

# BOOK REVIEW: *UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS – AN ARTICLE-BY-ARTICLE COMMENTARY*

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*Book review of Eckart J Brödermann UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary (Wolters Kluwer, Aalphen aan den Rijn, 2018).*

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The UNIDROIT Principles of International Commercial Contracts (PICC) do not have the recognition as an effective means to regulate contractual dealings between parties they deserve, as the author poignantly points out. This concise, well-written, easy to understand, and user-friendly commentary will undoubtedly be a milestone in propelling the PICC in the minds and maybe even in the hearts of those who regularly have to decide upon how to best administer cross-border contractual relationships.

Released in 2017 in their 4th edition, the PICC 2016 provide an effective tool for cross-border business-to-business (B2B) contract drafting and dispute resolution. The PICC's advantage is that they do not favour one particular domestic system of contract law or even legal system but rather provide a neutral set of rules that combine the best practices from legal systems around the world. Continuously improved since their first inception in 1983, the PICC have been described as a "restatement of international contract law".<sup>1</sup> The PICC are based on the principle that each contracting party is responsible for its own performance and its own sphere of operation.<sup>2</sup>

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1 Michael Joachim Bonell "The Law Governing International Commercial Contracts: Hard Law Versus Soft Law" in *Collected Courses of the Hague Academy of International Law* (Brill, Leiden, 2018) vol 388.

2 Eckart J Brödermann *UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary* (Wolters Kluwer, Aalphen aan den Rijn, 2018) at Introduction, B. Performance can be excused due to *force majeure* (art 7.1.7) or by contractual agreement, which is typically contained in a limitation of liability or another kind of exemption clause (art 7.1.6).

Most of the 211 principles constitute a compromise between different approaches to a given contractual topic, while others reflect a universal understanding or an emerging general principle of law.<sup>3</sup> On other occasions, for example regarding the order of performance,<sup>4</sup> the international Working Group, comprised of experts from all major legal systems,<sup>5</sup> has decided on a balanced middle ground between the common and civil law approaches. Sometimes the PICC propose a new approach, particularly appropriate for cross-border business. An example is art 6.2, which for the case of hardship devises an "innovative general (default) concept" based on the concept of fair trading.<sup>6</sup> The PICC also address typical international questions, such as a rule on foreign currency set-off (art 8.2) or a rule on time zones (art 1.12) for which there is no equivalent in most domestic laws.

Since the PICC are soft law their incorporation as the applicable law of the contract is subject to particular requirements. It depends on the parties, judges and arbitrators to decide, according to the applicable legal regime, whether and to what extent the PICC will govern the contractual relationship between the parties. Pursuant to many arbitration rules, "[t]he arbitral tribunal shall decide the dispute in accordance with such *rules of law* as are chosen by the parties as applicable to the substance of the dispute."<sup>7</sup> Thus, under most arbitral rules the PICC can be chosen to be the "rules of law" that will govern the contractual relationship between the parties. The same is true when parties decide to apply

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3 See PICC, art 1.7(1): "Each party must act in accordance with good faith and fair dealing in international trade." This reinforces an emerging and already widely existing international consensus: Brödermann, above n 2, art 1.7 para 1. See Bonell, above n 1, for further references. See also art 4.1 stating that the common intention of the parties is the starting point for contract interpretation establishing a "universal" interpretation rule unique in comparison with many domestic contract interpretation rules: Brödermann, above n 2, art 4.1 para 1).

4 Article 6.1.4 of PICC provides:

- (1) To the extent that the performances of the parties can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise.
- (2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise.

For further examples see Brödermann, above n 2, at Introduction, B.

5 For the list of UNIDROIT member states see UNIDROIT "Membership" (9 February 2018) <[www.unidroit.org](http://www.unidroit.org)>. New Zealand is not a member, however Australia is. Regarding the composition of experts see UNIDROIT *UNIDROIT Principles of International Commercial Contracts* (Rome, 2016) at x–xi; and Brödermann, above n 2, at LXVII–LZVIII.

