COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC)

Edited by
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Chapter 1
General Provisions

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Article 1.4

(*Mandatory rules*)

Nothing 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.

I. Introduction

1 If the PICC apply to a contract, it is not because of any proper authority inherent to their adoption but because of an authority that derives from some law that allows their choice and thus their application.[58] This lack of original legislative authority implies that mandatory rules enacted by a jurisdiction with sovereign powers may prevail for certain questions. Art 1.4 recognizes this **subordination**, which means that the parties or an arbitral tribunal, by choosing the PICC to apply to the contract, cannot avoid the application of a number of mandatory rules that would apply also in the absence of this choice.

2 Art 1.4 mentions that these mandatory rules may have **different origins**.[59] They are of purely national origin when enacted as autonomous national legislation of a state. They are of international origin if concluded as part of an international convention that is ratified by the signatory states and then implemented in their national legal orders. Or they are of supranational origin if adopted by some supranational entity with own jurisdictional powers, such as the European Community or the UN Security Council. Furthermore, Art 1.4 indicates that the mandatory rules that must be respected are those 'applicable in accordance with the relevant rules of private international law'—which is not much more than a warning that there might be 'something out there'. This vagueness reflects the fact that the determination of whether a rule is mandatory in a certain situation is most delicate and controversial in the context both of conflict of laws and in the context of arbitration.[60] In view of this complexity, only some rough guidelines can be given in the following.

[58] See above, Preamble I paras 30–34 and Preamble II paras 2–4.

[59] See also Off Cmt 1 to Art 1.4, p 12.

[60] For an example of the unease of classic private international law doctrine with rules that define their own scope of application and may impose themselves as mandatory independent of any bilateral conflict of laws rules see S Francq, 'The Scope of Secondary Community Law in the Light of the Methods of Private

II. Types of mandatory rules that may prevail

Rules have to be taken into consideration as mandatory if they explicitly or implicitly claim **3**
to apply to a given situation. Mandatory rules are legislative tools for **implementing public policy**. They impose a specific solution, or a specific method of determining a solution for a given situation in which public interests are at stake. These public interests are the protection of weak parties such as consumers or commercial agents; the protection of third parties that may be affected by the contract, such as creditors of one of the parties, lessees or distributors; or the protection of 'diffuse' public interests like undistorted competition, the transparency of certain markets, the efficiency of the judiciary, the environment, public security, or effective tax collection. Mandatory rules are the exceptions that prove—or rather give legitimacy to—the rule of individual freedom of contract. As a consequence, the parties cannot agree on a solution different from that imposed by a mandatory rule, ie they cannot derogate from it.[61] There are two types of mandatory rules and their application depends on the legal basis for the application of the PICC.

1. Domestic mandatory rules

If a contract is subject to the law of a country, it is automatically also subject to all of its **4**
mandatory rules that implement this country's public policy.[62] This **general framework for the freedom of contract** remains applicable if the PICC apply to the contract by mere incorporation as pre-drafted contract clauses, like the INCOTERMS or the ICC Rules of Arbitration. Such a limited application of the PICC may indicate that the parties wanted rules of the PICC to complement a national law. But even if the parties want the PICC fully to govern their contract as the 'applicable law', such a choice of law in favour of non-state rules may be excluded by the law at the place of the arbitration or by the conflict of laws rules of the court confronted with the contract. In that case, the PICC are reduced to mere contractual clauses subject to all mandatory rules of the applicable national law. For example, if the laws of New York govern the contract, a number of provisions of the PICC, depending on the circumstances, may not apply because they are incompatible with common law mandatory rules,[63] such as Art 1.2, whose general principle of informality may clash with the Statutes of Fraud;[64] Art 3.2, which dispenses with the requirement of 'consideration';[65] Art 7.2.2, which establishes the availability of specific performance as a rule;[66] or Art 7.4.13, which allows for the enforcement of penalty clauses 'irrespective of its actual harm'.[67]

International Law – Or the Other Way Around?' (2006) VIII Yearbook of Private International Law 333; for the problem of mandatory rules in arbitration see above, Preamble II para 5.

