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Salvatore Mancuso
Mauro Bussani *Editors*

The Principles of BRICS Contract Law

A Comparative Study of General Principles Governing International Commercial Contracts in the BRICS Countries

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Salvatore Mancuso · Mauro Bussani
Editors

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Preface

In presenting this first volume related to the preparation of the Principles of BRICS Commercial Contracts, we would like first of all to express our deepest appreciation to the Members of the Working Group, in particular to the Rapporteurs responsible for the preparation of the national reports. It was only on account of the extraordinary efforts of all those who participated in the different activities of the project that this volume was made possible.

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Last but by no means least, we would like to express our deepest appreciation to the Universities of Cape Town and Palermo for generously hosting the two meetings of the Working Group.

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Abbreviations

AADR	Africa ADR
AFSA	Arbitration Foundation of South Africa
AIR	All India Reporter
ALAFCR	Conflicts Statute of China 2010
ALTCPSCH	Supreme Court's Judicial Interpretations on the Application of Law in the Trials on Contract of Purchase and Sale of Commercial Houses
AML	Anti-Monopoly Law
ARBLR	Arbitration Law Reporter
BAC	Beijing Arbitration Commission
CADE	Administrative Council of Economic Defence
CAJAC	China-Africa Joint Arbitration Centre
CAP	Code on *Arbitrazh* Procedure of the Russian Federation
CCC	Chinese Civil Code
CCL	Chinese Contract Law
CCPL	Chinese Civil Procedure Law
CECL	Chinese E-Commerce Law
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)
CPA	Consumer Protection Act 68 of 2008
ECL	E-Commerce Law
ECTA	Electronic Communications and Transactions Act 25 of 2002
ESL	Electronic Signature Law
FB	Full Bench
FC	Federal Court
GPCL	General Principles of Civil Law
GZAC	Guang Zhou Arbitration Commission
HC	High Court
IA	Indian Appeals
ICA	Indian Contract Act 1872
ICAC	Russian Federation Chamber of Commerce and Industry

ICC	International Chamber of Commerce
ICSID	International Convention on the Settlement of Investment Disputes
JI	Juridical Interpretation
JICL (2)	Supreme Court's Second Judicial Interpretation on Contract Law
LCIA	London Court of International Arbitration
LCLFCR	Law on the Choice of Law for Foreign-related Civil Relationships
LOI	Letter of Intent
Mah LJ	Maharashtra Law Journal
MIA	Moores India Appeals
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
PA	Prescription Act 68 of 1969
PC	Privy Council
PICC	UNIDROIT Principles of International Commercial Contracts
QB	Queen's Bench
Russian CC	Russian Civil Code
SC	Supreme Court
SCC	Supreme Court Cases
SCW	Supreme Court Weekly
SHAC	Shanghai Arbitration Commission
SITCCC	Supreme Court's Opinion on Several Issues on Trials of Commercial and Civil Contract under Current Situation
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
WTO	World Trade Organization

Setting the Scene

The Research Project on the Principles of BRICS Commercial Contracts Law. An Introduction

Mauro Bussani and Salvatore Mancuso

1 General Premises

The use of the acronym BRIC to indicate Brazil, Russia, India and China, was first introduced in 2001 in a report by Goldman Sachs.[1] It subsequently evolved in BRICS, adding South Africa to the group in 2010 as observer and in 2011 officially.[2] Created as a platform for dialog and cooperation between countries that represent, as of 2017, 40.9% of the world's population, 29.6% of the world territory and about 23.2% of the gross world product,[3] BRICS have progressively acquired a leading role on the

[1] The term BRICs was originally used in 2001 by Jim O'Neill, then chairman of Goldman Sachs Asset Management, in his publication Building Better Global Economic BRICs, Goldman Sachs, Paper No. 66, 30 November 2001, available at https://www.goldmansachs.com/insights/archive/archive-pdfs/build-better-brics.pdf. In the report O'Neill predicted, "the real GDP growth in large emerging market economies in 2001 and 2002 would exceed that of the G7". The group met for the first formal summit in 2009. In 2010, South Africa joined the group so that it was renamed BRICS.

[2] See the "Sanya Declaration", Hainan, China, on April 14, 2011 where one reads: "The Heads of State and Government of Brazil, Russia, India and China welcome South Africa joining the BRICS and look forward to strengthening dialogue and cooperation with South Africa within the forum". The official documentation is available at the "BRICS Information Center" of the University of Toronto, http://www.brics.utoronto.ca.

[3] Source: BRICS Joint Statistical Publication, Johannesburg 2018, available at https://www.statssa.gov.za/wp-content/uploads/2018/11/BRICS-JSP-2018.pdf; and Sengupta (2019).

