSID Convention on 17 June 2000, and it came into force on 17 July 2000.
80 Lemire II, Decision on Jurisdiction and Liability (14 January 2010) para 106.
81 The tribunal awarded Lemire US $8.7 million plus interest for Ukraine’s violation of its treaty obligations. Shortly thereafter, Ukraine commenced annulment proceedings, but the ad hoc committee rejected Ukraine’s petition in its entirety. See Joseph Lemire v Ukraine, Decision on Annulment (8 July 2013) [not publically available].
used in this context as terms of the contract (settlement agreement). In addition, the settlement agreement included an explicit choice-of-law provision. This choice-of-law provision reads: ‘This Agreement shall be governed by the applicable law as determined by Art. 55 of the ICSID Additional Facility Rules.’

However, the tribunal in Lemire II noted that ‘[t]he relevant article in the Additional Facility Rules is in fact Article 54. The mistake is an obvious typographical error, and the Tribunal has no doubt the common intent of the parties was to refer to Article 54.’

The choice-of-law clause in the settlement agreement (Lemire I) refers to Article 54(1) of the ICSID Additional Facility Rules. According to Article 42(1) of the ICSID Convention, which regulates the tribunal’s determination of the governing law in Lemire II, the tribunal was bound by the parties’ explicit choice of applicable law. This choice required that the tribunal determine the applicable law according to the second sentence of Article 54(1) (the default mechanism absent an explicit choice). Article 54(1), second sentence of the Additional Facility Rules requires that the tribunal shall apply a ‘law’ (that is, national law) as determined by the conflict rules that the tribunal considers appropriate and ‘rules of international law’ that the tribunal considers applicable.

This requires that the tribunal apply Ukrainian law (or another national law) and ‘rules of international law.’ However, the tribunal analysed the question of the applicable law in a slightly different way, instead holding that the application of a national law (either Ukrainian or US law) was not appropriate.

The tribunal’s analysis of which law was applicable to the settlement agreement is discussed in section 6(1) of its decision on jurisdiction and liability. It began by stating that ‘[t]he Settlement Agreement contains an extensive chapter called “Principles of Interpretation and Implementation of the Agreement,” which includes Clauses 20 through 26. These Clauses were reproduced, with very light linguistic adjustments, from the 1994 UNIDROIT Principles.’

The tribunal went on to put the PICC in some context:

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 UNIDROIT Principles are neither treaty, nor compilation of usages, nor standard terms of contract. They are in fact a manifestation of transnational law.

In determining that the parties incorporated the PICC into the terms of the settlement agreement, the tribunal reasoned that this should be considered as an implied negative choice of a national law as the applicable law governing the settlement agreement in Lemire II. In reaching this conclusion, the tribunal stated:

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

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82 Lemire I (n 75) para 30.
83 Lemire II (n 80) para 106.
84 ICSID Additional Facility Rules (n 16) art 54(1), second sentence.
85 Lemire II (n 80) para 108.
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 authorizes 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.87

On this basis, the tribunal affirmed that, due to a negative inference that the parties did not want a national law to apply, it was empowered to apply rules of international law, with particular regard to the PICC. It is unclear whether the tribunal interpreted the incorporation of some PICC provisions into the contract as the parties’ choice of the PICC as the applicable law or whether it determined that the PICC were applicable as a consequence of the second sentence of Article 54(1). Under the first scenario, the tribunal may have erred because incorporation of a source into a contract is quite different from subjecting the contract to that source. This issue is a well-known distinction within private international law. For example, and particularly with reference to sources such as the PICC, this distinction has been recently confirmed in the Rome I Regulation,88 which constitutes the European Union’s (EU) conflict rules for contractual obligations.89 Incorporation of the PICC into the contract may, therefore, not be interpreted as a choice of the PICC as the applicable law.

Under the second scenario, the tribunal in Lemire II could have determined on its own initiative that the PICC were the appropriate ‘rules of law’ if the arbitration had been subject to any of the institutional arbitration rules detailed earlier (that is, the ICC, the SCC, or the LCIA). If the arbitration had been subject to the UNCITRAL Arbitration Rules, it would not have had the power to apply the PICC (it would have been required to apply a national law). Under Article 54(1) of the ICSID Additional Facility Rules—which the tribunal was directed to apply by the settlement agreement—it should have determined an applicable national law. In addition, the tribunal could have determined that the PICC were also applicable if it considered the PICC to be ‘rules of international law.’ The possibility to consider the PICC as a source of international law is analysed in section IV.1 later in this article.

**IV. The PICC and international law**

After having established that the PICC may be applied (with some caution) in investment arbitration as ‘rules of law’ chosen by the parties, it remains to be seen

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87 Ibid para 111.
89 Under the Rome I Regulation (n 88), sources such as the PICC may be incorporated into the contract, thus becoming terms of the contract. The contract (together with the incorporated sources) will so be subject to a governing law, which will be either the law chosen by the parties or, failing a choice by the parties, the law determined by the default conflict rule contained in the Rome I Regulation. For a more extensive analysis, see Cordero-Moss (n 30) ch 2, s 6.1; ch 4, s 2.3.
whether they may have a role in connection with the other sources that are applicable in investment arbitration, namely public international law. This section will look at the PICC from two angles in the context of international law. The first sub-section will address the situation where the PICC are considered to be sufficient proof of general principles of law and, as such, directly applicable as a source of international law (section IV.1). The second sub-section, which is more feasible and for which there are more case law examples, will address the situation where the PICC are used to corroborate a principle of international law that a tribunal is applying to a particular dispute (section IV.2).

1. The PICC as a source of international law

One of the sources of international law mentioned in the Statute of the International Court of Justice (ICJ Statute), Article 38(1)(c), are general principles of law. According to the prevailing theory and practice, they are established through ‘comparative law whereby features common to domestic legal systems are established.’ Therefore, general principles of law in investment arbitration stand in a slightly different position than the other sources because, while they are considered a source of international law, they do not derive their existence from international law—they are principles found in national legal systems. General principles of law are frequently invoked in investment arbitration, but they are distinct from other types of international law such as customary international law (CIL). The application of general principles of law as ‘rules of international law’ under the second sentence of Article 42(1) of the ICSID Convention requires a comparative analysis of national systems of law.

An important qualification, however, is that principles deriving from national law must be adapted to become ‘suitable for application on the level of public

90 Statute of the International Court of Justice, 59 Stat 1031, 1055 art 38(1) [ICJ Statute]: ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’

91 Schreuer (n 22) art 42, para 178.

92 See generally Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Stevens 1953); James Crawford, Brownlie’s Principles of International Law (OUP 2013) ch 2, s 5.

93 Examples of general principles of law invoked in investment arbitration include, inter alia: good faith; prohibition on corruption; nobody can benefit from his or her own fraud; general principles of contract law (including pacta sunt servanda); estoppel; unjust enrichment; the duty to mitigate damages; full compensation of prejudice resulting from a failure to fulfill contractual obligations; the claimant bears the burden of proof; res judicata; prohibition on the abuse of right; & valuation of damages. Schreuer (n 22) art 42, para 180.