[61] See eg Art 6 French Cc: 'It is not allowed to derogate by private agreement from the laws that interest the public policy and the good morals.'

[62] See above, Preamble I paras 33 and 41, and below Art 1.5 para 8.

[63] cf EA Farnsworth, 'An International Restatement: The UNIDROIT Principles of International Commercial Contracts' (1997) U of Baltimore LRev 1, 5.

[64] For the requirement of writing under the Statutes of Fraud see Farnsworth (n 55 above) para 6.1.

[65] See ibid para 2.2 n 1.

[66] ibid para 12.4.

[67] ibid para 12.18 n 5.

2. International mandatory rules

5 **(a) Potential conflict with the PICC.** Of the mandatory rules of the court's home law (the *lex fori*) not all are designed to apply to an international situation. A specific result is usually only intended for the territory over which the sovereign has jurisdiction. So if the consequences or effects of a contract unfold outside that jurisdiction, then there rarely is a legitimate interest in seeing the mandatory rules of the *lex fori* apply extra-territorially. However, even if a contract potentially has an impact within the jurisdiction, the fact that it is international may cause domestic public policy considerations to be considerably attenuated.[68] This is especially the case if the contract is governed by a foreign law, either because the parties have chosen it or because the conflict of laws rules of the court designate it as the proper law of the contract (the *lex contractus*). The applicable foreign law comes with its own public policy framework,[69] so that *a priori* the domestic mandatory rules of the *lex fori* have no reason to claim application. However, some mandatory rules of the *lex fori* represent such a strong public policy that the judge is obliged to enforce them irrespective of what solution is provided by the *lex contractus*. Only the result, or the method for determining the result, as defined by the *lex fori* is then acceptable in that country. Such strong mandatory rules are called internationally mandatory rules or *lois d'application nécessaire*, rules that impose a specific solution for a given situation **independent of any choice of law considerations**.[70] Internationally mandatory rules are the anticipation and concretization of the diffuse *ordre public* or public policy exception, which excludes the application of foreign law in those cases in which it is unacceptable because repugnant to the fundamental values of justice of the country in which the foreign law is to have effect.

6 Also the PICC come with their own little framework of public policy,[71] which applies if the PICC are chosen as the *lex contractus* either by the parties or—in case of default—by the court or arbitral tribunal in accordance with its respective conflict of laws rules. Nevertheless, there may be situations in which the law of the country in which a contract is to have effect will only accept this effect if a solution prevails that is different from that allowed under the PICC. For **example**, the PICC, and their 'own' public policy specified in Art 3.10, will not limit the duration of an exclusivity agreement in a distributorship contract unless the duration of this exclusivity amounts to an 'unjustifiable excessive advantage' for one party;

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[68] For the 'internationality' of a contract see above, Preamble I para 21.

[69] cf Arbitral Award 17 February 1984, ICC case no 4237, (1985) X YB Comm Arb 52, 55: 'It goes without saying that the Arbitrator shall have regard to [the terms of the contract and the trade usages] to the extent that they do not deviate from the mandatory rules of the applicable law'.

[70] See eg Art 7(2) of the (European) Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980, 80/934/EEC): 'Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract'. For the French understanding of '*loi d'application immédiate*' see Ph Francescakis, 'Quelques précisions sur les lois d'application immédiate et leur rapport avec les règles de conflit de lois' [1966] Revue critique de droit international privé 1; for an English perspective see TC Hartley, 'Mandatory Rules in International Contracts: the Common Law Approach' (1997) 266 Rec des Cours 337; for a comparison with American theories see TG Guedj, 'The Theory of the Lois de Police, A Functional Trend in Continental Private International Law: A Comparative Analysis with Modern American Theories' (1991) 39 Am J Comp L 661.

[71] See below, Art 1.5 paras 5 and 9.

the public policy of the PICC only polices against 'gross disparity' in the equilibrium between the parties. National or supranational competition laws police against the distortion of competition and may impose shorter limits to the duration of exclusivity agreements for the sake of avoiding the foreclosure of a market through a bundle or network of similar contracts.[72] According to Art 1.4, these competition rules will then prevail as internationally mandatory rules over the solution allowed by the PICC. Other examples are rules on compensation for commercial agents;[73] foreign exchange regulations;[74] political embargoes such as those imposed by the UN Security Council or national economic sanctions;[75] or public laws requiring import or export licences or other formalities, such as for military equipment, hazardous chemicals,[76] drugs, animals, wildlife, works of art and cultural goods.[77] The impact of the need for such authorizations is treated by Arts 6.1.14–6.1.17.