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international scene, stirring the interest, first and foremost, of economic analysts and, although only in recent years and cautiously, also of legal experts.

The main reason for the unadventurous interest of the legal community seems to lie in the fact that, to date, there is not a shared agreement on what the gathering together of the five countries under an acronym should mean from a legal perspective. Perhaps deliberately, from their side, the concerned governments have so far not taken an official stance on the nature of the legal status of their relationship, making it difficult to classify and determine accurately what BRICS should stand for. Some analysts, in fact, believe that it is exclusively an economic alliance born in opposition to the US hegemony in the context of the global economy[4]; others glimpse the possibility of identifying the BRICS as a sort of 'legal network', albeit still in its early days.[5] All, however, seem to agree on its potentials—many of which are still unexpressed (also from a legal point of view).[6]

Before proceeding two remarks are in order, though. First, over time the entity called BRICS has been the object of an evolution from within. If the initial motivation, or "aspiration"[7] that pushed these countries to come together was certainly due to economic reasons, over the course of time it seems to have gradually transformed itself into something wider. Suffice it to say that at the first official BRIC meeting in 2009,[8] the representatives of the four countries limited themselves to state their commitment to continue the reform of the international financial institutions in the light of the new structure of the global economy, while at the meeting held in Brasilia in 2019, they expressly referred to their cooperation not only in financial terms but also as including foreign policies, national security, environment, infrastructure, trade, health, technological and scientific innovation.[9]

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[4] See Marr (2010).

[5] See Scaffardi (2012).

[6] On these potentials, amidst the economists, see e.g. Jones (2012); Nadkarni and Noonan (2012). In the legal scholarship literature one can see Neuwirth et al. (2017); Scaffardi (2014). According to Mancuso (2017), even though it is easier to show what BRICS is not ("it is neither simply a regular summit nor a simple international organization"), legal scholars should "try to understand the legal implications of it". See also Bussani (2018); Carducci and Bruno (2014), stressing the necessity "to analyze the legal-institutional dimension of the BRICS phenomenon".

[7] See Scaffardi (2012). According to the Author, "what was once an aspiration of "emerging economies" is now creating a "legal network"".

[8] The meeting was held in Yekaterinburg, Russia, on June, 16 2009. See official documents at http://www.brics.utoronto.ca/docs/090616-leaders.html.

[9] The *2009 Joint Statement of the BRIC Countries' Leaders,* available at http://www.brics.utoronto.ca/docs/090616-leaders.html, reads: "The emerging and developing economies must have greater voice and representation in international financial institutions, whose heads and executives should be appointed through an open, trans- parent, and merit-based selection process. We also believe that there is a strong need for a stable, predictable and more diversified international monetary system". The Preamble, n. 4 of the *Joint Declaration, Brasilia, 2019*, available at http://www.brics.utoronto.ca/docs/191114-brasilia.html, reads: "We welcome, among other achievements, the establishment of the Innovation BRICS Network (iBRICS); the adoption of the New Architecture on Science, Technology and Innovation (STI), which will be implemented through the BRICS STI Steering Committee, and the Terms of Reference of the BRICS Energy Research Cooperation Platform. We also welcome the holding of the BRICS Strategies for Countering Terrorism Seminar, the Workshop

The second remark, more obvious, is that the way in which the BRICS countries deal with the different issues they deem worth being tackled follows the traditional institutional and diplomatic path. The results of the summits between heads of state and governments are disclosed through official statements that set out prospective issues of common interest as well as the furthering of current works in progress in order to meet the economic and social challenges affecting the five countries. Decisions on the above-mentioned issues are preceded by preparatory analyses carried out by joint working groups that sometimes are based, in their turn, on the results of previous meetings held by representatives of the various departments or sherpas involved in the matters with a view to elaborate common strategies.

In light of the above, one may think of 'platform' and 'process' as the key notions to identify, analyse and possibly understand the nature of the BRICS phenomenon in its complexity. The term platform already contains, in itself, the idea of an organization that does not correspond to any traditional international legal structure and, by evoking the idea of equality (in this case between the consenting States), it entails sharing and exchange. Sharing of information, practices and ideas, exchange of goods and services are indeed the main avenues along which the cooperation between those countries takes place. The term process, in its turn, may refer here to the set of activities that create value by transforming a series of resources, including human capital. In the case of BRICS, it is all the aforementioned (financial, political, environmental, technological) activities which combine with each other and eventually generate wealth—to be meant in economic terms as well as in terms of transmission and circulation of models.[10]

