

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

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COMMENTARY ON THE
UNIDROIT PRINCIPLES
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COMMERCIAL
CONTRACTS (PICC)

Edited by

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PREFACE

Summer in Hamburg can be surprisingly hot. This is particularly true for the ‘greenhouse office’ of the former Annex of the Max Planck Institute for Comparative and Private International Law in Mittelweg 41b. And it was a very hot summer day indeed on which the editors of this volume, whilst working in this ‘greenhouse’ on completely unrelated topics, realized that both of them would find it helpful to have a thorough explanation of the individual provisions of the UNIDROIT Principles of International Commercial Contracts. They knew that many writers had dealt with the legal nature, the purposes, and the applicability of these Principles. But surprisingly little had been written on the substantive content of their 185 articles. This seemed unfortunate. After all, those to whom the Principles are addressed—business people, lawyers, arbitrators, judges, and legislators—are usually less concerned with grand theory than with the solution to a particular legal problem. There was, it seemed, a need for an article-by-article commentary.

This is what we decided to embark on, and as soon as cooler days arrived—as they tend to do quickly in Hamburg—we became aware of the complexities which lay ahead. Fortunately we were able to assemble an international team of 14 contributors from nine different jurisdictions spread over three continents. Most of us were trained in at least two legal systems and many of us work in a country that is not our home jurisdiction. We hope therefore that we have been able to shed our national legal preconceptions as far as possible in order to write a book that deals with transnational law and is addressed to an international audience. Our task was not facilitated by the fact that we had to venture into largely uncharted territory. There is not only a dearth of academic literature on the substance of the Principles, but also a relative paucity of published case law in the field. We made full use of the published court decisions and arbitral awards, we carefully scrutinized the existing literature, and we extensively analysed the *travaux préparatoires* of the Principles. Nevertheless, much of our discussion of the articles had to be pro-active and forward looking: we asked ourselves which legal issues might arise under the Principles in the future and how they would best be resolved.

In doing so, we realized that the experiences of existing contract laws provide good indications of typical fact patterns and legal problems arising in practice, so we frequently included comparative observations on domestic and international contract law regimes. Of course, we were acutely conscious of the need to interpret the Principles ‘autonomously’, ie to understand their provisions in the context of the instrument and not by simple reference to a particular meaning that happens to be accepted in the contract law of any one particular jurisdiction. But in our view it does not follow that all references to other laws must be religiously avoided. The Principles were not drafted in a vacuum, but against the background of a wide variety of existing contract laws. As with any other text, it is impossible fully to understand them without a proper knowledge of their context. Moreover, at times even a cursory comparative survey on a given issue can assist the reader in assessing the persuasive authority of a particular provision of the Principles by supporting (or rebutting)

the claim that the provision in question represents a ‘restatement’ of a ‘general principle of law’. It is important to emphasize that we did not set out to provide comprehensive and abstract comparative studies. We rather drew selectively on particular problems and solutions that have arisen and have been tested in other legal systems if we found them useful for spotting potential problem areas and devising prospective solutions in the context of the Principles. Finally, we believe that the occasional comparative side glance is a useful service to a readership that will inevitably be based in a wide variety of jurisdictions: access to the Principles is facilitated if both their familiar and unfamiliar features are highlighted.

The editors and the contributors discussed these issues and related methodological questions at three workshops where we criticized each others’ drafts and tried to devise a common approach to structuring our contributions. This does not mean that an attempt was made to impose a uniform outlook or a uniform style. Even more importantly, the contributors to this volume do not subscribe to a uniform agenda. In fact it might be argued that we do not pursue a particular agenda at all. As yet, a substantial part of the existing literature on the Principles has been written by those who are fundamentally opposed to the very notion of a transnational ‘soft law’ in the area of international commerce. Perhaps an even greater body of scholarship has been produced by authors who were involved in the drafting of the instrument and who have a legitimate interest in promoting its virtues. As opposed to this, we have neither come to bury the Principles nor to praise them. Our approach is pragmatic. All we hope to offer is a balanced, reliable, comprehensive, and—if necessary—critical analysis of the provisions which will provide guidance for those who wish to avail themselves of the Principles. In doing so, we are fully aware that we are dealing with a non-binding, perhaps even ‘virtual’ law that is, with very few exceptions, authoritative only to the extent that the parties wish it to be so. Nonetheless, if they share this wish and if the applicable law is not opposed to it, their choice must be taken seriously. Thus, for the purposes of this commentary we treat the Principles as we would treat a binding contract law—which includes occasional advice to the parties to exert their autonomy and derogate from a provision if necessary.

This book is a first attempt to tackle a difficult subject. It was produced with an enormous amount of enthusiasm, but also in the face of a number of unforeseeable adversities. The editors are aware that much remains to be perfected, adapted, and revised, and we hope that a future edition will give us an opportunity to do so. We would be grateful to receive any comments, suggestions, or corrections you might have. Please send them to stefan.vogenauer@law.ox.ac.uk or j.kleinheisterkamp@lse.ac.uk.

For the editors, the privilege of collaborating with such an excellent, inspiring, and frequently hilarious group of lawyers from many different legal backgrounds easily offset the more mundane challenges that arose from the international character of the project. As it happened, almost the entire editorial work for this first edition had to be assumed by Stefan Vogenauer at Oxford. He received considerable assistance from Andrew Marshall whose Australian sense of humour, coupled with the linguistic awareness of a top debater, the sharp analytical skills of an Oxford BCL, and the trained solicitor’s ability to spot a missing comma across the room, made him the perfect companion for this venture. We are extremely grateful for his support, as we are for the help of other students or former students who were

involved at one stage of the project or another: Martin Flohr, Thomas Führich, Desislava Koleva, Veronika Korom, Catherine Lee, Matthias Maurer, and Olaf Meyer. Rebecca Howes, Rachel Mullaly, Fiona Stables, and Kate Whetter of Oxford University Press displayed a degree of professionalism in supervising our progress that we hope to emulate in the future. Financial support was provided by the Foundation of the HEC School of Management, Paris, where Jan Kleinheisterkamp was an Assistant Professor during the realization of the project and by the Research Support Fund of the Oxford Law Faculty. We also gratefully acknowledge that Professor Herbert Kronke, Secretary General of UNIDROIT, gave us permission to reproduce the text of the 2004 edition of the Principles. We are particularly grateful to our wives, Jutta and Stéphanie, for having supported us, and *supporté*, particularly during the less elevating stages of this project.

This book is dedicated to Veronika Elisabeth Vogenauer and Anton Kleinheisterkamp. Both were born whilst it was in the making. They may reasonably expect to see more of their fathers in the future.