94 Examples of customary international law invoked in investment arbitration include, inter alia: principles of State responsibility, the principle of respect for acquired rights, consequences of a state of necessity; denial of justice; the standard of protection in case of an insurrection; expropriation requires compensation; and the international minimum standard of treatment. Ibid art 42, para 177.
international law.95 As will be seen in sections V.2 later in this article, rules of national contract law do not necessarily have the ability of being elevated to the level of general principles of public international law, at least not the specific technical aspects of the rules (for example, their scope of application, the modalities of their exercise, and the specific legal effects). For example, the principle of good faith in public international law does not necessarily coincide with the principle of good faith in the contract law of a specific State. While the International Court of Justice (ICJ) found that the principle of good faith in public international law requires unilateral promises to be binding,96 as a general rule unilateral promises are not enforceable under English contract law.97

That general principles are established mainly through comparative analysis opens the door for the application of collections of principles recognized in numerous legal systems as proof of general principles and, thus, a source of international law. To the extent that the PICC may be considered to be an expression of generally recognized principles of law, they may be used as a source of international law. However, the PICC are not only a collection of existing principles common to all systems (established through comparative research), they also contain rules that are developed by the PICC’s authors as best rules.98 Therefore, the simple circumstance that a rule is contained in the PICC is not sufficient proof that it is a general principle recognized in most legal systems.99 It is therefore necessary to distinguish the rules that express generally recognized principles from the rules that do not. It might be reasonable to conclude that some (but not all) of the principles established in the PICC would qualify as general principles of law that could be applied as a source of international law in investment arbitration, provided that they are adapted to become suitable for application on the level of public international law.

A note of caution is warranted, however. The ICSID ad hoc annulment committee annulled the award in *Klöckner* because the tribunal applied a principle on duty of full disclosure simply assuming its existence in the governing law, and this was deemed to be an award based on equity.100 In this context, Schreuer states:

> General principles of law are not an expression of general feelings of justice or equity but are part of the body of international law which, in a particular case, must be proven

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95 *El Paso* (n 12) para 622.
97 More extensively, see Cordero-Moss (n 30) ch 2, s 5.1.
98 ‘For the most part the *Unidroit* Principles reflect concepts to be found in many, if not all, legal systems. Since however the *Unidroit* Principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted.’ PICC 1994 (n 2) introduction.
99 ‘The PICC may contain principles and rules that do not reflect generally acknowledged standards, but represent what the restatements’ authors considered to be the best rule. Hence, they may not be used as evidence of the general acknowledgement of the principles contained therein; however, they could become evidence if they are used consistently and widely in practice.’ Cordero-Moss (n 30) ch 2, s 4.2.
100 *Klöckner* (n 23).
and not presumed. This proof must be furnished on the basis of rigorous examination, if not all systems of law at least the most important major representative systems.  

In this situation, and to the extent that the PICC are considered to be an expression of generally recognized principles, they may be deemed to constitute sufficient proof of the existence of a principle and thus avoid the criticism that was made in the Kloëckner annulment decision.

However, a reference to the PICC will not always be a substitute for proving content. For example, the most important principle of the PICC is the principle of good faith. This principle is understood in many different ways depending on the context and on the legal system, which renders it impossible to define a specific content on the basis of a comparative analysis. For this reason, the PICC specify that the principle of good faith is autonomous and to be understood ‘as in international trade.’ However, there does not seem to be a uniform understanding of the principle of good faith in international trade. Therefore, it may not be excluded that the PICC may not provide sufficient evidence to prove the specific content of a general principle of good faith in international law.

In the SCC case of Petrobart v Kyrgyz Republic, the tribunal applied the PICC as a rule of international law, without explaining, however, to what extent they expressed a generally recognized principle of law. The dispute involved claims against the Kyrgyz Republic for violations of its obligations under the ECT. Accordingly, the tribunal held that the applicable law was international law according to the explicit choice of law provisions in the ECT. The tribunal stated:

Accordingly, the question as to whether the Kyrgyz Republic is in breach of any of its Treaty and international obligations (and if so what consequences follow from any such breach) is to be determined by reference to the applicable law, i.e. the Treaty and rules and principles of international law, and not by reference to the Republic’s domestic law. It should of course be borne in mind that domestic law will be relevant as a question of evidence and fact.

The PICC are referenced in the decision regarding the parties’ disagreement as to the rate of interest and the date from which interest should accrue. Claimants argued that interest should be determined according to Article 7.4.9 of the PICC states: ‘(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 the place for payment, or where no such rate exists that place, then the same rate in the State of the currency of payment. In the absence of such a rate either

101 Schreuer (n 22) art 42, para 182.
102 Cordero-Moss (n 30) ch 3. Along the same lines, see Stefan Vogenauer and Jan Kleinheisterkamp, Commentary on the UNIDROIT Principles of International Commercial Contracts (OUP 2009) art 1.7, paras 11–29.
103 PICC 2010 (n 3) art 1.7.
104 Cordero-Moss (n 30) ch 2, s 4.3.
105 Petrobart (n 11).
106 ECT (n 58) art 26(6).
107 Petrobart (n 11) 23.
108 Article 7.4.9 (interest for failure to pay money) of the PICC states: ‘(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 the place for payment, or where no such rate exists that place, then the same rate in the State of the currency of payment. In the absence of such a rate either

‘UNCITRAL [sic] Principles of International Commercial Contracts.’ The Kyrgyz Republic, on the other hand, argued that interest should be based on the rates available under Kyrgyz law and that the date should be when the claim was filed. The tribunal agreed with the claimants’ position and stated:

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.

Notwithstanding the fact that the tribunal incorrectly refers to the PICC as the ‘UNCITRAL Principles,’ it is curious that they are believed to be international rules. As stated in this section, there may be cases where the PICC reflect general principles of law that in turn constitute a part of international law. But this consideration requires a careful comparative analysis of national legal systems. In this case, the PICC are being applied directly as a rule of international law with no analysis as to whether Article 7.4.9 reflects a general principle of law and thus a source of international law applicable to the dispute.

2. The PICC as corroboration of international law

In investment arbitration case law, there are three examples of awards that make reference to the PICC as an expression of generally recognized principles. However, in none of these cases are the PICC cited as independent proof of such general principles of law. Instead, these tribunals use the PICC as corroborating evidence alongside other sources of law. Of these three cases, one is subject to the ICSID Convention, one case is subject to the ICSID Additional Facility Rules, and one case is an ad hoc arbitration under the UNCITRAL Arbitration Rules. Each of these cases is detailed in the following sections (in chronological order).

A. Eureko v Poland

The first case to reference the PICC is the ad hoc UNCITRAL arbitration of Eureko v Poland, which is a case based on the Netherlands–Poland BIT. The dispute 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.’ PICC 2010 (n 3).
arose out of a share purchase agreement (SPA) between the Poland Ministry of State Treasury and the claimant for a 30 per cent stake in PZU (an insurance company). A later addendum to the SPA allowed the claimant to increase its stake by 21 per cent, thus giving it a majority stake in PZU. However, this additional purchase, originally envisaged by law, never occurred, and it is this failure to increase its stake in the investment that formed the basis of the dispute.

The applicable law rules for the dispute are provided in Article 35(1) of the UNCITRAL Arbitration Rules. The tribunal held that there was an explicit choice-of-law provision in the Netherlands–Poland BIT requiring the application of the BIT, the agreements between the parties (the PSA), and international law, and it is on this basis that they proceeded:

The Tribunal further recalls that, under the Treaty, its decision must be made 'on the basis of respect for the law, including particularly this [Treaty] and other relevant agreements existing between the two Contracting Parties and the universally acknowledged rules and principles of international law.'

In interpreting the agreement, the tribunal found that a certain waiver clause in the first addendum to the PSA was not applicable. This clause required both parties to settle and terminate all disputes and controversies before a certain date, and Poland argued that the disputed claim had been waived. The claimants, on the other hand, argued that there was an exception of non-performance (exceptio non adimpleti contractus) that vitiated the waiver. Both arguments were rejected. The tribunal held that: (i) both parties had performed all of their obligations under the waiver and (ii) the waiver did not apply to the disputed claim that arose after the signing of the first addendum.