2 BRICS and the Law

BRICS have never set up a proper international organization. However, from the analysis of the documents published after each summit it is clear that BRICS produce relatively stable 'legal flows' in different domains that are the expression of the countries' activities and interconnections.[11]

The 2015 Strategy for BRICS Economic Partnership document, signed at the 2015 BRICS Summit held in Ufa (Russia), stressed how improving the transparency of the trade and investment climate in the framework of international obligations

on Human Milk Banks and the BRICS Meeting on Asset Recovery. We commend the signature of the Memorandum of Understanding among BRICS Trade and Investment Promotion Agencies (TIPAs), and the establishment of the BRICS Women Business Alliance (WBA). We further appreciate the approval of the Collaborative Research Program for Tuberculosis, and other initiatives promoted by the 2019 BRICS Chairship". On the evolving nature of BRICS, see also, Scaffardi (2012), 150, footnote 14.

[10] In these terms, see the VI BRICS Legal Forum Declaration "Building Legal Capacity for New Rule Based World Economic Order" signed in Rio de Janeiro on October 16, 2019, available at https://bricslegalforum.org/wp-content/uploads/2019/10/Rio-de-Janeiro-Declaration.pdf.

[11] Scaffardi (2012), 162.

and national legislation and creating favorable conditions for the development of mutual trade and foreign direct investment in the BRICS countries are amongst the primary goals to be pursued to expand trade and investment cooperation. In the same document, one of the main areas of BRICS countries' educational cooperation is deemed to be the establishment of networks of researchers and the development of joint projects in areas of mutual interest.[12]

More importantly, from our perspective, on 11 December 2014, further to a meeting held in Brasilia, the BRICS Legal Forum was created,[13] and in the 10th BRICS summit held in 2018 in Johannesburg, the BRICS Legal Forum has been included in the official and sectorial meetings of the group with a view to make of it the long-term instrument of legal cooperation for the BRICS countries.[14] The BRICS Legal Forum intends to promote integration among the BRICS countries and to achieve infrastructure investments, enabling integrated legal–economic development. It aims to pave the way to the realization of the BRICS objectives through the use of proper legal principle, international decision-making procedures and dispute resolution mechanisms, relationships with and participation in different international organizations and the possible creation of common institutions.[15]

The Forum also intends to serve as an instrument to enhance the mutual understanding about the legal systems of the member countries. It is meant to promote legal cooperation and coordination and protect the diversity of the legal culture in each member country, providing a platform of exchange of the respective experiences on common legal issues.[16] Further, the members consider that economic cooperation between them, aiming to develop trade, investments and financial transactions, will call for a common legal framework on which such activities can be performed efficiently, together with a simple, quick and reliable system of dispute resolution.[17]

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[12] The 2015 Strategy for BRICS Economic Partnership document signed at the 2015 BRICS Summit was held in Ufa (Russia); it is available at http://www.brics.utoronto.ca/docs/150709-partnership-strategy-en.html.

[13] See the official documents at https://bricslegalforum.org/wp-content/uploads/2019/05/BRASILIA-DECLARATION-1st-Forum.pdf.

[14] See the official document at https://bricslegalforum.org/wp-content/uploads/2019/05/CAPE-TOWN-DECLARATION-5th-Forum.pdf, particularly point. n. 8.

[15] For a general view on the Legal Forum, see the official home page available at https://bricslegalforum.org/about/. In particular, see the document issued from the Conference held in Cape Town on 23–24 August, 2018, at https://bricslegalforum.org/wp-content/uploads/2019/09/BRICS-LF2018.-Book-of-Abstracts-Cape-Town.2018.-Final.16.9.2019.pdf, points n. 5, 6 and 10.

[16] See https://bricslegalforum.org, where the Legal Forum is defined as an "opportunity for legal cooperation through unity and diversity".

[17] See the "New Delhi Declaration" of 2016, made by the BRICS countries for the third Legal Forum, available at https://bricslegalforum.org/wp-content/uploads/2019/05/NEW-DELHI-DECLARATION-3rd-Forum.pdf. Worth mentioning is also the *BRICS Law Journal,* founded in 2014 and published in Russia by the Tyumen State University and available at https://www.bricslawjournal.com.