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<http://www.pbookshop.com>

ABBREVIATIONS

A 2d	Atlantic Reporter, Second Series (USA)
AA	Ars Aequi (Netherlands)
AC	Law Reports, Appeal Cases, House of Lords and Privy Council (1890–) (United Kingdom)
AcP	Archiv für die civilistische Praxis (Germany)
ACT SC	Supreme Court of the Australian Capital Territory (Australia)
ADC	Anuario de derecho civil (Spain)
Add	Addenda to CD documents (UNIDROIT)
ADR	Alternative dispute resolution
AEPL Code	Académie des privatistes européens (Academy of European Private Lawyers), <i>Avant-projet d'un Code européen des contrats – Preliminary Draft of a European Contract Code</i> (2001)
AG	Amtsgericht (German District Court); or Documents issued in connection with UNIDROIT's General Assembly
A Int'l Arb J	Asian International Arbitration Journal (Singapore)
AJP	Aktuelle Juristische Praxis/Pratique juridique actuelle (Switzerland)
Ala	Alabama Court of Appeals (USA)
Alberta CA	Court of Appeal of Alberta (Canada)
ALI	American Law Institute (USA)
ALJ	Australian Law Journal (Australia)
All ER	All England Law Reports (England)
All ER (Comm)	All England Law Reports (Commercial Cases) (England)
All ER (D)	All England Direct Law Reports (Digests) (England)
Am Bus LJ	American Business Law Journal (USA)
Am J Comp L	American Journal of Comparative Law (USA)
Am Rev Int'l Arb	American Review of International Arbitration (USA)
Annual Survey of Int'l & Comp Law	Golden Gate University School of Law Annual Survey of International & Comparative Law (USA)
App	Corte d'Appello (Italian Appeal Court)
App Cas	Law Reports, Appeal Cases, House of Lords and Privy Council (1875–1890) (United Kingdom)
APRDO	P Catala (ed), <i>Avant-projet de réforme du droit des obligations et de la prescription</i> (2006) (http://lesrapports.ladocumentationfrancaise.fr/BRP/054000622/0000.pdf) (France)
Arb Int'l	Arbitration International (United Kingdom)
Arb J	The Arbitration Journal (USA)
Ariz J Int'l & Comp L	Arizona Journal of International and Comparative Law (USA)
Art(s)	article(s)
ASA Bull	Bulletin de l'Association suisse de l'arbitrage (Switzerland)
ASEAN	Association of South East Asian Nations

Abbreviations

Ass plén	Cour de cassation, Assemblée plénière (Full Assembly of the French Court of Cassation)
Aust Bus LRev	Australian Business Law Review (Australia)
Austrian Cc	Allgemeines Bürgerliches Gesetzbuch of 1 June 1811 (www.ris.bka.gv.at/bundesrecht/)
Bamberger/Roth/contributor	HG Bamberger and H Roth (eds), <i>Kommentar zum Bürgerlichen Gesetzbuch, vol I: §§ 1-610, CISG</i> (2nd edn, 2007) (Germany)
BaslerKomm/contributor	H Honsell et al (eds), <i>Basler Kommentar Obligationenrecht I: Art. 1-529 OR</i> (4th edn, 2007) (Switzerland)
BB	Der Betriebsberater (Germany)
BCC	British Company Cases (United Kingdom)
BCCA	British Columbia Court of Appeal (Canada)
BCLC	British Company Law Cases (England)
BernKomm/contributor	<i>Berner Kommentar zum schweizerischen Privatrecht</i> (Switzerland)
BezG	Bezirksgericht (Austrian/Swiss District Court)
BGer	Bundesgericht (Swiss Federal Tribunal)
BGH	Bundesgerichtshof (German Federal Court of Justice)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany)
Bianca/Bonell/contributor	CM Bianca and M Bonell (eds), <i>Commentary on the International Sales Law: the 1980 Vienna Sales Convention</i> (1987) (Italy)
Brussels Convention	European Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters
Brussels Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Bull civ	Bulletin des arrêts de la Cour de cassation, Chambres civiles (France)
Burr	Burrow's King's Bench Reports, tempore Mansfield (England)
Bus Law	The Business Lawyer (USA)
CA	Cour d'appel (French Appeal Court); or Court of Appeal (England)
Cal	California Supreme Court (USA)
Can Bus LJ	Canadian Business Law Journal (Canada)
Cass	La Suprema Corte di Cassazione (Italian Court of Cassation)
Cass civ	Cour de cassation, Chambre civile (Civil Chamber of the French Court of Cassation)
Cass com	Cour de cassation, Chambre civile, Section commerciale (Commercial Chamber of the French Court of Cassation)
Cass req	Cour de cassation, Chambre des requêtes (Chamber for Petitions of the French Court of Cassation)
Cass soc	Cour de cassation, Chambre sociale (Social Chamber of the French Court of Cassation)
Cc	Civil code

Ccom	Commercial code
CCP	Court of Common Pleas (England)
CD	Documents issued in connection with UNIDROIT's Governing Council
cf	compare
CFR	Common Frame of Reference (European Union); or Cost and freight (Incoterm)
ch(s)	chapter(s)
Ch	High Court of Chancery (England); or Law Reports, Chancery Division (1890–) (England)
ChD	Law Reports, Chancery Division (1875–1890) (England)
Cian/Trabucchi/contributor	G Cian and A Trabucchi (eds), <i>Commentario breve al Codice civile</i> (8th edn, 2007) (Italy)
CIF	Cost, insurance, freight (Incoterm)
CIM	Convention internationale concernant le transport des marchandises par chemins de fer/International Convention on the Carriage of Goods by Rail (Berne, 7 February 1970)
CIP	Carriage and insurance paid to (Incoterm)
Cir	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)
CISG-AC	Advisory Council of the Vienna Convention on Contracts for the International Sale of Goods (www. cisg-online.ch/cisg/cisgac.html)
CISG-online	Internet database on the CISG, University of Basel (www.cisg-online.ch/index.html) (Switzerland)
CISG Pace	Internet database on the CISG, Pace University School of Law (www.cisg.law.pace.edu/) (USA)
CILSA	Comparative and International Law Journal of Southern Africa (South Africa)
CJ	Chief Justice
Cl & F	Clark & Finnelly's House of Lords Cases (England)
CLC	CCH Commercial Law Cases (United Kingdom)
CLE	Commercial Laws of Europe (United Kingdom)
CLJ	Cambridge Law Journal (United Kingdom)
CLOUT	Case Law on UNCITRAL Texts (www.uncitral.org/ uncitral/en/case_law.html) (United Nations)
CLP	Current Legal Problems (United Kingdom)
CLPRC	Contract Law of the People's Republic of China (1999)
CLR	Commonwealth Law Reports (Australia)
Clunet	Journal du droit international ('Clunet') (France)
CMLR	Common Market Law Reports (United Kingdom)
CML Rev	Common Market Law Review (Netherlands)
CMR	Convention relative au contrat de transport inter- national de marchandises par route/Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956)
cod	cash on delivery
col(s)	column(s)
Colum J Asian L	Columbia Journal of Asian Law (USA)
Colum J Eur L	Columbia Journal of European Law (USA)
Colum J Transnat'l L	Columbia Journal of Transnational Law (USA)

Abbreviations

Colum LRev	Columbia Law Review (USA)
COM	Document of the European Commission intended for communication to the public
Com LJ	Commercial Law Journal (USA)
concl	conclusions
Conn	Connecticut Supreme Court (USA)
cons	consideration
Contr impr	Contratto e impresa (Italy)
Contr impr Europa	Contratto e impresa: Europa (Italy)
Cornell Int'l LJ	Cornell International Law Journal (USA)
Cornell LRev	Cornell Law Review (USA)
Corp	Corporation
COTIF	Convention relative aux transports internationaux ferroviaires/Convention concerning International Carriage by Rail (Berne, 5 May 1980) (www.otif.org/otif/_fpdf/cotif-1980-f.pdf)
CPT	Carriage paid to (Incoterm)
CR-CO/contributor	L Thévenoz and F Werro (eds), <i>Commentaire romand: Code des obligations, vol I (arts 1-522)</i> (2003) (Switzerland)
Ct App	Court of Appeals (USA)
D	Recueil Dalloz de doctrine, de jurisprudence et de législation (1945–1964) (France); or Recueil Dalloz et Sirey de doctrine, de jurisprudence et de législation (1965–) (France)
DA	Recueil Dalloz, analytique de jurisprudence et de législation (1941–1944) (France)
DAF	Delivered at frontier (Incoterm)
DB	Der Betrieb (Germany)
DC	Divisional Court (England)
DC Cir	United States Court of Appeals, District of Columbia Circuit (USA)
DCFR	Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), <i>Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) – Interim Outline Edition</i> (2008) (for a 'Pre-version', see www.law-net.eu/en_index.htm)
D chr	Recueil Dalloz Sirey, Chroniques (France)
DDC	United States District Court for the District of Columbia (USA)
DDP	Delivered duty paid (Incoterm)
DDU	Delivered duty unpaid (Incoterm)
Del	Delaware Supreme Court (USA)
DEQ	Delivered ex quay (Incoterm)
DES	Delivered ex ship (Incoterm)
DF	Distrito Federal (Mexico)
DFT	Decision of the Federal Tribunal (Switzerland)
DH	Dalloz, Recueil hebdomadaire de jurisprudence (1924–1940) (France)
Dig	Digest of Justinian