(b) Anticipating internationally mandatory rules in negotiations. Parties negotiating **7**
and drafting a contract must be conscious of, and anticipate, the possible impact of internationally mandatory rules so as to avoid bad surprises. Art 1.4 provides little help for this anticipation as it only warns of mandatory rules 'which are applicable in accordance with the relevant rules of private international law'. This is not self-evident, precisely because internationally mandatory rules by definition apply irrespective of any classic conflict of laws considerations. In essence, the parties have to, and in most cases instinctively will, look at the **laws at the places where the contract is to unfold its effect**, since mandatory rules in most cases are concerned with obtaining specific results within a given territory. If a Californian high-tech producer wants its products to be sold in Europe by commercial agents, it must be aware that European law—different from Californian law—guarantees

[72] See eg Art 81(2) Treaty establishing the European Community (EC Treaty, Rome 25 March 1957) and Art 5(a) Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (Block Exemptions Regulation) [1999] OJ L 336/21: maximum of 5 years; for the possible foreclosure effect of bundles and networks of distribution agreements see ECJ Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] I-ECR 935 [20]–[21] (based on the previous Commission Regulation (EEC) No 1983/83).

[73] See eg ECJ Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] ECR I-9305 [21]–[25], referring to Art 17 of the Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L 382/17 (transposed in the UK by SI 1993 no 3053): 'it is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause. The purpose served by the provisions in question requires that they be applied . . . irrespective of the law by which the parties intended the contract to be governed'.

[74] See eg Art VIII(2)(b) of the Articles of Agreement of the International Monetary Fund (Bretton Woods, 22 July 1944) (www.imf.org/external/pubs/ft/aa/index.htm).

[75] For economic embargoes and sanctions prohibiting certain contracts see for the UN: www.un.org/sc/committees/; for the USA: www.treas.gov/offices/enforcement/ofac/; for the European Union: http://ec.europa.eu/external_relations/cfsp/sanctions/index.htm.

[76] See eg Regulation (EC) No 304/2003 of the European Parliament and of the Council of 28 January 2003 concerning the export and import of dangerous chemicals, [2003] OJ L 169/27, which implements the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 24 September 2004) (www.pic.int); see also http://ecb.jrc.it/import-export/.

[77] For a first overview on import or export licences in the UK see www.businesslink.gov.uk/bdotg/action/layer?topicId=1074185375; in France: www.douane.gouv.fr/menu.asp?id=215.

commercial agents an indemnity in case of termination of the agency contract,[78] and that European courts will ensure that such indemnity is granted irrespective of the law chosen by the parties (even if the contract—according to the Californian model—does not provide for a post-contractual non-compete obligation).[79] If a French fashion designer wants its creations to be sold in California by commercial agents, it must be aware that Californian law—different from European law[80]—guarantees fired agents freedom from any contractual restrictions to exercise their professional activity in California,[81] and that Californian courts will strike down post-contractual non-compete obligations irrespective of the law chosen by the parties (even if the contract—according to the European model—provides for an indemnity in case of termination).[82] Furthermore, parties must be aware that their choice of a place of arbitration may also lead to the application of the mandatory laws of that country (see para 11 below).

8 (c) **Coping with internationally mandatory rules in litigation.** If the parties agreed on having the PICC govern their contract as the *lex contractus*, and if a subsequent dispute on the existence or validity of certain contractual rights leads to litigation, the precise **determination of the national laws that are mandatory** for the parties in the specific case becomes an issue. The answer is different according to whether the dispute leads to litigation in a state court or before an arbitral tribunal.