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113 *Eureko* (n 12) para 41.
114 Ibid paras 52–73.
115 In a partial award, the tribunal determined that Poland had breached its treaty obligations. Poland later sought—unsuccessfully—to have this award set aside in Belgium (the seat of the arbitration was Brussels).
116 The provision that is cited in the decision is from Article 12 of the Netherlands–Poland BIT (n 112), which deals with disputes between the two contracting States to the treaty in regard to the interpretation of the treaty. Article 9 of the Netherlands–Poland BIT deals with disputes between nationals of one contracting State and the other contracting State. Article 9 provides no choice of law provision. This confusion might not have had a significant impact on the choice of law, since the treaty was invoked by the claimant, and according to the earlier-mentioned case law, this may be considered as an implicit choice of international law. Following this reasoning, the tribunal would have been empowered to apply the treaty and international law.
117 *Eureko* (n 12) para 91.
118 Ibid para 161.
119 Ibid para 162.
120 Ibid para 167.
122 Ibid para 181.
The tribunal based this conclusion, in part, on the exception of non-performance. The PICC are mentioned in the section titled ‘Effect of the Waiver Clause in the First Addendum,’ as an example of a source recognizing this principle. In what seems to be a rather hasty analysis of international law, which is intended to be corroborated by the PICC, the tribunal stated:

The Tribunal must now determine whether the [Respondent] can rely on the Article 1 waiver because it has allegedly not performed its own obligations under the First Addendum. In other words, is the exception of nonperformance applicable, as Claimant contends? Without deciding whether the exception of nonperformance is a maxim of interpretation or a rule of international law, the Tribunal is of the view that the exception cannot assist Claimant because it essentially applies to cases of simultaneous or conditional performance. For example, Article 7.1.3 of the UNIDROIT principles of International Commercial Contracts provides that, ‘Where the parties are to perform simultaneously, either party may withhold performance’ if the other party is not willing and able to perform.

The exception of nonperformance thus relates to the simultaneous performance of particular obligations, i.e. mutuality, which is exactly the case with Article 1 of the First Addendum. According to its terms, both parties had to perform simultaneously, which they did, and on 3 April 2001, all contract and other claims were terminated, not suspended. As the Tribunal noted earlier, if the parties had intended the waiver to be conditional upon subsequent performance of all of their obligations under the First Addendum, that Addendum would have been drafted in a completely different way. Indeed, such a waiver would not have been a waiver at all, and far from excluding the repeated bringing of claims, it would have expressly contemplated that possibility. Claimant’s position inverts the meaning and purpose of Article 1 of the First Addendum.

The tribunal is stating the existence of a principle, leaving it open whether it is a principle of interpretation (presumably a generally recognized principle of interpretation) or a rule of international law, according to which a party cannot benefit from a non-performance exception because such an exception only applies to a simultaneous or conditional performance. The PICC are mentioned as an illustration of this stated principle. This line of argument is somewhat reminiscent of the reasoning that was criticized by the ad hoc committee who annulled the Kloëckner award: the existence of a principle is assumed rather than proven. In the Eureka award, the tribunal offered an illustration of the principle by making reference to the PICC. This is a step towards proving the principle, although it does not seem to meet the strict requirement of a ‘rigorous examination, if not of all systems of law at least of the most important major representative systems.’

124 Kloëckner (n 23).
125 Schreuer (n 22) art 42, para 182; see also s IV.1 earlier in this article.
B. Gemplus v Mexico

The second of these cases is Gemplus v Mexico,126 which is based on the France–Mexico BIT127 and the Argentina–Mexico BIT.128 The dispute arose out of a concession awarded to a locally incorporated company, Renave.129 The concession was for the development and performance of a national vehicle registry. However, shortly after the concession was awarded to Renave, its director Ricardo Cavallo, was extradited to Spain for crimes relating to Argentina’s ‘dirty war.’130 Later in 2000, Ramos Tercero, the person running the company in Cavallo’s absence, was found murdered in a wooded area.131 The issues relating to Cavallo and Tercero caused concern in the Mexican government about the granting of concessions to private parties.132 This concern led to the eventual revocation of the law that had initially allowed for the concession to be granted. The repealed law was replaced with a law prohibiting the operation of a national vehicle registry by private parties.133 This change in the law formed the basis of the dispute and a finding by the tribunal that Mexico unlawfully expropriated both claimants’ investments.134

In making its determinations, the tribunal applied international law as the law applicable to the dispute. However, there is very little discussion of the applicable law in this case. As a tribunal constituted under the ICSID Additional Facility Rules, Article 54(1) applies. Of the two BITs relevant to the dispute, only the Argentina–Mexico BIT contains an explicit choice-of-law provision. It states: ‘The arbitration body shall rule on the disputes submitted for its consideration on the basis of the provisions of this Agreement and the applicable rules and principles of international law.’135 The tribunal, as provided for by Article 54(1) of the ICSID Additional Facility Rules, was required to apply international law (which was the choice of the parties) under the Argentina–Mexico BIT and the default mechanism (Article 54(1), second sentence)136 under the France–Mexico BIT. However, the tribunal applied international law as the applicable law to the

126 Gemplus (n 12).
129 Renave was a company whose foreign shareholders were the two claimants in the arbitration.
130 Gemplus (n 12) paras 4.94–4.107.
132 Ibid paras 4.88–4.90
134 The tribunal awarded the claimants US $4.5 million (Gemplus) and US $6.5 million (Talsud) plus compound interest for breaches of the respective BITs.
135 Argentina–Mexico BIT (n 128) art 10(5).
136 ICSID Additional Facility Rules (n 16) art 54(1), second sentence, states: ‘Failing such designation by the parties, the Tribunal shall 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.’
claims under both BITs. According to practice, this appears to be the correct interpretation of the applicable law rules under the ICSID Convention and the ICSID Additional Facility Rules.\textsuperscript{137} Where the dispute is based on a claim of breach of treaty, tribunals—absent an explicit choice-of-law provision in the treaty—have held that ‘rules of international law’ (to the exclusion of any municipal law) are applicable to the dispute as an implicit choice of law.\textsuperscript{138} For example, when discussing the FET provisions in the relevant BITs, the tribunal held:

Given that the Tribunal here addresses only the Claimants’ rights arising from the two BITs under international law, the Tribunal is not concerned with the different legal rights of the Concessionaire under the Concession Agreement and Mexican law, which were the exclusive subject-matter of the decisions of the Mexican courts invoked by the Respondent.\textsuperscript{139}

After determining that Mexico had breached its FET and expropriation obligations under both BITs, the tribunal analysed the issue of compensation for damages. In regard to lost profits, the tribunal discussed the International Law Commission’s (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles):\textsuperscript{140}

In this ILC Commentary [on the issue of lost profits] there is an emphasis on ‘certainty’ to be established evidentially by a claimant in all cases; but it is clear from other legal materials there cited that the concept of certainty is both relative and reasonable in its application, to be adjusted to the circumstances of the particular case.\textsuperscript{141}

In deciding the evidentiary standard for awarding lost profits under international law, the tribunal cited the ILC Draft Articles\textsuperscript{142} for the principle that there must be a relative and reasonable level of certainty about future income streams. To support and corroborate this principle, the tribunal cited the PICC:

It may be noted that Article 7.4.3(1) of the \textit{UNIDROIT Principles} requires a ‘reasonable degree of certainty’ for establishing compensation for future harm, thereby further confirming that the requirement for certainty in proving a claimant’s claim for compensation is relative and not incompatible with an award of compensation for loss of opportunity, nor is the latter necessarily linked to an arbitrator’s power to decide \textit{ex aequo et bono}.\textsuperscript{143}