D inf rap	Recueil Dalloz Sirey, Informations rapides (France)
Dir comm int	Diritto del commercio internazionale (Italy)
Diss	Dissertation/thesis
D jur	Recueil Dalloz Sirey, Jurisprudence (France)
D jur gén	Dalloz, Jurisprudence générale, Répertoire méthodique et alphabétique de législation, de doctrine et de jurisprudence (France)
DLR	Dominion Law Reports (Canada)
D Mass	United States District Court for the District of Massachusetts (USA)
D Me	United States District Court for the District of Maine (USA)
Doc	Document
Dow & Ry KB	Dowling & Ryland's King's Bench Reports (England)
DP	Dalloz, Recueil périodique et critique de jurisprudence, de législation et de doctrine (1825–1940) (France)
Dr prat com int	Droit et pratique du commerce international/ International Trade Law and Practice (France)
D somm	Recueil Dalloz Sirey, Sommaires commentés (France)
Duke LJ	Duke Law Journal (USA)
Dutch Cc	Burgerlijk Wetboek of 1992 (www.civil-code.nl/index.htm)
E & B	Ellis & Blackburn's Queen's Bench Reports (England)
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)
ECJ	Court of Justice of the European Communities
ecolex	ecolex (Austria)
ECR	European Court Reports
ed(s)	editor(s)
ED Mich	United States District Court for the Eastern District of Michigan (USA)
edn	edition
EDNY	United States District Court for the Eastern District of New York (USA)
EEC	European Economic Community
eg	for example
EG	Estates Gazette (United Kingdom)
EGLR	Estates Gazette Law Reports (United Kingdom)
EJLR	European Journal of Law Reform
ELRev	European Law Review (United Kingdom)
Emory Int'l LRev	Emory International Law Review (USA)
Eq Ab	Equity Cases Abridged (England)
ER	English Reports (England)
ERCL	European Review of Contract Law (Germany)
ERPL	European Review of Private Law (Netherlands)
et al	and others
etc	and so forth
EU	European Union
Eur dir priv	Europa e diritto privato (Italy)
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (Germany)
EWCA	England and Wales Court of Appeal (neutral citation)
EWHC	England and Wales High Court (neutral citation)

Abbreviations

EWiR	Entscheidungen zum Wirtschaftsrecht (Germany)
EWS	Europäisches Wirtschafts- und Steuerrecht (Germany)
Ex	Court of Exchequer (England)
ExD	Law Reports, Exchequer Division (England)
EXW	ex works (Incoterm)
F	Federal Reporter (USA)
F 2d	Federal Reporter, Second Series (USA)
F 3d	Federal Reporter, Third Series (USA)
FAS	Free alongside ship (Incoterm)
FCA	Federal Court of Australia (neutral citation); or Free Carrier (Incoterm)
FCR	Federal Court Reports (Australia)
Fed Reg	Federal Register (USA)
FIATA	Fédération Internationale des Associations de Transitaires et Assimilés/International Federation of Freight Forwarders Associations
FIFA	Fédération Internationale de Football Association
Fla	Florida Supreme Court (USA)
Fla App	Florida District Court of Appeal (USA)
Fla J Int'l L	Florida Journal of International Law (USA)
FLR	Federal Law Reports (Australia)
FOB	Free on board (Incoterm)
Fordham Int'l LJ	Fordham International Law Journal (USA)
Fordham LRev	Fordham Law Review (USA)
French Cc	Code civil des français of 21 March 1804 (www. legifrance.gouv.fr/WAspad/ListeCodes)
F Supp	Federal Supplement (USA)
F Supp 2d	Federal Supplement, Second Series (USA)
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law (USA)
Ga LRev	Georgia Law Review (USA)
Gaz Pal	La Gazette du Palais (France)
Geo Wash J Int'l L & Econ	The George Washington Journal of International Law and Economics (USA)
German Cc	Bürgerliches Gesetzbuch of 1 January 1900 (www. gesetze-im-internet.de/bgb/index.html)
Giur comm	Giurisprudenza commerciale (Italy)
Giust civ	Giustizia civile (Italy)
GPR	Zeitschrift für Gemeinschaftsprivatrecht
Greek Cc	Astikos Kodikas of 15 March 1940
Harv Int'l LJ	Harvard International Law Journal (USA)
Harv LRev	Harvard Law Review (USA)
Hastings Int'l & Comp LRev	Hastings International and Comparative Law Review (USA)
HCA	High Court of Australia (neutral citation)
Herber/contributor	R Herber and B Czerwenka (eds), <i>Internationales Kaufrecht: Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf</i> (Germany)

HGB	Handelsgesetzbuch (Austrian/German Commercial Code)
HGer	Handelsgericht (Austrian/Swiss Commercial Court)
HKK/contributor	M Schmoeckel et al (eds), <i>Historisch-kritischer Kommentar zum BGB</i> (2001–) (Germany)
HL	House of Lords (United Kingdom)
Hofstra LRev	Hofstra Law Review (USA)
Hong Kong LJ	Hong Kong Law Journal (Hong Kong)
Honnold	JO Honnold, <i>Uniform Law for International Sales under the 1980 United Nations Convention</i> (3rd edn, 1999) (Netherlands)
Houst J Int'l L	Houston Journal of International Law (USA)
HR	Hoge Raad (Dutch Supreme Court)
HSG	Handelsrechtliche Schiedsgerichtspraxis (subsequently published under the title <i>Rechtsprechung kaufmännischer Schiedsgerichte</i>) (Germany)
ibid	the same place
ICC	International Chamber of Commerce
ICC Ct Arb	ICC Court of Arbitration
ICC Int'l Ct Arb Bull	ICC International Court of Arbitration Bulletin (France)
ICC Rules	ICC Rules of Arbitration as of 1 January 1998 (www.iccwbo.org/court/english/arbitration/rules.asp)
ICLQ	International and Comparative Law Quarterly (United Kingdom)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965) (http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp)
Idaho LRev	Idaho Law Review (USA)
idem	the same person
ie	that is
IHR	Internationales Handelsrecht, Zeitschrift für das Recht des internationalen Warenkaufs und -vertriebs (Germany)
ILM	International Legal Materials
Inc	Incorporated
INCOTERMS	International Commercial Terms of the ICC (2000)
Ind	Indiana Supreme Court (USA)
Indian J Int'l L	Indian Journal of International Law (India)
Indiana Int'l & Comp LRev	Indiana International and Comparative Law Review (USA)
Int'l ALR	International Arbitration Law Review (United Kingdom)
Int'l Arb J	International Arbitration Journal (USA)
Int'l Arb Rep	International Arbitration Report (USA)
Int'l Bus Law	International Business Lawyer (United Kingdom)
Int'l Bus LJ	International Business Law Journal/Revue de Droit des Affaires Internationales (France)
Int'l J Leg Inf	International Journal of Legal Information (USA)
Int'l Law	The International Lawyer (USA)