9 *(1) Internationally mandatory rules in a state court.* In the—still rather hypothetical—case in which a state court were to recognize the choice of the PICC as a genuine choice of law,[83] the court would simply look to its own ***lex fori*** and its internationally mandatory rules that may not be circumvented by the choice of the PICC. This results from the court's constitutional obligation not to lend its jurisdictional powers to any acts that could affect fundamental public policies within its jurisdiction. Circumstances may be such that the court may also want to take into consideration internationally mandatory rules of a third legal order, such as the laws of a country in which the judgment is most likely to be enforced. However, it derives from the sovereign autonomy of the state that there can be no such obligation,[84] unless accepted in a specific international treaty.

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[78] See n 73 above.

[79] See in Germany OLG München 17 May 2006 (7 U 1781/06), WM 2006, 1556, refusing to refer parties to arbitration in California under Californian law (as agreed in the contract) because of the obvious danger that the European protective legislation would not be applied; for an almost identical case in Belgium see Cour de cassation 16 November 2006 (C.02.0445.F), Revue de Droit Commercial 2007, 889.

[80] See n 72 above.

[81] § 16600 of the Californian Business and Professions Code: 'Except as provided in this Chapter, every contract by which any one is restrained from engaging lawful profession, trade, or business of any kind is void'.

[82] *Ronald Frame v Merrill Lynch, Pierce, Fenner & Smith Inc* 20 Cal App 3d 668, 672–674 (Cal App 1971), implicitly warning arbitrators not to ignore Californian law despite the parties' choice of New York law, which allows such contractual restrictions.

[83] Under the overwhelming majority of national conflict of laws rules, the choice of the PICC that is not coupled with a valid arbitration agreement will only qualify as a mere incorporation of the PICC as contract clauses, see above, Preamble I paras 33 and 50, and therefore does not affect the application of the applicable law and its mandatory rules, see para 4 above.

[84] See eg Art 7(1) Rome Convention: 'When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close

(2) Internationally mandatory rules before an arbitral tribunal. The question of whether and which mandatory rules other than those of the *lex contractus* have to be taken into consideration is much more complex for an arbitral tribunal than for state courts—and hotly disputed among academics. Arbitral tribunals do not have a *lex fori* and their jurisdictional powers do not derive from a constitution. However, the **source of arbitral jurisdiction** provides some rough guidelines. Arbitral jurisdiction has its source in the agreement between the parties to submit themselves and their dispute to the decision of an arbitral tribunal. This leads to a contract by which the arbitrators obligate themselves towards the parties to render an arbitral award in accordance with the arbitration agreement. By accepting their appointment and thus arbitral jurisdiction, the arbitrators assume an obligation of best efforts to render an award that is effective in the sense of turning the dispute into *res iudicata* so as to exclude any future dispute on the same matter and in the sense of being enforceable so as to give effect to the remedies awarded to the winning party.[85] It follows from these two elements that the arbitral tribunal must make every reasonable effort to put its award on solid legal bases so as not to expose it to the risk of being annulled or to the risk of being unenforceable. **10**

First, the arbitral tribunal, when applying the PICC as the *lex contractus*, may need to take into consideration the internationally mandatory rules of the **law at the place of arbitration**, the *lex arbitrii*, which is usually the law which controls the possibility of requesting the annulment of the award.[86] However, the place of arbitration is frequently chosen as a neutral place so that the contract and the award do not unfold their effect in that country. Therefore, they often do not fall within the scope of the mandatory rules of the *lex arbitrii*, which usually have no interest in imposing their solution on exclusively foreign situations. Swiss competition rules need not be taken into consideration by an arbitral tribunal if the contract between a French and an Italian party only unfolds its anti-competitive effect on the Italian market.[87] **11**

Second, the arbitral tribunal—for the sake of respecting its obligation of best efforts to render an enforceable award—should always take into consideration the internationally mandatory **rules of the countries in which enforcement of the arbitral award** is likely to be sought. State courts that are requested to grant leave for enforcement or *exequatur* to an **12**

connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.'

[85] cf Art 35 ICC Rules of Arbitration of 1 January 1998 and the almost identical Art 32(2) LCIA Arbitration Rules of 1 January 1998: 'In all matters not expressly provided for in these Rules, . . . the Arbitral Tribunal . . . shall make every effort to make sure that the Award is enforceable at law'.