\textsuperscript{137} Schreuer (n 22) art 42, paras 89–95; see also s II earlier in this article.
\textsuperscript{138} Ibid.
\textsuperscript{139} Gemplus (n 12) para 7.74.
\textsuperscript{141} Gemplus (n 12) para 13.82.
\textsuperscript{142} ILC Draft Articles (n 142) art 36(2).
\textsuperscript{143} This paragraph incorporates two footnotes of relevance. The first states: ‘The Tribunal notes the \textit{UNIDROIT Principles} for the general proposition that lost profit is an accepted and well-established component in assessing compensation.’ The second states: ‘\textit{UNIDROIT Principles: Article 7.4.3
After providing an example from English case law, the tribunal justified its reference to the PICC according to the following statement:

It would be possible to illustrate these general principles from several other national legal systems (both common law and civilian); but it is unnecessary to do so here because, first, such principles are broadly re-stated in the UNIDROIT Principles; and, second, the Tribunal is in no doubt that similar principles form part of international law, as expressed in the ILC Articles. Moreover, the law applicable in this case is not English, Mexican, Canadian or any other national law.

In this case, the tribunal used the PICC to corroborate a general principle of law that clearly forms a part of international law as expressed in the ILC Draft Articles: the certainty of harm principle. The analysis of international law was corroborated first by a reference to English law and then by a reference to the PICC as a substitute or proxy for a comparative analysis of national legal systems.

C. El Paso v Argentina

The third case to refer to the PICC as a means of corroborating international law is El Paso v Argentina, a case based on the USA–Argentina BIT, where a tribunal held that Argentina breached the FET provisions of the treaty and awarded the claimant US $43 million in damages. This dispute arose out of emergency measures enacted by Argentina during its financial crisis of 2000–01. Under ICSID arbitration, the applicable law to the dispute was selected according to Article 42(1) of the ICSID Convention. The tribunal held that the applicable law to the dispute was the ‘BIT supplemented by international law as well as Argentinian law.’ The reference to the PICC came as a corroboration of international law in support of general principles of law used to interpret specific provisions in the USA–Argentina BIT. The PICC were cited in the award in the section titled: ‘The Interpretation of Article XI: Admissibility of the State’s

(Certainty of Harm) provides: (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 the discretion of the court. Gemplus (n 12) paras 13.82–13.90.

144 Ibid para 13.89.
146 ILC Draft Articles (n 140) art 36(2), commentary.
147 In this case, the tribunal uses the PICC as additional evidence of the existence of the certainty of harm only after citing more relevant sources. It first stated that the principle exists in the ILC Draft Articles, many common law and civil law jurisdictions, English law, and the PICC. Gemplus (n 12) paras 13.82–13.90.
148 El Paso (n 12).
149 Treaty between the United States of America and the Republic of Argentina Concerning the Reciprocal Encouragement and Protection of Investment (14 November 1991) [USA–Argentina BIT].
150 As of 15 June 2014, an ICSID ad hoc annulment committee decision remains pending.
151 El Paso (n 12) paras 128–41.
Defence under Article XI.\textsuperscript{152} Article XI of the USA–Argentina BIT is the ‘non-precluded measures’ provision of the treaty: ‘This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.’\textsuperscript{153} After discussing the ILC Draft Articles\textsuperscript{154} and the general principles of law\textsuperscript{155} on the preclusion of wrongfulness,\textsuperscript{156} the tribunal cited the PICC as corroborating evidence as to a general principle of law on the preclusion of wrongfulness in certain situations:

That there is a general principle on the preclusion of wrongfulness in certain situations can hardly be doubted, as is confirmed by the UNIDROIT Principles on International Commercial Contracts, a sort of international restatement of the law of contracts reflecting rules and principles applied by the majority of national legal systems. Article 6(2)(2) of these Principles, dealing with ‘hardship,’ provides that events causing hardship must be ‘beyond the control of the disadvantaged Party.’ Article 7(1)(6) on ‘exemption clauses’ prescribes that a party may not claim exemption from liability ‘if it would be grossly unfair to [exempt it] having regard to the purpose of the contract.’ Finally, Article 7(1)(7), relating to ‘force majeure’ (\textit{vis maior}) excuses non-performance of a contract ‘... 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 its consequences.’ Exemption from liability for non-performance or other forms of relief are therefore excluded under the UNIDROIT Principles if the Party claiming it was ‘in control’ of the situation or if it would be ‘grossly unfair’ to allow for such exemption.\textsuperscript{157}

As based on this discussion of the ILC Draft Articles, general principles of law, and the PICC, the tribunal concluded:

It follows from the above that: (i) there is a rule of general international law which provides that necessity may not be invoked as a ground for precluding wrongfulness if the State concerned has significantly contributed to creating that necessity; (ii) there also seems to be a general principle of law recognized by civilised nations that necessity

\textsuperscript{152} Ibid paras 613–26.
\textsuperscript{153} USA–Argentina BIT (n 149) art 11.
\textsuperscript{154} ILC Draft Articles (n 140).
\textsuperscript{155} On general principles, the tribunal stated: ‘So far, this Tribunal has limited itself to examining the question of whether the above-mentioned precept is a rule of general international law, applicable between the Parties to the BIT and, hence, a rule which may be used to interpret Article XI of the latter. It has reached an affirmative conclusion on this point. One could also ask whether the rule exists as a “general principle of law recognised by civilised nations” in the sense of Article 38 (1)(c) of the Statute of the ICJ. Volumes have been written on the subject of “general principles.” Some authors consider that the latter must meet requirements similar to those applied to customary rules (general practice and \textit{opinio juris}), which suggests that in reality this category is not an autonomous one. The mainstream view seems to be, however, that “general principles” are rules largely applied in \textit{foro domestico}, in private or public, substantive or procedural matters, provided that, after adaptation, they are suitable for application on the level of public international law.’ El \textit{Paso} (n 12) paras 621–2.
\textsuperscript{156} Ibid para 620.
\textsuperscript{157} Ibid para 623.
cannot be recognised if a Party to a contract has contributed to it. This means that the rule or principle in question may be used, under Article 31(3) of the Vienna Convention, to ascertain the meaning of Article XI of the Argentina-US BIT. Accordingly, that Article may be taken to mean that necessity cannot be invoked by a Party having itself created such necessity or having substantially contributed to it.\footnote{Ibid para 624.}

The tribunal used the PICC to corroborate the principle of preclusion of wrongfulness based on necessity, which is spelled out in the ILC Draft Articles.\footnote{ILC Draft Articles (n 140) art 25(2)(b).} While the ILC Draft Articles are used as the primary source of such a general principle, the PICC are helpful in corroborating the existence of similar principles in national legal systems.

\section*{V. The PICC and national law}

As we have seen in the earlier discussion, the PICC may be applied in investment arbitration if they have been chosen by the parties to govern the dispute. We have also seen that the PICC may be applied in investment arbitration if the tribunal finds that they express general principles of law and, therefore, may be considered as a source of international law. It is now necessary to examine how the PICC interact with the applicable national law to the extent that they are considered to be an expression of general principles. As it appears from the preamble of the PICC, one of their main functions is to ‘interpret or supplement domestic law,’\footnote{PICC 2010 (n 3) preamble, comment 6.} thus ensuring that the particular law ‘would be interpreted and supplemented in accordance with internationally accepted standards and/or the special needs of cross-border trade relationships.’\footnote{Ibid.} This may be particular useful when ‘[a]pplying a particular domestic law, courts and arbitral tribunals may be faced with doubts as to the proper solution to be adopted under that law, either because different alternatives are available or because there seem to be no specific solutions at all.’\footnote{Ibid.} As the next section will show, there is some case law showing that investment arbitration tribunals have referred to the PICC as a corroboration of the applicable national law. When the PICC confirm the applicable law, contribute to interpreting it, or supplement it in case of gaps, the interaction between the PICC and the applicable national law does not seem to give particular challenges. It is less clear, however, how the PICC may interact with the applicable national law when they are not compatible with it. As was seen earlier, international law has a corrective function in respect to the applicable national law. However, it is doubtful that this function may be exercised by principles of contract law.
Section V.2 will examine to what extent the PICC may exercise this function as well.