Abbreviations

Int'l Rev L & Econ	International Review of Law and Economics (The Netherlands)
Int'l Trade & Bus L Ann	International Trade and Business Law Annual (Australia)
Int'l Trade Forum	International Trade Forum/Forum du Commerce International (Switzerland)
Iowa LRev	Iowa Law Review (USA)
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (Germany)
IPRSpr	Deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts (Germany)
Israel LRev	Israel Law Review (Israel)
Italian Cc	Codice civile italiano of 16 March 1942 (www.jus.unitn.it/Cardozo/Obiter_Dictum/codciv/Codciv.htm) (Italy)
ITC	International Trade Center
J	Justice
Japanese Cc	Meiji Civil code of 16 July 1898
JBl	Juristische Blätter (Austria)
JBL	Journal of Business Law (United Kingdom)
JCL	Journal of Contract Law (Australia)
JCP	Juris-classeur périodique, La semaine juridique (édition générale) (France)
J Int'l Arb	Journal of International Arbitration (Switzerland)
J Int'l Bus L	Journal of International Business Law (USA)
J L & Com	Journal of Law and Commerce (USA)
JT	Juridisk Tidskrift (Sweden)
J Transnat'l L & Pol'y	Journal of Transnational Law & Policy (USA)
Juris Data	Internet database (France)
JuS	Juristische Schulung (Germany)
JW	Juristische Wochenschrift (Germany)
J World Trade L	Journal of World Trade Law (USA)
JZ	Juristenzeitung (Germany)
KB	Court of King's Bench (England); or Law Reports, King's Bench Division (England)
KG	Kammergericht (Berlin Appeal Court)
KGer	Kantonsgericht (Swiss Appeal Court)
Ky App	Kentucky Court of Appeals (USA)
La LRev	Louisiana Law Review (USA)
Law Com	Report of the Law Commission (England)
LC	Lord Chancellor (England)
LCIA Rules	Arbitration Rules of the London Court of International Arbitration, effective as of 1 January 1998 (www.lcia.org/ARB_folder/ARB_DOWNLOADS/ENGLISH/rules.pdf)
LexisNexis	LexisNexis database (www.lexisnexis.com/) (USA)
LG	Landgericht (German/Austrian Regional Court)
Lithuanian Cc	Civilinio kodekso patvirtinimo, isigaliojimo ir igyvendinimo istatymas (Civil code of the Republic of Lithuania of 1 July 2001) (translated on www.tm.lt/default.aspx?item=aktual&cid=4536)

Liverpool LRev	Liverpool Law Review (United Kingdom)
LJ	Law Journal; or Lord Justice (England)
LJ Ch	Law Journal Reports, Chancery, New Series (1831–1875) (England)
LJ Ex	Law Journal Reports, Exchequer Division, New Series (1831–1875) (England)
Lloyd's Rep	Lloyd's List Law Reports (United Kingdom)
LM	Entscheidungen des Bundesgerichtshofs, collection published by Lindenmaier and Möhring (Germany)
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly (United Kingdom)
Louisiana Cc	Louisiana Civil code (1976–) (www.legis.state.la.us/lss/lss.asp?folder=67)
Loy LA Int'l & Comp LJ	Loyola of Los Angeles International and Comparative Law Journal (USA)
Loy LA LRev	Loyola University of Los Angeles Law Review (USA)
Loy LRev	Loyola Law Review (USA)
LQR	The Law Quarterly Review (United Kingdom)
LR	Law Review
LS	Legal Studies (United Kingdom)
L Soc J	Law Society Journal (USA)
LT	Law Times Reports (United Kingdom)
Ltd	Limited
LUV	1972 Draft of a Law for the Unification of Certain Rules Relating to Validity of Contracts on International Sale of Goods, (1977) VIII Yearbook of the United Nations Commission on International Trade Law, Appendix II, 104
Luxembourg Cc	Code civil du Grand-Duché de Luxembourg of 21 March 1804
Mass	Massachusetts Supreme Judicial Court (USA)
Md App	Maryland Court of Special Appeals (USA)
MDR	Monatsschrift für deutsches Recht (Germany)
Me	Maine Supreme Judicial Court (USA)
MERCOSUR	Mercado Común del Sur
Minn	Minnesota Supreme Court (USA)
Misc	Miscellaneous documents issued by UNIDROIT
MJ	Maastricht Journal of European and Comparative Law (Netherlands)
MLR	The Modern Law Review (United Kingdom)
Mo App	Missouri Court of Appeals (USA)
MüKo/contributor	K Rebmann et al (eds), <i>Münchener Kommentar zum Bürgerlichen Gesetzbuch</i> (4th edn of vols 3 to 11, 2000–2006; 5th edn of vols 1 and 2 [§§ 1–432], 2006–2007) (Germany)
MüKoHGB/contributor	K Schmidt (ed), <i>Münchener Kommentar zum Handelsgesetzbuch</i> (2nd edn, 2005–2007) (Germany)
n(n)	footnote(s)
NAFTA	Northern American Free Trade Agreement

Abbreviations

NCPC	Nouveau code de procédure civile (France)
ND Cal	United States District Court for the Northern District of California (USA)
ND Ill	United States District Court for the Northern District of Illinois (USA)
NE	North Eastern Reporter (USA)
NE 2d	North Eastern Reporter, Second Series (USA)
Neb	Nebraska Supreme Court (USA)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)
NIPR	Nederlands Internationaal Privaatrecht (Netherlands)
NJ	Nederlandse Jurisprudentie (Netherlands); or New Jersey Supreme Court (USA)
NJ App Div	Superior Court of New Jersey, Appellate Division (USA)
NJB	Nederlands Juristenblad (Netherlands)
NJCL	Nordic Journal of Commercial Law (Finland)
NJW	Neue Juristische Wochenschrift (Germany)
NJWRR	Neue Juristische Wochenschrift-Rechtsprechungsreport Zivilrecht (Germany)
NLJ	New Law Journal (United Kingdom)
no(s)	number(s)
NSWCA	New South Wales Court of Appeal (Australia)
NSWLR	New South Wales Law Reports (Australia)
NSWSC	Supreme Court of New South Wales (neutral citation) (Australia)
NTBR	Nederlands Tijdschrift voor Burgerlijk Recht (Netherlands)
NWB	Neue Wirtschaftsbriefe (Germany)
Nw J Int'l L & Bus	Northwestern Journal of International Law and Business (USA)
NY	New York Court of Appeals (USA)
NY App	New York Court of Appeals (USA)
NY App Div	New York Supreme Court, Appellate Division (USA)
NY Int'l L Rev	New York International Law Review (USA)
NYLJ	New York Law Journal (USA)
N Y L Sch J Int'l & Comp L	New York Law School Journal of International and Comparative Law (USA)
N Y St B J	New York State Bar Journal (USA)
N Y U J Int'l Law & Pol	New York University Journal of International Law and Politics (USA)
NZBLQ	New Zealand Business Law Quarterly (New Zealand)
NZCA	Court of Appeal of New Zealand (neutral citation)
NZLJ	New Zealand Law Journal (New Zealand)
NZLR	New Zealand Law Reports (New Zealand)
NZM	Neue Zeitschrift für Miet- und Wohnungsrecht (Germany)
OAS	Organization of American States
obs	observation