6 Brödermann, above n 2, at art 6.2.1 para 1.

7 United Nations Commission on International Trade Law *UNCITRAL Model Law on International Arbitration 1985: With amendments as adopted in 2006* (2006), art 28(1) (emphasis added). Compare International Chamber of Commerce *Arbitration Rules – Mediation Rules* (2018), art 21(1): "The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."

the PICC during arbitral proceedings.<sup>8</sup> In contrast, in a contract providing for international litigation, the applicable private international law rules will generally require that a domestic law is chosen.<sup>9</sup> However, even if parties can only validly choose a domestic law to govern their contractual relationship the additional choice of the PICC might be beneficial. The PICC will provide additional contractual interpretation background and will bridge, if necessary, the gap between common and civil law. Parties are also free to incorporate the PICC into their contract as the applicable contract clauses. The applicable domestic law then will provide the legislative default framework for that contract and the mandatory rules which override the PICC clauses.<sup>10</sup> However, the PICC themselves recognise their subservience to mandatory rules "which are applicable in accordance with the relevant rules of private international law".<sup>11</sup>

In addition to the concise, well-written and practical commentary of each of the PICC articles, what makes this commentary such an excellent read is Brödermann's introduction to the PICC. In his introduction, he sets out the importance of the PICC, paraphrasing a businessman:<sup>12</sup>

If so many brains from around the globe have concentrated on the development of the UNIDROIT Principles over so many years, why should I spend time and money on researching national alternative for my cross-border business?

He emphasises the cross-cultural background of the PICC,<sup>13</sup> which is probably one of the reasons why the PICC have been recognised by arbitral tribunals and by courts.<sup>14</sup> For example, the Court of Appeal of Rio Grande do Sul held in 2017 that the PICC were the new *lex mercatoria*.<sup>15</sup> From a practitioner's perspective (Brödermann being a practitioner as well as an academic), he points out the

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8 Brödermann himself reports that he has experienced this twice in his professional practice: in 2001 when the Chairman of a Swiss arbitration proposed the application of the PICC and again in 2017 when the respondent in a Chinese European Arbitration Centre arbitration proposed their application in order to avoid research and proof of otherwise applicable Chinese law to European arbitrators. Eckart Brödermann "The Future for Cross-Border Contracts: In combination with Arbitration Clauses, the UNIDROIT Principles of International Commercial Contracts provide a Practice-Proven Bridge between Common and Civil Law" (25 March 2018) Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com>>.

9 See for example Regulation 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, art 3(1); and Maria Hook *The Choice of Law Contract* (Hart Publishing, Oxford, 2016) at 73.

10 Brödermann, above n 2, at Preamble, 2 paras 4–5.

11 PICC, art 1.4.

12 Brödermann, above n 2, at Introduction, A.

13 At Introduction, D.

14 At Introduction, A.

15 *Noridane Foods SA v Anexo Comercial Importação e Distribuição Ltd* Court of Appeal of Rio Grande do Sul (Number 70072362940, 14 February 2017) available at <[www.unilex.info](http://www.unilex.info)>.

PICC are easy to work with. There are five aspects that make the use of the PICC for B2B contractual relationships especially valuable from a practitioner's point of view:<sup>16</sup>

- (ii) the PICC's recognition of individual solutions and clauses, and of party autonomy as one of the corner stones of the contractual relationship;
- (iii) for exemption clauses the test is whether the clause seeks to establish an excessive advantage (art 7.1.6 no 4);
- (iii) the PICC provide a balanced regime of default rules, ie if parties come from different legal traditions no party will feel disadvantaged;
- (iv) in the case of the plurality of obligees, it is necessary to make an explicit choice for which art 11.2 sets out default rules; and
- (iv) like any other contractual rules or legal regime not all issues arising out of a contractual relationship are covered by the PICC, such as property or securities in rem, and these will therefore need autonomous solutions.

In summary, the PICC are an important instrument for cross-border B2B contracts. Brödermann's article-by-article commentary provides a useful tool in utilising the PICC when drafting cross-border contracts, advising businesses and resolving disputes (once there is a dispute governed by the PICC).

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<sup>16</sup> Brödermann, above n 2, at Introduction, C.