1. The PICC as corroboration of national law

In investment arbitration case law, there are five examples of awards that make reference to the PICC as an expression of generally recognized principles and use them as a corroboration of national law alongside other sources. In all five cases, the PICC are used to support the national law that the tribunal considers applicable. This use of the PICC in the context of investment arbitration may be particularly useful in assisting the tribunal in legitimizing their interpretation and conclusions about national law. A recurring issue in investment arbitration is the desirability of having international arbitrators—with potentially limited knowledge of a particular national legal system—interpret that legal system’s rules. The PICC in this context provide good evidence that a particular principle under a national legal system is a principle of law accepted by most legal systems (and that the tribunal’s understanding of the national law is correct). In these types of cases (where the national legal system of the respondent State is deemed the applicable law), the use of the PICC may prove valuable. Each of these five cases is detailed in the following sections (in chronological order).

A. AIG v Kazakhstan

The first case to use the PICC as a corroboration of national law is AIG v Kazakhstan, a case based on the USA-Kazakhstan BIT, where the tribunal awarded the claimant US $5.9 million for Kazakhstan’s expropriation of its investment in a real estate development project. As an ICSID arbitration, the applicable conflict rules are found in Article 42(1) of the ICSID Convention. Since the USA–Kazakhstan BIT contains no explicit choice-of-law provision, the second sentence of Article 42(1) applied. In a section on the applicable law to the dispute, the tribunal engaged in a thorough analysis and held that ‘[i]n the circumstances the Tribunal holds that the applicable law in this case is the law of the Republic of Kazakhstan (State party to the dispute)—in particular that which is contained in Claimants’ Exhibit Nos. 2 and 34—read with and controlled by the provisions contained in the BIT.’ The tribunal came to this conclusion after determining that, while the dispute was based on a treaty, the USA–Kazakhstan BIT also extends to jurisdiction over claims arising out of ‘investment authorization agreements.’ In this case, the investment authorization agreement between the claimant and respondent contained an applicable law provision calling for the

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163 AIG (n 13).
164 Treaty between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment (12 January 1994) [USA–Kazakhstan BIT].
165 AIG (n 13) para 10.1.1.
166 Ibid para 10.1.4.
167 Ibid para 10.1.3.
application of Kazakh law.\textsuperscript{168} The PICC are mentioned in the award in the section titled: ‘Mitigation of Damages: Offer of Alternative Site and its Refusal.’\textsuperscript{169} In this section the tribunal analysed Kazakhstan’s offer to provide an alternative piece of land for the real estate development project and the claimant’s refusal to accept the alternative. The PICC are mentioned along with other principles where the duty to mitigate damages has been incorporated, to corroborate Kazakh Law.\textsuperscript{170} The tribunal noted:

As to the competing pleas of the parties with regard to the offer of an alternative site and the ‘duty to mitigate,’ the findings and conclusions of this Tribunal are as follows:

(1) Mitigation of damages, as a principle, is applicable in a wide range of situations. It has been adopted in common law and in civil law countries, as well as in International Conventions and other international instruments—as for instance in Article 77 of the Vienna Convention and Article 7.4.8 of the UNIDROIT Principles for International Commercial Contracts. It is frequently applied by international arbitral tribunals when dealing with issues of international law. In commercial trade relations, it is said that a purchaser ‘... must take measures that are reasonable in the circumstances to mitigate the loss ...’ (Vienna Convention, Article 77): as when for example a seller fails to deliver materials contracted to be sold, and the buyer neglects to purchase substitute materials available in the market, the shutdown losses that the purchaser could have prevented would not be recoverable.\textsuperscript{171}

After detailing the prevalence of a duty to mitigate damages in legal doctrine (both national and international), the tribunal held that:

there was no ‘obligation’ on the part of the Claimants—either in contract or in principle or in law—to accept an alternative site in place of the agreed and allocated Project site; not only was the offer of an alternate site in breach of contract and wrongful; the taking itself was also wrongful and arbitrary i.e., not in accordance ‘with procedures established by (current) Kazakhstan legislation’ as admitted in the [minutes] of the high powered Working Group (of September 5, 2000) and hence the

\textsuperscript{168} The BIT itself establishes a rule of law as between the parties thereto: Article VI(1) of the BIT provides that an investment dispute (for the purposes of that Article) is a dispute between a party and a national or company of the other party that arises out of or relates to inter alia an “investment agreement between that party and such national or company” as well as “an investment authorisation granted by that Party’s foreign investment authority to such national or company.” Contract no 0159-12-99 dated December 13, 1999 (Claimants Exhibit no 3) is the Investment contract or authorization with respect to which an investment dispute has been raised ... The Investment Agreement/authorization with respect to which an investment dispute has been raised ... The Investment Agreement/authorization with respect to which an investment dispute has been raised ... The Investment Agreement/authorization with respect to which an investment dispute has been raised ...

\textsuperscript{169} Ibid para 10.6.

\textsuperscript{170} ‘The law of Kazakhstan spells out the consequences of not taking reasonable measures to mitigate losses—particularly in paragraph 20 of Resolution no 5 dated July 21, 1954 of the Plenum of the Supreme Arbitration Tribunal of the Republic of Kazakhstan (concerning practices of solving Claims for compensation or damages)—in the latter it is stated that ‘in seeking recovery of damages in form of lost profits, arbitration tribunals should note that a creditor may not claim compensation or damages that it would have avoided had it taken necessary measures to reduce them.’ Ibid para 10.6.4(3).

\textsuperscript{171} Ibid para 10.6.4
alleged duty to mitigate damage under international law did not need to be exercised any further.\footnote{Ibid para 10.6.5(1).}

In this situation, the tribunal held that the claimants had no obligation to accept an alternative site under Kazakh law, and, therefore, there was no duty to mitigate damages that ever arose in this context.

\textbf{C. African Holding v Democratic Republic of Congo}

The second case where the PICC were cited to corroborate national law is in the ICSID arbitration of \textit{African Holding v Democratic Republic of Congo (DRC)}.\footnote{African Holding (n 13).} The dispute arose out of a contract between the claimant and the DRC and regarded the question whether performance under the contract breached DRC’s obligations under the USA–DRC BIT.\footnote{Treaty between the United States of America and the Republic of Zaire Concerning the Encouragement and Reciprocal Protection of Investments, with Protocol (3 August 1984) [USA–DRC BIT].} A majority declined jurisdiction over the claim because the dispute initially arose out of events that had taken place when the investment was under the control of a Belgian company and therefore could not be protected under the USA–DRC BIT.\footnote{African Holding (n 13) para 123.}