Off Cmt	Official Comment to the PICC (UNIDROIT, 2004) (www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1)
OGer	Obergericht (Swiss Appeal Court)
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OHADA	Organisation pour l'Harmonisation en Afrique du Droit des Affaires
Ohio St LJ	Ohio State Law Journal (USA)
OJ	Official Journal of the European Communities
OJLS	Oxford Journal of Legal Studies (United Kingdom)
ÖJZ	Österreichische Juristenzeitung (Austria)
OLG	Oberlandesgericht (Austrian/German Regional Appeal Court)
OLG-Rp	OLG-Report (Germany)
OLGRspr	Die Rechtsprechung der Oberlandesgerichte auf dem Gebiete des Zivilrechts (Germany)
OLGZ	Entscheidungen der Oberlandesgerichte in Zivilsachen einschließlich der freiwilligen Gerichtsbarkeit (Germany)
Or LRev	Oregon Law Review (USA)
p(p)	page(s)
P 2d	Pacific Reporter, Second Series (USA)
Pa	Pennsylvania Supreme Court (USA)
Pace Int'l LRev	Pace International Law Review (USA)
Palandt/contributor	<i>Palandt's Kommentar zum Bürgerlichen Gesetzbuch</i> (66th edn, 2007) (Germany)
para(s)	paragraph(s)
PC	Documents issued in connection with UNIDROIT's Working Group for the Preparation of Principles of International Commercial Contracts; or Judicial Committee of the Privy Council (United Kingdom)
PECL	Commission on European Contract Law, <i>Principles of European Contract Law</i> (1998)
PEL CAFDC	Principles of European Law on Commercial Agency, Franchise and Distribution Contracts
Petites aff	Les petites affiches (France)
PICC	UNIDROIT, <i>UNIDROIT Principles of International Commercial Contracts</i> (2004)
plc	public limited company
Portuguese Cc	Código civil português of 25 November 1966
Preadviezen	Preadviezen uitgebracht voor de Vereniging voor Burgerlijk Recht (Netherlands)
Prec Ch	Precedents in Chancery (England)
P Wms	Peere-Williams' Chancery & King's Bench Cases (England)
QB	Court of Queen's Bench (England); or Law Reports, Queen's Bench Division (England)
QSC	Queensland Supreme Court Reports (Australia)

Abbreviations

Québec Cc	Code civil du Québec/Civil code of Québec of 1 January 1994 (www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ/CCQ_A.html)
Queensl L S J	Queensland Law Society Journal (Australia)
R	The Queen/The King
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht (Germany)
Rb	Arrondissementsrechtbank (Netherlands Regional Court); or Rechtbank van Koophandel (Belgian Regional Court)
RCEA	Revista de la Corte Española de Arbitraje (Spain)
RDC	Revue des contrats (France)
RDIDC	Revue de droit international et de droit comparé (Belgium)
RdW	Österreichisches Recht der Wirtschaft (Austria)
Rec des Cours	Recueil des Cours, Collected Courses of the Hague Academy of International Law (Netherlands)
Record of NYCBA	Record of the Association of the Bar of the City of New York (USA)
Reg	Regulation
Rép civ	Répertoire du droit civil Dalloz (France)
Restatement 2d Conflict of Laws	Restatement of the Law Second, Conflict of Laws (1996) (USA)
Restatement 2d Contracts	Restatement of the Law Second, Contracts (1979) (USA)
Restatement 3d Agency	Restatement of the Law Third, Agency (2006) (USA)
Rev	Revised drafts in Study L documents (UNIDROIT)
Rev arb	Revue de l'arbitrage (France)
Rev CISG	Cornell Review of the Convention on Contracts for the International Sale of Goods (USA)
Rev crit dr int privé	Revue critique de droit international privé (France)
Rev de la Fac de Cien Jur y Pol	Revista de la Facultad de Ciencias Jurídicas y Políticas (Caracas/Venezuela)
Rev der com oblig	Revista del derecho comercial y de las obligaciones (Argentina)
Rev Der Mercantil	Revista de Derecho Mercantil (Spain)
Rev Der MERCOSUR	Revista de Derecho Internacional y del MERCOSUR (Argentina)
Rev der priv	Revista de derecho privado (Mexico)
Rev dir merc ind	Revista de direito mercantil, industrial, econômico e financeiro (Brazil)
Rev dr com belge	Revue de droit commercial belge (Belgium)
Rev dr int & dr comp	Revue de droit international et de droit comparé (Belgium)
Rev Int'l Bus L	Review of International Business Law (Canada)
Rev jur com	Revue de jurisprudence commerciale (France)
RG	Reichsgericht (Supreme Court of the German Empire)
RGRK/contributor	<i>Das Bürgerliche Gesetzbuch mit besonderer Berücksichtigung der Rechtsprechung des Reichsgerichts und des Bundesgerichtshofs</i> ('Reichsgerichts-rätekommentar') (12th edn, 1982-) (Germany)

RGZ	Entscheidungen des Reichsgerichts in Zivilsachen (Germany)
RIDC	Revue internationale de droit comparé (France)
Riv arb	Rivista dell'arbitrato (Italy)
Riv dir civ	Rivista di diritto civile (Italy)
Riv dir comm	Rivista del diritto commerciale e del diritto generale delle obbligazioni (Italy)
Riv dir int priv proc	Rivista di diritto internazionale privato e processuale (Italy)
Riv dir priv	Rivista di diritto privato (Italy)
Riv trim dir proc civ	Rivista trimestrale di diritto e procedura civile (Italy)
RIW	Recht der Internationalen Wirtschaft (Germany)
RJ	Repertorio de jurisprudencia Aranzadi (Spain)
RJA	Revista Jurídica de Andalucía (Spain)
RJT	La Revue juridique Thémis (Canada)
ROW	Recht in Ost und West (Germany)
RSC	Rules of the Supreme Court
RTD civ	Revue trimestrielle de droit civil (France)
RTD com	Revue trimestrielle de droit commercial et économique (France)
RTD eur	Revue trimestrielle de droit européen (France)
Rummel/contributor	P Rummel (ed), <i>Kommentar zum Allgemeinen bürgerlichen Gesetzbuch</i> (3rd edn, 2000–2004) (Austria)
Russian Cc	Civil Code of the Russian Federation (1994–2006) (translated on www.russian-civil-code.com/)
S	Recueil Sirey (France)
s(s)	section(s)
SA	South African Law Reports; or South Australia
SALJ	South African Law Journal (South Africa)
San Diego LRev	San Diego Law Review (USA)
SAR	Stockholm Arbitration Report (Sweden)
SC	Session Cases, Court of Session (Scotland)
SCA	Supreme Court of Appeal (South Africa)
Scand SL	Scandinavian Studies in Law (Sweden)
Schlechtriem/Schwenzer/contributor	P Schlechtriem and I Schwenzer (eds), <i>Commentary on the UN Convention on the International Sale of Goods (CISG)</i> (2nd (English) edn, 2005)
Schwimann/contributor	M Schwimann (ed), <i>ABGB Praxiskommentar</i> (3rd edn, 7 vols, 2005–2007) (Austria)
S Ct	Supreme Court Reporter (USA)
SD	South Dakota Supreme Court (USA)
SD Cal	United States District Court for the Southern District of California (USA)
SDNY	United States District Court for the Southern District of New York (USA)
SE	South Eastern Reporter (USA)
Sem jud	La Semaine Judiciaire
Sh Ct	Sheriff Court (Scotland) (Switzerland)
SI	Statutory Instrument (United Kingdom)
SJZ	Schweizerische Juristen-Zeitung (Switzerland)
SLR	Scottish Law Reporter