[86] See Art 34(2)(b) of the UNCITRAL Model Law on International Commercial Arbitration; see also Art V(1)(e) New York Convention, which refers to the setting aside 'by the competent authorities of the country in which, or under the law of which, that award was made'.

[87] Example based on DFT 8 March 2006 (4P.278/2005), ASA Bull 2/2006, 363 = [2006] Rev arb 763, where the Swiss Federal Court rejected the allegation that the award made in Switzerland would violate the Swiss *ordre public* because of its conflict with European competition law and did not proceed to inquire whether the award violated Swiss competition law.

arbitral award will test the award against their own public policy.[88] Accordingly, they may refuse enforcement if the combined choice of the PICC and arbitration leads to a circumvention of the internationally mandatory rules of the forum. The degree of control under the public policy exception to enforcement varies significantly in different jurisdictions. Courts in some countries, like Germany and the USA, uphold a more or less detailed review of awards that are potentially contrary to their own internationally mandatory rules.[89] In other countries, in particular France, courts cultivate a strong pro-arbitration bias and only refuse enforcement where there is a 'blatant' violation of their own internationally mandatory rules.[90]

13 In view of the somewhat opaque veil that the rules on the review of arbitral awards spin around internationally mandatory rules at the stages of setting aside and of enforcement, it has been suggested that these rules have become merely 'semi-mandatory'.[91] Others even claim that arbitration should be interpreted as excluding the relevance of national mandatory laws al together.[92] Yet others warn that arbitration simply leads to lawlessness.[93] Be that as it may, state courts will always remain bound to their constitution and thus to—at least the core of—their public policy. If courts accept delicate subject-matters covered by mandatory rules as being capable of settlement by arbitration (instead of simply refusing enforcement due to lack of arbitrability, which was the traditional solution), this liberty can only prevail if there is sufficient certainty that at least those mandatory rules that reflect a strong public policy will be respected by the arbitral tribunal.[94] Arbitral tribunals should be fully conscious that they do not have a jester's licence and that it is in their own best interest (in terms of reputation) and in the best interest of arbitration at large that they take their **obligation of best efforts to render an irreproachable and enforceable award** seriously by respecting those internationally mandatory rules that claim application to their case.[95]

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[88] Art V(2)(b) New York Convention.

[89] In the USA *Mitsubishi Motors Corp v Soler Chrysler Inc* 473 US 614 (1985). In Germany BGH 31 May 1972 (KZR 43/71), NJW 1972, 2180, 2181; OLG Dresden 20 April 2005 (11 Sch 01/05), SchiedsVZ 2005, 210, 211. In Belgium TPI Brussels 8 March 2007 (2005/7721/A), [2007] Rev arb 303.

[90] CA Paris 18 November 2004 [2005] Rev arb 751, 758, refusing to review an award on a contract that allegedly violated European competition law (see also n 98 below); in the same sense already the Austrian OGH 23 February 1998, [1999] Rev arb 384, 386.

[91] LG Radicati di Brozolo, 'Mondialisation, juridiction, arbitrage: vers des règles d'application semi-nécessaire?' (2003) 92 Revue Critique de Droit International Privé 1; *idem*, 'Antitrust: A Paradigm of the Relations between Arbitration and Mandatory Rules: A Fresh Look at the "Second Look"' [2004] Int'l Arb LRev 23.

[92] Ph Fouchard, 'La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine' [1997] Rev arb 351; A Mourre, 'Le libre arbitre, ou, L'aveuglement de Zaleucus (variations sur l'arbitrage, l'ordre public et le droit communautaire)' in F Bohnet and P Wessner (eds), *Mélanges en l'honneur de François Knoepfler* (2005) 283.

[93] See eg PhJ McConnaughay, 'The Risk and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration' (1999) 93 Nw U LRev 453; SJ Ware, 'Default Rules from Mandatory Rules: Privatizing Law Through Arbitration' (1999) 83 Minnesota LRev 703.

[94] For the classic conception that only restricted arbitrability can justify a restriction of the review on public policy grounds compare points (a) and (b) of Art V(2) New York Convention.