There is no discussion or analysis of the applicable law. The tribunal appears to have applied Congolese law to the contract and international law to the claims under the treaty, but this is not explicitly stated. The tribunal made three references to the PICC as general principles of contract law corroborating Congolese law. The first citation to the PICC refers to the principle that a contract need not be in writing and that it may be proven by other evidence.\footnote{The contract issue in this dispute was destroyed or lost during a period of civil strife in the DRC in the 1990s.} The tribunal decided that under both Congolese law and the PICC, a contract does not have to be in writing:

\begin{quote}
[C]ontracts do not necessarily need to be made in writing following Congolese legislation or international law. In fact, Article 1.2 of the UNIDROIT Principles of International Commercial Contracts expressly provides that a contract must not be concluded in or evidenced by writing and that it may be proved by all possible means, including by a witness.\footnote{African Holding (n 13) para 32. Original in French: ‘[L]es 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.’}
\end{quote}

The second reference to the PICC cites the principle that the existence of a contract can be inferred from the conduct of the parties:

\begin{quote}
We reach the same conclusion when assessing the matter in accordance with UNIDROIT Principles mentioned above, more particularly pursuant to Article 2.1.1, a contract
\end{quote}
can also be concluded from the conduct of the parties which is showing sufficiently their agreement. This is the case in the present matter even if no written text were made.\(^{178}\)

Here, the tribunal is referring to the PICC to support the conclusions of an expert witness giving evidence on the respondent’s conduct in relation to the contract. The third reference to the PICC states the principle that non-performance by one party to a contract is considered a default on its obligations by that party. The tribunal stated:

The Tribunal concludes in this respect that the nature of the dispute concerns the fact that work has been performed under a contract and that the costs incurred were not paid for a long period over fifteen years. If the DRC has officially refused to pay or remained silent is not important with regards to the nature of the dispute. The fact is that DRC is in breach of its obligations in terms of the agreement, which implies non-performance as provided by article 7.1.1 of the UNIDROIT Principles. Pursuant to the same article, non-performance includes defective performance or late performance. Furthermore, the fact that DRC offered to renegotiate its debts and to pay only a fraction of its value can only be treated as an official refusal. Even if DRC had accepted to pay, but has in fact not paid, the nature of the dispute would have stayed to same: before as after the critical date: the value of the work performed was not paid.\(^{179}\)

The three general principles of contract law that are referred to in this case are very general and also exist in Congolese law and thus presented the tribunal with little challenge in applying the PICC as corroborating evidence.

C. Sax v City of Saint Petersburg

The third case to refer to the PICC as a corroboration of national law is the ad hoc UNCITRAL arbitration of Carl Sax v City of Saint Petersburg.\(^{180}\) The dispute in this case arose out of a series of agreements relating to the development of a new passenger terminal at the Saint Petersburg Airport. The contract between the parties included an arbitration clause and a choice-of-law clause. The choice-of-law clause in the Charter contract stated that ‘[t]his Charter shall be governed by appropriate Russian law, treaties, and international law.’\(^{181}\)

\(^{178}\) Ibid para 35. Original in French: ‘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.’

\(^{179}\) Ibid para 121. Original in French: ‘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.’

\(^{180}\) Sax (n 13).

\(^{181}\) Ibid para 107.
The PICC are referenced in the award in the section on the principles governing the issuance of interest.\(^\text{182}\) However, in this case, all of the claimant’s claims were dismissed on the merits. Therefore, the discussion on interest was only relevant to an allocation of costs determination for the respondents. It appears that, while the tribunal was willing to give the respondents a more generous interest rate, they were restricted by the rate that the respondents pleaded in their memorials:

Respondents have not submitted detailed allegations regarding post-award interest in the case the Tribunal’s determination would result in an award in Respondents’ favor, with the consequence that the Respondents will not be the debtors but, in the opposite, will be creditors as regards the recovery of costs. However, Respondents, commenting on Claimant’s interest claim, nevertheless, mentioned that an application of the LIBOR for 3-months deposit ‘as a rate which would not depend on the winning party’ would be appropriate . . . For the Tribunal, it seems clear that Respondents’ submission in the sense that the LIBOR for 3-month deposits should be applied, may not provide adequate remedy for actual refinancing costs . . . However, on the other hand, the Tribunal cannot go \textit{ultra petita}, i.e. beyond what had been requested by Respondents.\(^\text{183}\)

The tribunal discussed the applicable interest rate by referring to Article 7.4.9 of the PICC.\(^\text{184}\) It did this to corroborate the principle found in Article 395 of the Russian Civil Code,\(^\text{185}\) which permits the applicable rate of interest to be determined according to the jurisdiction where the prevailing party resides. However, this discussion was largely rendered moot due to the fact that the tribunal felt compelled to apply the interest rate that the respondent considered appropriate according to its pleadings.\(^\text{186}\)

\textbf{D. Al-Kharafi v Libya}

The fourth case to refer to the PICC as a corroboration of national law is the ad hoc arbitration of \textit{Al-Kharafi v Libya}.\(^\text{187}\) In this ad hoc arbitration subject to the Unified Agreement for the Investment of Arab Capital in the Arab States (Unified Agreement),\(^\text{188}\) Al-Kharafi claimed that Libya’s failure to fulfil its obligations

\(^\text{182}\) Ibd paras 808–9.

\(^\text{183}\) Ibid paras 820–6.

\(^\text{184}\) Article 7.4.9 (interest for failure to pay money) states: ‘(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 the place for payment, or where no such rate exists that place, then the same rate in the State of the currency of payment. In the absence of such a rate 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.’ PICC 2010 (n 3).


\(^\text{186}\) In other words, the tribunal ultimately did not have to make a determination on the issue for which the PICC were cited.

\(^\text{187}\) \textit{Al-Kharafi} (n 13).

\(^\text{188}\) Unified Agreement for the Investment of Arab Capital in the Arab States, Eleventh Arab Summit, Amman, Jordan, (26 November 1980) [Unified Agreement].
regarding the construction and management of a large resort complex in Tripoli was a violation of the Unified Agreement. The tribunal held that Libya was liable for US $935 million in damages.\textsuperscript{189}

The claim under the Unified Agreement was based on a contract between Al-Kharafi and Libya. Article 29 of the contract states:

In the event of a dispute between the two parties arising from the interpretation or performance of the provisions of the present contract during its validity period, such a dispute shall be settled amicably. Failing that, the dispute shall be referred to arbitration pursuant to the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States adopted on Nawar (November) 26, 1980 A.D.\textsuperscript{190}

Article 30 of the contract States that the applicable law shall be Libyan law:

\textit{[U]}nless otherwise provided for in this contract, the provisions of Law No. 5 of 1426 (1997 A.D.) on the promotion of foreign capital investment and its executive regulations, Law No. 7 of 1372 a.P. (2004 A.D.) on tourism and its executive regulations, as well as other legislation in force in Libya shall apply.\textsuperscript{191}

The tribunal held that the applicable law to the dispute was Libyan law and the Unified Agreement.\textsuperscript{192}

The reference to the PICC is in corroboration of provisions found in Libyan law. On the issue of compensation for lost profits, the tribunal cited Article 224 of the Libyan Civil Code\textsuperscript{193} as encompassing provisions on the assessment of compensation and then cited jurisprudence from the Libyan Supreme Court on the interpretation of Article 224 as confirming the right to compensation for lost profits.\textsuperscript{194} To support this conclusion, the tribunal referred to Article 7.4.2 of the PICC on full compensation\textsuperscript{195} and Article 7.4.3 on the certainty of harm principle.\textsuperscript{196}

D. Suez v Argentina

The fifth case to exemplify this use of the PICC as a corroboration of national law is in the ICSID arbitration of \textit{Suez v Argentina}.\textsuperscript{197} This dispute arose out of alleged

\textsuperscript{189} \textit{Al-Kharafi} (n 13) 386.
\textsuperscript{190} Ibid 6.
\textsuperscript{191} Ibid 68.
\textsuperscript{192} Ibid 3.
\textsuperscript{194} Ibid 368–9.
\textsuperscript{195} Article 7.4.2 (full compensation) states: ‘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.’ PICC 2010 (n 3).
\textsuperscript{196} Article 7.4.3 (certainty of harm) states: ‘(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 stability of its occurrence. (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is the discretion of the court.’ Ibid.
\textsuperscript{197} \textit{Suez} (n 13).
violations of the United Kingdom–Argentina BIT, the France–Argentina BIT, and the Spain–Argentina BIT by Argentina following its financial crisis of 2000–01. The applicable law in this dispute was selected according to Article 42(1) of the ICSID Convention. All three of these treaties contain similar explicit choice-of-law provisions that the tribunal applies. Article 10(5) of the Spain–Argentina BIT states:

The arbitral tribunal shall make its decision on the basis of this Agreement and, where appropriate, on the basis of other treaties in force between the Parties, the domestic law of the Party in whose territory the investment was made, including its norms of private international law, and the general principles of international law.