Abbreviations

SLT	Scots Law Times
So	Southern Reporter (USA)
Somm	sommaire
South Cal LRev	Southern California Law Review (USA)
Spanish Cc	Código civil español of 24 July 1889 (http://civil.udg.edu/normacivil/estatal/CC/INDEXCC.htm)
Stan J Int'l L	Stanford Journal of International Law (USA)
Staudinger/contributor	<i>J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen</i> (Germany)
Stud Transnat'l Econ L	Studies in Transnational Economic Law (USA)
Study L	Documents issued in connection with UNIDROIT's work on the PICC (www.unidroit.org/english/principles/contracts/principles2004/study50-archive1998-2004.pdf and www.unidroit.org/english/workprogramme/study050/main.htm)
Study LVIII	Documents issued in connection with UNIDROIT's work on the Convention on International Factoring supplement
suppl	under the word
sv	South Western Reporter, Second Series (USA)
SW 2d	South Western Reporter, Third Series (USA)
SW 3d	Zivilgesetzbuch/Code civile of 10 December 1907 (www.admin.ch/ch/d/sr/c210.html)
Swiss Cc	Obligationenrecht/Code des obligations of 30 March 1911 (www.admin.ch/ch/d/sr/c220.html)
Swiss CO	Swiss Rules of International Arbitration as of 1 January 2004 (www.swissarbitration.ch/rules.php)
Swiss Rules	Syracuse Journal of International Law and Commerce (USA)
Syracuse J Int'l L & Com	SZ
SZ	Entscheidungen des österreichischen Obersten Gerichtshofs in Zivilsachen (Austria)
SZIER	Schweizerische Zeitschrift für Internationales und Europäisches Recht (Switzerland)
SZW/RSDA	Schweizerische Zeitschrift für Wirtschaftsrecht/Revue suisse de droit des affaires (Switzerland)
TCC	Technology and Construction Court (England)
Tex App	Texas Court of Appeals (USA)
Tex Int'l LJ	Texas International Law Journal (USA)
TGI	Tribunal de grande instance (France)
TLR	Times Law Reports (United Kingdom)
TPI	Tribunal de première instance (Belgium)
Transnat'l Law	The Transnational Lawyer (USA)
Transnat'l L & Contemp Probs	Transnational Law and Contemporary Problems (USA)
TranspR-IHR	Zeitschrift für Transportrecht, Beilage Internationales Handelsrecht (Germany)
Trib	Tribunal (Switzerland); or Tribunale (Italy)
Trib com	Tribunal de Commerce (Belgium/France)

TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement establishing the World Trade Organisation, signed in Marrakesh, Morocco on 15 April 1994 (www.wto.org/english/docs_e/legal_e/27-trips.pdf)
TS	Tribunal Supremo (Supreme Court of Spain)
Tul Civ LF	Tulane Civil Law Forum (USA)
Tul Eur & Civ L Forum	Tulane European and Civil Law Forum (USA)
Tul J Int'l & Comp L	Tulane Journal of International and Comparative Law (USA)
Tul LRev	Tulane Law Review (USA)
UBCLRev	University of British Columbia Law Review (Canada)
UCC	Uniform Commercial Code (USA)
UCC LJ	Uniform Commercial Code Law Journal (USA)
U Chic LRev	University of Chicago Law Review (USA)
UCP 600	ICC Uniform Customs and Practice for Documentary Credits published by the ICC in 1935 and revised in 1951, 1962, 1974, 1993 and 2007
ULF	Uniform Law on the Formation of Contracts for the International Sale of Goods of 1 July 1964
ULIS	Uniform Law on the International Sale of Goods of 1 July 1964
ULR	Uniform Law Review/Revue de droit uniforme (Italy)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules of 28 April 1976 (www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985, as amended on 7 July 2006 (www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)
UNCTAD	United Nations Conference on Trade and Development
UN-Doc	United Nations documents
UNIDROIT	International Institute for the Unification of Private Law/Institut international pour l'unification du droit privé
Unilex	International Case Law, UNIDROIT (www.unilex.info)
UNO	United Nations Organization
UNTS	United Nations Treaty Series
U Pa J Int'l Econ L	University of Pennsylvania Journal of International Economic Law (USA)
U Pa LRev	University of Pennsylvania Law Review (USA)
U Pitt LRev	University of Pittsburgh Law Review (USA)
US	United States of America; or United States Reports
USA	United States of America
v	versus
Vand J Transnat'l L	Vanderbilt Journal of Transnational Law (USA)

Abbreviations

VersR	Versicherungsrecht (Germany)
Vindobona J Int'l Comm L & Arb	Vindobona Journal of International Commercial Law and Arbitration (USA)
vol(s)	volume(s)
VR	Victorian Reports (Australia)
WarnR	Rechtsprechung des Reichsgerichts, soweit sie nicht in der amtlichen Sammlung der Entscheidungen des Reichsgerichts abgedruckt ist, begründet von Warneyer (Germany)
WASCA	Case of the Supreme Court of Western Australia (Court of Appeal) (Australia)
Wash	Washington Supreme Court (USA)
Wash LRev	Washington Law Review (USA)
WiBl	Wirtschaftliche Blätter (Germany)
WIPO	World Intellectual Property Organization
WiR	Wirtschaftsrecht (Germany)
WiRO	Wirtschaftsrecht in Osteuropa (Germany)
Wis	Wisconsin Supreme Court (USA)
WL	Westlaw (USA)
WLR	Weekly Law Reports (England)
WM	Wertpapier-Mitteilungen (Germany)
WPNR	Weekblad voor privaatrecht, notariaat en registratie (Netherlands)
WR	Weekly Reporter (England)
WTO	World Trade Organization
WVa	West Virginia Supreme Court (USA)
Yale J Int'l L	Yale Journal of International Law (USA)
Yale LJ	Yale Law Journal (USA)
YB Comm Arb	Yearbook of Commercial Arbitration (USA)
ZBJV	Zeitschrift des Bernischen Juristenvereins (Switzerland)
ZEuP	Zeitschrift für Europäisches Privatrecht (Germany)
ZfBR	Zeitschrift für deutsches und internationales Baurecht (Germany)
ZfRV	Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht (Austria)
ZGer	Zivilgericht (Swiss Civil Court)
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (Germany)
ZIP	Zeitschrift für Wirtschaftsrecht (Germany)
ZNotP	Zeitschrift für die Notarpraxis (Germany)
ZRP	Zeitschrift für Rechtspolitik (Germany)
ZSR	Zeitschrift für Schweizerisches Recht (Switzerland)
ZvglRWiss	Zeitschrift für vergleichende Rechtswissenschaft (Germany)

CHAPTER 1

GENERAL PROVISIONS

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Introduction to Chapter 1 of the PICC

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I. The sense of ‘general provisions’

Chapter 1 of the PICC lays out the ‘General Provisions’ and precedes the chapters containing specific provisions on formation, validity, etc. This technique of opening a codification with an **abstract ‘general part’**, that extracts and pulls upfront those provisions common to all ‘specific parts’, can be found not only in the German Civil Code (1900),¹ but also—under the influence of German jurisprudence—in the codifications that decisively influenced the drafting of the PICC, notably the UCC (USA) (1958),² the ULIS (1964) and the CISG (1980).³ Different from the German model, Chapter 1 of the PICC is neither overly stringent in fully extracting the general rules nor so purist as to exclude programmatic enunciations.⁴

II. Programmatic enunciations

More in line with the Swiss ideal of codification,⁵ Chapter 1 of the PICC contains some ‘general provisions’ that are not real ‘provisions’ in the sense of providing for any

¹ For the historic and dogmatic background of the *Allgemeiner Teil* see HKK/Schmoeckel vor §1/Ordnung. See also F Schmidt, ‘The German Abstract Approach to Law, Comments on the System of the *Bürgerliches Gesetzbuch*’ (1965) 9 *Scandinavian Studies in Law* 131, 134, who refers to ‘a peculiar German approach to law’.