[95] P Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 Arb Int'l 274, 284–285. For a positive empirical evaluation see C Drahozal, 'Contracting Out of the Uniform Commercial Code: Is Arbitration Lawless?' (2006) 40 Loyola of Los Angeles LRev 187, 215: 'The [empirical] research to date,

Arbitral tribunals may well find that an internationally mandatory rule does not want to apply to their specific situation, or that its conditions are simply not met.[96] But for reaching that finding, they should respect the interpretations given to that rule by courts of the rule's country of origin.[97]

14 In summary, arbitrators will do well in taking into consideration those mandatory rules mentioned above, or at least those pleaded by one party during arbitral proceedings,[98] so as to avoid the risk of annulment or refused enforcement and a potentially embarrassing discussion of their findings.[99] This implies that they should be most careful in **sufficiently justifying the application or, moreover, the non-application** of any internationally mandatory rules which the parties have argued, since the clearer the reasoning of the award on this point, the less probable it is that a state court will review the details of the merits.[100]

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however, suggests that perhaps arbitration is less lawless than is sometimes feared'; but see JJ Johnson, 'Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration' (2005) 84 North Carolina LRev 123, 141–146: 'In spite of lack of current statistically significant evidence as to whether arbitrators are applying the law [in securities exchange arbitrations], there are many reasons to believe that they are not'.

[96] See in the USA *Audi-NSU Auto Union AG v Overseas Motors Inc*, III YB Comm Arb 291, 292 (ED Mich 1977), where an alleged violation of US competition law was simply dismissed as unsubstantiated by the US court, which stayed its proceedings so as to allow arbitration in Switzerland.

[97] See AS Rau, 'The Arbitrator and "Mandatory Rules of Law"', American Review of International Arbitration (forthcoming, available at http://ssrn.com/abstract=1078737) at n 25, criticizing Arbitral Award 1992, ICC case no 6320, (1992) XX YB Comm Arb 62, 98–103 where the arbitrators refused to hear a claim for treble damages under the US Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 USC 1964(c).

[98] For the possible consequences of the parties' omission to plead the application of internationally mandatory rules during arbitral proceedings see CA Paris 18 November 2004 (n 90 above) 755–756, where the refusal to review the award for possible violations of European competition law was mainly based on the fact that the party seeking annulment had never before invoked the issue that the contract would violate competition rules.

[99] cf EA Posner, 'Arbitration and the Harmonisation of International Commercial Law: A Defense of Mitsubishi' (1999) 39 Virginia J Int'l L 647, 667–668.

[100] D de Meulemeester and M Piers, 'Merits revisited? Arbitral Award, Public Policy and Annulment – The Belgian Experience' (2007) 25 ASA Bull 630, 641; LG Radicati di Brozolo, 'L'illicéité "qui crève les yeux": critère de contrôle des sentences au regard de l'ordre public international (à propos de l'arrêt Thalès de la Cour d'appel de Paris)' [2005] Rev arb 529, 546–547.

Article 1.5

(*Exclusion or modification by the parties*)

The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles.

I. Scope

1 Art 1.5 addresses what in early drafts was entitled the '**party autonomy**'.[101] The parties may decide that the PICC shall govern their contract; they may, just as well, decide that the PICC shall not, or not entirely, govern their contract. However, if the parties want the PICC to govern their contract in general, they should be conscious that the PICC are designed to apply only if a few essential provisions are left unaltered by the contract.

II. Exclusion of the PICC *in toto*

2 In principle, the PICC only apply to the contract if the parties have chosen them as applicable rules (paragraph 2 of the Preamble).[102] The possibility of excluding—instead of simply not choosing—the PICC is relevant in the light of paragraphs 3 and 4 of the Preamble. If the parties have agreed that their contract is to be governed by general principles of law, the *lex mercatoria* or alike, circumstances may be such that they did not want the PICC to apply. Similarly, there may be situations in which the parties have not chosen any law to govern their contract, but they have, explicitly or implicitly, excluded the application of the PICC.[103] Such a **negative choice** should be respected.