Article 8(4) of the Argentina–France BIT provides:

The ruling of the arbitral body shall be based on the provisions of this Agreement, the legislation of the Contracting Party which is a party to the dispute, including rules governing conflict of laws, the terms of any private agreements concluded on the subject of the investment, and the relevant principles of international law.

Article 8(4) of the United Kingdom–Argentina BIT states:

The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific Agreement concluded in relation to such an investment and the applicable principles of international law.

The PICC were mentioned in a separate opinion issued by the respondent-appointed arbitrator. In this opinion, the arbitrator disagreed with the tribunal’s reasoning on whether the process of renegotiating the concession contract under Argentina’s Public Emergency Act was a violation of the FET standard in the

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199 Accord entre le Gouvernement de la République Française et le Gouvernement de la République Argentin sur l’Encouragement et la Protection Réciproques des Investissements (3 March 1993) [France–Argentina BIT].

200 Acuerdo para la Promoción y Protección Recíprocas de Inversiones entre el Reino de España y la República Argentina (28 September 1992) [Spain–Argentina BIT].

201 While the decision on liability was awarded in 2010, the final award on damages and quantum remain pending as of 15 June 2014.

202 Suez (n 13) para 54.

203 In regard to how the choice of law provisions are applied, the tribunal stated: ‘The question that the Tribunal must answer is whether Argentina’s treatment of the Claimants through its legislation, regulations, and administrative actions violated its commitments under the BITs. In order to assess such treatment, for example Argentina’s actions to deal with its financial crisis, the Tribunal must make reference to and analyze Argentine law in order to judge whether those acts comply with or violate Argentina’s international obligations under the BITs. But such internal legislation and regulations by themselves cannot legally override or modify Argentina’s commitments and obligations in treaties to which it is a party.’ Ibid para 64.

204 Spain–Argentina BIT (n 200) art 10(5).

205 France–Argentina BIT (n 199) art 8(4).

206 United Kingdom–Argentina BIT (n 198) art 8(4).
BIT. In the majority decision, the tribunal held that ‘Argentina’s treatment of AASA and the Claimants during the renegotiation process that began in 2002 was a breach of its promise of fair and equitable treatment under the three BITs in question.’ They came to this conclusion after analysing the renegotiation process:

The Tribunal questions whether in reality the process thus established constituted a ‘renegotiation’ in reality or whether it was actually an effort to compel changes in the Concession under that label. In the opinion of the Tribunal, such a process cannot in fairness be said to constitute a renegotiation as that term is generally understood. It was certainly not the kind of renegotiation or revision process that AASA and the Claimants were led to expect by the legal framework of the Concession and the events of the first eight years of the Concession.

In his separate opinion, the respondent-appointed arbitrator took issue with the majority’s finding that Argentina’s forced renegotiation of the concession contract was a per se violation of the treaty. In challenging this finding, the arbitrator determined that the obligation to renegotiate contracts when faced with unforeseen events can be found in both Argentine law and in the concession contract. He stated:

Renegotiation of long-term concession contracts is far from exceptional. Several witnesses for the Claimants admitted that it was normal to renegotiate the original terms of such contracts when faced with new and unforeseen events ... I do not agree with the assumption expressed in the Decision (para. 239) that AASA was coerced into acceding to the renegotiation because, had it refused, it could have been accused of violating Article 5.1 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 the Concession Contract itself and that AASA could not lawfully refuse to renegotiate (as in fact it did not refuse).

On this basis, he concluded that the ‘renegotiation process was not per se a violation of the State’s obligations under the standard of fair and equitable treatment.’ In coming to this conclusion, he cited to the PICC to corroborate the obligation to renegotiate under Argentine law and to support his conclusion that this obligation was not extraordinary:

The international standard for such contracts [the concession contract at dispute] 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, which is moreover, in my opinion, a corollary of the good faith that should prevail in the execution of any contract.

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208 Suez (n 13) para 241.
210 Suez (n 13) separate opinion, para 50.
211 Ibid paras 47–8.
212 Ibid para 48.
To support and corroborate the position that there is an obligation to renegotiate a contract in the event of hardship, he cited the following in a footnote: ‘Cf. 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).’

2. The PICC as corrective of national law?

In order to determine whether the PICC could (or should) be applied as corrective of national law in an investment arbitration, it is first important to establish the parameters under which international law is capable of correcting national law in investment arbitration under Article 42(1), second sentence, of the ICSID Convention. In the context of ICSID arbitration, the second sentence of Article 42(1) permits the application of international law as a corrective of national law where the application of national law would be inconsistent or incompatible with public international law. In these cases, the ‘rules of international law’ are meant as a reference to international minimum standards that restrict abusive conduct by sovereigns and, therefore, are relevant only to specific elements or aspects of national law. They are not intended to substitute the details of national law with other detailed rules regulating the contractual aspects of the relationship between the parties. International minimum standards of protection regulate matters that are covered by the States’ public international law commitments to other States and are based on sources of public international law, such as treaties, CIL, judicial decisions, and writings. In addition, guidelines and other soft law mechanisms are relevant, but they are not part of international law and are applicable only if referred to or if they reflect CIL.

Finally, general principles of law are also considered as sources of international law. However, it is doubtful that international law in the context of Article 42(1), second sentence, extends to cover the principles of contract law. International law and contract law are applicable each in its own ambit. They each have different
roles: international law is complementary or corrective because it brings a different dimension, the dimension of the obligations of the State towards other States, which restrict the sovereign power to legislate (also in contract matters) when the legislation violates the State’s commitment towards other States. The function of this correction is to preserve the international commitments among States (for example, ensuring that a State does not expropriate without paying compensation), not to override an internal rule of national law and substitute it with another rule having the same function but a different content (for example, overriding the English law rule of contract law according to which unilateral promises are not enforceable with a rule according to which unilateral promises are binding). In this context, Schreuer states that:

parallel application ... [is] reasonable where compliance with mandatory standards of international law is at stake. It is much less convincing where the rules of international law derive from general principles of law. If a clear rule of law is offered by the host State’s domestic law, a comparative search for general principles is of doubtful value. It will be difficult to argue that there is a general principle of law which is at variance with the host State’s law. Moreover, general principles of law do not necessarily set minimum standards which must be complied with.

Even if the notion of international law in the context of Article 42(1), second sentence, of the ICSID Convention extended to contract law (which, as seen earlier, is doubtful), it is questionable whether the PICC are designed to have such a corrective function. The PICC may, according to their function, be used to fill gaps in the applicable national law (although it cannot be excluded that the opposite scenario may turn out to be true, and it is the PICC that need a national law to fill their own gaps). However, it is more uncertain whether the PICC may be used to override a rule of national law. According to their preamble, the PICC ‘may be used to interpret or supplement domestic law.’ This is quite a different function from the corrective function of international law under Article 42(1), second sentence. Moreover, Article 1.4 of the PICC states that ‘[n]othing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.’