² For the influence of German jurisprudence and in particular of Levin Goldschmidt (the leading drafter of the *Allgemeines Deutsches Handelsgesetzbuch* of 1861, which was the basis for today’s German Commercial Code) on the drafter of the UCC, Karl Llewellyn, see J Whitman, ‘Commercial Law and the American Volk: A Note on Llewellyn’s German Sources for the Uniform Commercial Code’ (1987) 97 *Yale LJ* 156. For the influence of Ernst Rabel (see n 3 below) on Llewellyn (who attended a session of UNIDROIT’s special committee elaborating the 1935 draft, cf E Rabel, ‘A Draft on an International Law of Sales’ (1938) 5 *U Chic LRev* 543) see DS Clark, ‘The Influence of Ernst Rabel on American Law’ in M Lutter et al (eds), *Der Einfluss deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* (1993) 107, 123–126. For the American influence on the PICC see EA Farnsworth, ‘The American Provenance of the UNIDROIT Principles’ (1998) 72 *Tul LRev* 1985. For the specific influence of the UCC, eg, on the provisions on formation see below, Art 2.1.1 para 9; Art 2.1.11 paras 7–9; Art 2.1.12 para 1; Art 2.1.14 para 2; Art 2.1.18 para 1.

³ Ernst Rabel was ‘the master mind’ behind the 1935 draft Uniform Act on Sales, the predecessor of the ULIS of 1964, which eventually led to the CISG in 1980; see B Grossfeld and P Winship, ‘The Law Professor Refugee’ (1992) 18 *Syracuse J Int’l L & Comm* 3, 11.

⁴ For the reproaches made to the German Cc for having privileged abstraction over perspicuity and scientific purism over closeness to common people, thus making it an elitist law reserved for lawyers, see HKK/Schmoeckel vor § 1/Ordnung paras 43–49.

⁵ The drafter of the Swiss Cc, Eugen Huber, insisted—against the German conception—that general principles are the essential vitality of the codification; cf HKK/Schmoeckel vor § 1/Ordnung para 10.

enforceable consequences, but rather ‘general principles’ in the strict sense of the term.⁶ These **programmatic enunciations** aim to give both lawyers and businessmen a feeling for the general spirit of the PICC and thereby provide general directives for the interpretation of the operative provisions. In light of this, the principle of freedom of contract in Art 1.1 can be likened to the dot on an ‘i’ rather than the crown of the drafter’s creation. It can hardly give a party a right to act against restrictions of its private autonomy set either by a state or by some abusive monopolist. Nor should it be understood as glorifying the freedom of enterprise for the sake of fending off Marxist conceptions of economy. Rather, Art 1.1 provides an essential and sober guideline that the starting point of any analysis of contractual relations under the PICC is the ‘freedom *from* contract’ and that, in a true case of doubt, only the application of the ‘operative’ rule of Art 1.8 can hold a party bound despite its explicit declarations to the contrary. Similarly, the principle of good faith and fair dealing is a straightforward expression of the ‘tit-for-tat’ logic of profit-maximizing co-operation, rather than some overriding moralization of business.⁷ Art 1.1 cannot, in itself, impose duties other than those resulting from Arts 4.8 and 5.1.2 as omitted or implied terms or from Art 2.1.15(2), which prohibits negotiation in ‘bad faith’. However, the general principle of good faith, by appealing to an *esprit de corps* of a virtual merchant community, provides a tool for argumentation and conceptualization when applying these provisions.

- 3 The general programmatic enunciation of ‘good faith and fair dealing’ is intimately linked with, and in fact implemented by, **operative but vague open-ended terms** within the specific provisions.⁸ The solutions retained in the PICC are sometimes subject to a ‘legitimate interest’,⁹ or to the ‘adequacy’ for a specific situation;¹⁰ and frequently they simply depend on what is ‘reasonable’.¹¹ The reliance on such open-ended terms pays tribute to the fact

⁶ See above, Preamble I para 12.

⁷ See R Axelrod, *The Evolution of Cooperation* (1984) 179, relying on S Macaulay, ‘Non-Contractual Relations in Business: a Preliminary Study’ (1963) 28 *American Sociological Review* 55: ‘The fairness of transactions is guaranteed not by the threat of a legal suit, but rather by the anticipation of mutually rewarding transactions in the future’; also *Tymeshare v Covell* 727 F 2d 1145, 1152 (DC Cir 1984) (Scalia J): good faith is ‘simply a rechristening of fundamental principles of contract law’.

⁸ For Karl Llewellyn’s ‘romantic notion of ‘reasonableness and decency’ as inspired by Levin Goldschmidt (see n 2 above), who in turn was inspired by the ideal of the English commercial tradition as the best representation of the medieval ideal of the law merchant or *lex mercatoria*, so that Llewellyn claimed to ‘revive the practices of Lord Mansfield’ through the UCC, see Whitman (n 2 above) 161, 171–173.

⁹ See Art 6.1.3(1) (rejection of partial performance); Art 6.1.5(1) (rejection of early performance); and Art 7.1.4(1)(c) (refusal of cure).

¹⁰ Art 1.10(1) (means of giving notice); Art 2.1.16 (damages for breach of confidentiality); Art 4.8 (omitted terms, which names ‘reasonableness’ as a factor for determining what is appropriate); Art 6.1.15(2) (notice of refusal of permission); Art 7.1.4(1)(b); Art 7.2.3 (right to repair and replacement); Art 7.3.6 (appropriate allowance instead of restitution in kind); Art 7.4.9(2) (interest rate); Art 7.4.11 (redress in instalments); Art 7.4.12 (currency in which to assess damages).

¹¹ In addition to the provisions on reliance (n 24 below) and in addition to Arts 2.1.7, 2.1.12, 2.2.7(2)(b), 2.2.9(2), 3.15, 5.1.8, 6.1.1, 6.1.12(2), 6.1.16(1), 6.2.3(3), 7.1.5, 7.1.7(3), 7.2.2(e), 7.2.5(1), 7.3.2(2), 7.3.4(2), 7.4.5, 8.4, 9.1.12, which refer to a ‘reasonable time’, the following provisions explicitly rely on the test of reasonableness: Art 1.9(2) (usages); Art 2.1.14(2) (contract on open terms); Art 2.1.20 (surprising terms); Art 2.2.8 (sub-agency); Art 3.8 (fraud); Art 3.9 (threat); Art 3.10(1) and (2) (gross disparity); Art 3.16 (partial avoidance); Arts 4.1(2) and 4.2(2) (interpretation); Art 4.8(2)(d) (omitted terms); Art 5.1.2(d) (omitted terms); Art 5.1.3 (duty of co-operation); Art 5.1.4(2) (duty of best efforts); Art 5.1.6 (determination of quality); Art 5.1.7 (price determination); Arts 6.1.16(2) and 6.1.17(1) (permission refused); Arts 6.2.2(b) and 6.2.3(4)

that business executives, when making decisions often need a certain margin of appreciation of the situation and a certain degree of discretion as to the reactions chosen. Courts and arbitral tribunals, mostly composed of lawyers, then have the difficult and sometimes illusory task of scrutinizing these commercial decisions according to the standard of ‘good faith and fair dealing’ of the merchant community.¹² Nevertheless, these undefined terms also bear some benefit for lawyers since they allow for maintaining legal argumentation schemes based on general rules despite the flexibility required by economic logic on the specific circumstances.¹³ Arbitral tribunals benefit from this technique, which allows for finding solutions that are equitable even without a mandate to decide *ex aequo et bono*.¹⁴ The open-ended drafting, however, increases the danger of non-uniformity of the interpretation and application of the PICC (see below, Art 1.6 para 13).