3 An exclusion of the PICC may also be included **in standard terms**. In view of the frequent practice of excluding of the application of the CISG in standard terms, a clause in standard term excluding the applicability of the PICC will probably not qualify as 'surprising' in the sense of Art 2.1.20. Such a clause should regularly prevail, since even if the PICC were applied to the formation of the contract, the application of the 'knock-out' rule of

[101] This expression was used up to the ninth consolidated draft: (1991) Study L – Doc 40.7, p 1, draft Art 1.3.

[102] Whether the parties are free to choose the applicable rules is a question of the conflict of laws rules binding the court or arbitral tribunal confronted with them, see above, Preamble I para 30.

[103] See above, Preamble II para 36.

Art 2.1.22 allows the exclusion clause to neutralize any clause providing for the application of the PICC. Their application is then excluded under paragraph 2, but also under paragraph 4 of the Preamble.

III. Derogation from or variation of certain provisions

4 The possibility of choosing the PICC in general while excluding some of their provisions is not only stated in Art 1.5 but also mentioned in the model clauses proposed in the official footnote of the Preamble.[104] The parties may have good reasons to exclude some of the provisions that they do not find sufficiently convincing or well adapted to their particular purposes.[105] The parties can deselect certain provisions and leave the gaps to be filled by the applicable law, or they may designate the laws or rules they find more fitting for these specific situations. Or they can, consciously or unconsciously, stipulate specific solutions directly in the contract and thereby derogate from the suppletive provisions of the PICC.[106] This approach of 'picking the raisins', of ***dépeçage***, or of simply of overwriting some of the provisions of the PICC supposedly has some limits.

1. Mandatory rules in the PICC

5 It may be the case that the parties want their contract to be governed partially by the PICC, but there are some circumstances in which the PICC, even if chosen, **refuse to apply**. The drafters of the PICC considered that their creation could not be applied sensibly, or in 'good faith', if amputated of some essential features; they therefore tried to construe a mechanism that would force a 'take-it-or-leave-it' logic on parties trying to loot the PICC. As announced in Art 1.5, some provisions of the PICC explicitly or implicitly declare themselves mandatory. They thereby try to impose on the parties a kind of own *ordre public*, a public policy that defines the core of a minimum standard of justice without which the PICC refuse to apply.

6 The **mandatory provisions** that explicitly do not accept any derogation are: Art 1.7, which enunciates the general obligation of 'good faith and fair dealing'; Arts 3.8–3.11, 3.14–3.18, and 3.19, which guarantee the right to avoidance in case of fraud, threat, or gross disparity;[107] Arts 5.1.7(2) and 7.4.13(2), which ensure the test of reasonableness of a price determination by one of the parties and of contractual penalties; and Art 10.3(2), which imposes restrictions on the shortening and extension of limitation periods.[108] A provision that is not explicitly but implicitly mandatory due to its protective nature is Art 7.1.6, which submits exemption clauses to the test of gross unfairness.

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[104] See above, Preamble I para 46.
[105] See also above, Preamble I para 6.
[106] For the generally suppletive character of the PICC see above, Preamble I para 9.
[107] See in detail below, Art 3.19.
[108] For the criticism of this provision see below, Art 10.3 para 4.

7 Another provision considered mandatory by the Official Comment is Art 1.8,[109] which states the general **principle of reasonable reliance** and the related prohibition of *venire contra factum proprium*. This characterization is, however, slightly misleading. Art 1.8 can only operate if reliance on an understanding caused by the other party is reasonable. Reliance is, however, not reasonable if there is an explicit warning or a clear allocation of risk. Each party must be allowed to prevent the other party from making inferences and relying upon them without seeking prior explicit clarification. Any purported 'derogation' from Art 1.8 or from any proviso of reasonable reliance in the specific provisions can be re-interpreted as a clear warning that reliance on uncorroborated inferences is unreasonable. Reasonable reliance is virtually excluded when the unambiguous wording in a letter of intent or in a memorandum of understanding provides for a restricted interim regime before the final contract is executed according to Art 2.1.13.[110] The same holds true for a strict 'no oral modification clause' under Art 2.1.18.[111] During the pre-contractual stage, the parties are sufficiently protected by the mandatory subsequent right to avoid the contract in case of fraud, threat, or gross disparity under Arts 3.8–3.10. The same logic applies to Art 2.1.15(2), which is not mandatory because parties may have a legitimate interest in excluding the risk of seeing their aggressive negotiation strategy interpreted as 'bad faith'. A party that accepts the continuation of negotiations despite a clear warning in this sense waives its right to rely on the absence of 'bad faith'.[112] Additionally, a clear warning to treat exclusively with accredited agents will bar reliance on a supposedly apparent authority under Art 2.2.5(2).[113] An explicit reservation of the possibility to modify or to revoke a third party right before acceptance by the beneficiary excludes any earlier reliance on the conferred right under the second limb of Art 5.2.5.[114] What the parties cannot derogate from is the very core of Art 1.8, the protection against fraud. Art 1.8 cannot be excluded for cases in which the insistence on any such prior waiver or warning is clearly abusive because one party tricked the other party into an inevitable mistake and was conscious that the other party would act to its detriment in reliance thereon. Art 1.8 is thus mandatory in the sense that it guarantees this minimum protection also beyond the pre-contractual stage (for which Arts 3.8 and 3.9 apply as *leges speciales*).