It seems therefore that it is not the PICC’s function to override a rule of national law in case of contrast between the regulation contained in the law and in the provisions of the PICC. An example may assist in conveying this point. There is

the negotiations leading to the second sentence of Art 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.’ Wena Hotels (n 27) paras 21–55.

223 See section IV.1 earlier in this article; Cordero-Moss (n 30) ch 2, s 4.1.
224 Schreuer (n 22) art 42, para 211.
225 Cordero-Moss (n 30) ch 2, s 6.3.
226 PICC 2010 (n 3) preamble.
227 Ibid art 1.4.
no general duty of good faith in English law, whereas the PICC give the general
principle of good faith a prominent role.228 This distinction has repercussions on
various areas—for example, the effects of revocation of irrevocable offers are
different in English law and under the PICC,229 and the interpretation of a ter-
mination clause may also be different.230 Furthermore, the PICC regulate the
consequences of hardship, which, however, English law does not recognize.
In a dispute where the PICC are considered for application in addition to
English law, will they override English law and impose a different regulation
for irrevocable offers, termination, and hardship even though the English regu-
lation does not violate England’s international commitments?

Contract practice is an important source in the lex mercatoria and should
therefore be an important source in the interpretation of the PICC. Contract
practice, with its detailed contracts, aims at exhaustively regulating the parties’
relationship and seems to exclude any recourse to the principle of good faith, in
any case if it would entail overriding the contract terms. International contract
practice is actually heavily inspired by the drafting style based on English law,
which privileges a formal interpretation of the contract wording.231 This seems to
indicate that the principle of good faith in the PICC should be applied restrict-
ively, in spite of the prominent role that it is given in the PICC. This was con-
firmed in Lemire II.232 Rather than the PICC correcting national law, it seems that
it is contract practice that moderates the application of the PICC.

VI. Conclusion

Investment arbitration has a peculiar regime regarding the applicable law, based
on a combination of national law and international law. The PICC express prin-
ciples of contract law, and their applicability may be relevant in two situations: (i)
where the PICC have been chosen as the applicable contract law and (ii) where the
PICC are considered as proof of general principles that are part of international
law according to Article 38(1)(c) of the ICJ Statute and they are used to corrob-
orate international law or national law.

Regarding the first situation, the part of an investment arbitration that does not
have public international law implications is governed by the applicable law,
including contract law. This does not necessarily have to be a national law—
the parties are given the possibility of choosing ‘rules of law’ to regulate their
relationship and may thus choose a combination of national laws and soft law
sources, such as, for example, the PICC. There does not seem to be any case law

228 Cordero-Moss (n 30) ch 2, s 4.2.
229 Ibid ch 4, s 6; PICC 2010 (n 3) art 2.1.4.
230 Cordero-Moss (n 30) ch 2, s 4.2.4, 4.3.
231 Ibid ch 1.
232 Lemire II (n 10) para 114; see generally s III earlier in this article.
based on such a choice however. If an investment dispute is subject to arbitration rules that give the tribunal the possibility of applying ‘rules of law’ even absent a choice by the parties, such as the arbitration rules of the ICC, the SCC, or the LCIA, and to the extent that the PICC give a sufficient regulation of the disputed matter, the PICC may be used as the applicable law on the tribunal’s initiative. There does not seem to be any case law based on such a determination by the tribunal however.

In investment disputes subject to the ICSID Convention or the UNCITRAL Arbitration Rules, the arbitral tribunal has to apply a national law. There is some case law showing that the PICC, to the extent that they are deemed to be an expression of generally recognized principles of contract law, are used to corroborate the applicable national law. Regarding the second situation, where international law is applied directly, to the extent that the PICC may be used as proof of the existence of general principles, they may become applicable as international law, provided that they are suitable for application as international law. There is one case applying the PICC directly as a source of international law, and some case law showing the use of the PICC as corroboration in this context. In addition, international law is meant to correct the national law when application of the latter would lead to violation of treaty obligations or of other public international law obligations of the host State. Even when the PICC may be used as proof of the existence of general principles, it is doubtful that they may be used to correct the applicable national law. There is no case law showing use of the PICC in this context.

Looking forward, it seems that the use of the PICC in investment arbitration may be enhanced by implementing measures that minimize two kinds of challenges. The first challenge lies in ensuring a uniform interpretation and application of the PICC when parties explicitly choose the PICC as the ‘rules of law’ governing their relationship. This is particularly important for the provisions that are based on broad principles or general clauses such as good faith. The earlier-mentioned *Lemire* case is an illustration of how application of the PICC provision on entire agreement clauses varies dramatically depending on the interpreter’s understanding of the role of the good faith principle in commercial contracts. The *Lemire* tribunal restricted the role of good faith and privileged a literal understanding of the contract wording, while decisions rendered by other courts and tribunals understood the PICC as giving good faith a prominent role and thus considered it capable of overriding the contract wording. As long as the PICC

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233 The *Lemire I* case incorporated some provisions of the PICC into the terms of their contract (the settlement agreement), but the parties did not choose the PICC as the applicable law governing the agreement. Ibid.

234 *AIG, African Holding, Sax, Al-Kharafi, Suez* (all n 13); see generally s V.1 earlier in this article.

235 *Petrobart* (n 11); see generally s IV.1 earlier in this article.

236 *Eureko, Gemplus, El Paso* (all n 13); see generally section IV.2 earlier in this article.

237 *Lemire II* (n 10) para 114.

238 For references and a more extensive analysis, see Cordero-Moss (n 30) ch 2 s 4.
may be understood in so diverging ways, their ability of governing a contract to the exclusion of any national laws may be questioned.

As a remedy, the UNIDROIT launched a commendable initiative in 1992: a database called UNILEX that collects case law and a bibliography on the PICC and the Convention on Contracts for the International Sale of Goods. UNILEX collects and publishes, *inter alia*, arbitral awards that contain references to the PICC. Making available the case law that (if at all published) otherwise would be scattered among the publications issued by different arbitral institutions all over the world is a valuable step in promoting the development of a uniform body of law. When the number of the collected decisions becomes significant and their level of detail is such that they can be used to determine the specific scope of general clauses such as the principle of good faith, the PICC will be in a position to contribute to the harmonization of the general contract law—assuming that the decisions do not give contradictory interpretations. As the example of the regulation of entire agreement clauses showed, however, for the moment, the body of cases is not sufficient to ensure a harmonized interpretation of the principles. Intensifying the work on UNILEX seems to be an appropriate measure to contribute to enhancing the use of the PICC as a body of rules of law that may be chosen by the parties to regulate their relationship.

Regarding the use of the PICC as proof of generally recognized principles and, thus, a source of international law, the second challenge lies in identifying which articles of the PICC express a rule that actually may be found in a large number of jurisdictions and which articles express what the authors of the PICC deemed to be the best rule. While the latter may also become general principles if, thanks to their persuasive authority, they are applied in a sufficient number of occasions, it is first of all the former that may be used directly as proof of general principles. The official commentary to the PICC has interesting and useful comments explaining the scope of each provision and giving illustration of their possible use. Integrating the comments with a part that documents to what extent the various provisions reflect rules existing in specific legal systems might contribute to considering the PICC as proof of generally recognized principles. This might enhance their use as sources of general principles of international law. As long as the PICC rely mainly on their persuasive authority, it will be easier to use them as corroboration of other sources, rather than to apply them directly.

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241 PICC 2010 (n 3) commentary.