III. General provisions on application

Chapter 1 of the PICC also contains a category of provisions that are hard-and-fast rules, **4** but not truly general rules abstracted and extracted from the specific chapters. These rules would belong, together with the paragraphs of the Preamble (at least paragraphs 2–4),¹⁵ in a preliminary chapter on applicability that would precede the ‘general provisions’, such as Chapter I of Part I of the CISG, the *Einführungsgesetz* to the German Civil Code or the *Titre préliminaire* of the French Civil Code. These **provisions on the scope and the mode of application** of the PICC are Arts 1.4 and 1.5, which recognize the subordination of the PICC to mandatory laws and the stipulations made by the parties, and Art 1.6, which states how the provisions of the PICC are to be interpreted and thus applied. Art 1.9, in addition to specifying the principle of good faith,¹⁶ combines elements of both scope and mode of application by defining the practices and usages that prevail over the PICC (and possibly over the stipulations of the contract) and that provide guidance for interpretation.

(hardship); Art 7.1.6 (exemption clauses); Art 7.1.7 (*force majeure*); Art 7.2.2(b) and (c) (specific performance); Art 7.3.1(2)(a) (fundamental non-performance); Art 7.3.4 (adequate assurance); Art 7.3.6 (restitution in money); Art 7.4.3 (certainty of harm); Art 7.4.6(2) (proof of harm by current price); Art 7.4.8(1) and (2) (mitigation of harm); and Art 7.4.13 (penalty).

¹² Both Goldschmidt and Llewellyn (n 2 above) relied heavily on open-ended terms based on the assumption that commercial disputes would best be decided by lay courts composed primarily of merchants relying on their own experience, Whitman (n 2 above) 159–161, 169, 171, 173–1714. Goldschmidt’s assumption still lives in the commercial chambers at the German high courts, consisting of two merchants and one ordinary judge: § 105 *Gerichtsverfassungsgesetz* (similar to the French commercial courts, Arts L 411-1, 412-1, 412-3, 413-3 *Code de l’organisation judiciaire*). In contrast, the merchant juries proposed by Llewellyn in his first draft of the UCC were not accepted in the USA: ZB Wiseman, ‘The Limits of Vision: Karl Llewellyn and the Merchant Rules’ (1987) 100 Harv LRev 465, 527–528.

¹³ cf JJ White and RS Summers, *Uniform Commercial Code* (1st edn, 1980) 20, hailing the open-ended terms in the UCC (USA) for allowing courts to ‘escape the ancient dilemma of either adhering to the legal rule and doing an inequity, or of doing equity but in an unlaw-like fashion’. See also Governing Council of UNIDROIT, ‘Introduction to the 1994 Edition’ in UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2004* (2004) xiv, xv.

¹⁴ cf Preamble II paras 63–66.

¹⁵ See above, Preamble I, para 30.

¹⁶ cf UCC (USA) § 1-204 Comment.

IV. Abstracted general provisions

- 5 These distinctions being made, the remaining rules are truly abstract ‘general provisions’ in the sense of *subsidiary leges speciales*. Unless specified otherwise in the ‘specific provisions’ or the contract, these fully operative rules act as ‘implied provisions’ for every specific part of the PICC. They may not be forgotten when applying any of the ‘special provisions’. These general provisions *strictu sensu* are Art 1.2 (no form required); Art 1.8 (inconsistent behaviour); Art 1.10 (notice); Art 1.11 (definitions); and Art 1.12 (computation of time).
- 6 Despite having been abstracted into Chapter 1 of the PICC, these general provisions are rarely fully extracted from the specific provisions. Specific rules sometimes reiterate ‘general provisions’ instead of merely relying on them tacitly. This is often done for the sake of clarity so as not to mislead users with a particular legal background. For example, while Art 2.1.3(1) is simply superfluous in the light of Art 1.10(2) and (4),¹⁷ since an offer, like any notice, becomes effective when it reaches the addressee, Art 2.1.6(2) alerts the common law practitioner that the ‘mail box’ rule will not apply.¹⁸ By contrast, one may not forget about Art 1.10(2) when wondering how an objection to a modified acceptance according to Art 2.1.11(2) becomes effective.¹⁹ Art 2.1.15(1) seems to be superfluous in the light of Art 1.1, since the freedom to contract implies the right not to conclude a deal.²⁰ But this provision is an assurance to common lawyers that the pre-contractual liability of Art 2.1.15(2) is merely an exception that needs to be interpreted restrictively so as to preserve the rule.²¹ Accordingly, Art 2.1.18(1) could be considered superfluous in the light of Art 1.2, which *a contrario sensu* allows the parties to impose any form requirements they desire.²² However, the reiteration shows that the reliance rule in Art 2.1.18(2) is to be interpreted restrictively in the sense of only prohibiting abuse.²³ Art 2.1.18(2) itself, like Art 2.1.4(2)(b), could be deemed superfluous since the 2004 revision of the PICC, which included the general prohibition of inconsistent behaviour in Art 1.8.²⁴ Nevertheless, these

¹⁷ For the proposal to integrate also Art 2.1.3(2) into Art 1.10 so as to state the general possibility to withdraw any notice, see below, Art 1.10 para 16 and Art 2.1.3 para 2.

¹⁸ See below, Art 2.1.6 para 12.

¹⁹ See below, Art 2.1.11 para 12.

²⁰ In this sense, suggesting the deletion of this paragraph, P Perales Viscasillas, ‘Formación’ in D Morán Bovio (ed), *Comentario a los Principios de Unidroit para los Contratos del Comercio Internacional* (2nd edn, 2003) 107, 152.

²¹ See below, Art 2.1.15 paras 1 and 6.

²² See below, Art 2.1.18 para 1, and also Art 2.1.13 para 1.

²³ See below, Art 2.18 para 2.

²⁴ In addition to Arts 2.1.4(2)(b) and 2.1.18(2), the prohibition of inconsistent behaviour of Art 1.8 is reiterated in Art 2.2.5(2) (apparent authority); Art 3.5(1)(b) (mistake); Art 3.10(3) (gross disparity); Art 3.11(2) (acts of third persons); Art 3.13(1) (loss of right to avoid); Art 5.2.5 (revocation of third party right).

provisions remain useful, because they prevent the reader who forgets about the abstraction from being misled.²⁵ In contrast, it is necessary not to forget about Art 1.8 when determining under Arts 2.1.1 and 2.1.13 whether a ‘memorandum of understanding’ can qualify as an enforceable contract despite an explicit ‘subject to contract’ clause, because inconsistent behaviour may preclude a party even from invoking an alleged lack of intention to be bound.²⁶

²⁵ Nevertheless, both Arts 2.1.4(2)(b) and 2.1.18(2) risk being misleading due to their unfortunate attempt to establish a compromise between civil law and common law positions, which invites interpretations that undermine the rule-exception relationship, see below Art 2.1.4 paras 2–5 and Art 2.1.18 para 2.

²⁶ See below, Art 2.1.2 para 13.

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