2. Consequences of non-respect for mandatory rules in the PICC

8 If the PICC are **merely incorporated** into the contract by reference, there is no need for a special public policy of the PICC since the public policy of the applicable law fully controls.[115] Derogation from a self-proclaimed mandatory rule of the PICC is then only problematic if the applicable law contains an identical mandatory rule.

9 In contrast, if the PICC are **chosen as the 'applicable law'** in the sense of choice of law under paragraph 2 of the Preamble, the intention of the PICC not to apply without their 'public

[109] Off Cmt 3 to Art 1.5, p 14.
[110] See below, Art 2.1.2 para 13 and Art 2.1.13 para 7.
[111] See below, Art 2.1.18 para 2.
[112] See below, Art 2.1.15 para 3.
[113] See below, Art 2.2.5 para 18.
[114] See below, Art 5.2.5 para 7.
[115] See above, Preamble I paras 33 and 41 and Art 1.4 para 4.

policy provisions' should in principle be respected just as the public policy of any other chosen law.[116] By choosing the PICC as applicable law, the parties 'deselect' the otherwise applicable law and its general public policy. Only those laws claiming mandatory application not only in the domestic but also in the international context can possibly have an impact (Art 1.4). The vacuum of public policy created by the choice of law is thus to be filled by the own public policy of the PICC. As a consequence, derogations of a 'mandatory' provision of the PICC should not be given effect. However, an open conflict between contractual stipulations and mandatory provisions of the PICC may indicate that the parties' choice of the PICC was not a 'choice of law' in the first place but a mere incorporation of the PICC into their contract by reference, so that only the mandatory rules of the applicable law control.[117]

10 The same logic applies if the court or the arbitral tribunal is confronted with the question of whether the **PICC** '**may be applied**' according to paragraphs 3 and 4 of the Preamble, ie when the parties have chosen general principles of law, the *lex mercatoria* or alike or have not chosen any law to govern their contract. An open conflict between the contractual stipulations and the 'mandatory' rules of the PICC will indicate that the PICC are not the adequate body of rules to govern the contract.

11 This being said, the refusal of an arbitral tribunal to enforce the self-proclaimed mandatory rules of the PICC against the parties' explicit intention, or the tribunal's choice to apply the PICC despite incompatible contractual stipulations which are then struck down, will most likely not affect the effectiveness of the final award, since the merely 'wrong' application of the law is **not a ground for objecting to the enforcement of the award** under Art V of the New York Convention.[118] The self-proclaimed mandatory nature of some of the provisions of the PICC is therefore dependent on whether the court or tribunal confronted with them is persuaded by their claim of being essential for making a just decision.

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[116] See above, Preamble I paras 32 and 41.

[117] Similarly EM Belser, 'Die Inhaltskontrolle internationaler Handelsverträge durch internationales Recht: Ein Blick auf die Schranken der Vertragsfreiheit nach *UNIDROIT Principles*' in M Immenhauser and J Wichtermann, *Vernetzte Welt – Globales Recht* (Jahrbuch Junger Zivilrechtswissenschaftler 1998) 73, 79.

[118] See above, Preamble II paras 78–81.