3 BRICS and Contract Law

All the above poses to the comparative law scholars many challenges, the most important of which is whether the current scenario drawn by BRICS is actually bound, or not, to yield a common legal pattern that may fit the interconnected needs of these countries. Taking on this challenge as a whole would require expertise and capacities beyond those available to editors and contributors to this volume. We thought it possible to deal, instead, with one specific field, i.e. contract law, whose legal significance and economic relevance is of the utmost concern for any one interested, from within or from outside the BRICS, in the development of the initiative. Moreover, after the starting of the project[18] the Legal Forum held in Cape Town in 2018 stressed the opportunity to find common elements in the subject of contracts and in particular "contractual clauses that are common to BRICS member states, including Governing law; Arbitration, Dispute Resolution, Forum and related matters".[19] This stance shored up our choice of focusing more particularly on commercial, business-to-business (B2B) contract law. B2B transactions make up the greater part of international trade, and are less vulnerable than other types of transactions to local variations dictated by each system's needs and policies. Further, B2B contracts are less exposed to the intricacies arising out of the membership of each legal system to one or the other groupings—continental law, common law, mixed jurisdictions—macro-comparison usually relies on.[20]

That being said, any contract lawyer knows that surveying the law applicable and applied in B2B transactions would require not only enquiring about black-letter rules, courts' rulings, and scholarly materials, but also investigating how in practice businessmen negotiate and perform (or non- or mis-perform) contracts and how disputes arising out of them are avoided or settled through arbitration or otherwise. Engaging seriously into such an investigation would have needed much more funding and time than we had. Much of the analysis contained in the book is therefore limited

[18] The project started in 2014. See below, Section IV.

[19] See https://bricslegalforum.org/wp-content/uploads/2019/05/BRICS-Legal-Forum-Programme-24-and-24-August-2018.pdf.

[20] The above-mentioned classifications are obviously debatable, and applying them to BRICS may result even more problematic. A few examples can be brought forward in this respect. Russian company law has been highly influenced by Western law, mainly US company law (see Dedov and Molotnikov 2017, Nougayrède 2013). India displays great legal diversity and legal pluralism with various indigenous, Hindu and Islamic laws being applied in different contexts and fields (see, ex multis, Menski 2006, Lingat 1967). Modern Chinese law is commonly associated with the civil law legal family due to the great influence that European continental law exercised on its (official) legal development and on its codification activity preceded by detailed statutory law largely based on the Romano-Germanic model (on the influence exercised by German law on the development of Chinese law, using Japan and Taiwan as access doors, see Chen 2011). However, the strong presence of the socialist pattern and the common law influences deriving from the adoption of institutions from Hong Kong (on which see Chen 2009)—not to mention the deeply rooted sway of traditional law—could lead to Chinese law being considered as a hybrid mixed system, on which see Castellucci (2010).

to the official legal framework applicable to B2B transactions in each country. As we will see in the next section, however, the research methodology we adopted allowed us to go well beyond the surface of that framework whenever necessary.

4 The Book

The volume we are presenting constitutes the first phase of a project that aims to investigate the possible foundations of a common system of international commercial contract law within the BRICS' network.

The Project kicked-off in 2014 in Cape Town (hosted by one of the authors of the present chapter, at that time Chair of the Centre for Comparative Law in Africa at the University of Cape Town) where the project coordinators and the national reporters met in order to delineate the development of the Project, to choose the topics to be addressed, to discuss the preparation of a questionnaire and the main features of the subsequent national reports. The need of replacing the Indian rapporteur and the long uncertainty about the detailed contents of the final version of the new Chinese Civil Code[21] imposed some delays on the original programme. Eventually, in February 2020, the members of the research team met in Palermo (hosted by the same author, who moved back to Italy in the meantime) to finalize the national reports and discuss outlines and contents of the comparative analysis.

Even though the search for common principles in this area is certainly nothing new in the international arena, the methodology that the editors of this volume have deemed most appropriate to adopt recalls in part what is being done by both "The Common Core of European Private Law" Project[22] and by Rudolf Schlesinger through the so-called Cornell Seminars and the subsequent publication, in 1968, of the seminal work on "Formation of Contracts".[23]

A questionnaire has therefore been drawn up by Jacques Du Plessis and then shared with the editors and the national reporters who made their suggestions to produce the final version inserted in the present volume. It poses eight questions concerning the various phases of the contract, from its formation, to the moment of its performance up to its possible pathological evolution. Editors and contributors

[21] Moreover, the Covid-19 pandemic obliged the Chinese authorities to postpone the official adoption of the Code which was originally scheduled for March 2020.

[22] 'The Common Core of European Private Law' project was started in 1993 by Ugo Mattei and one of the authors of this paper. While receiving quite a substantial attention in the comparative law literature, the Common Core project has so far been involving more than three hundred scholars. For a more extensive and complete presentation of the project, see Bussani (2015); see also Bussani and Mattei (1997–1998), Bussani et al. (2009), Bussani and Mattei (2007), Bussani and Mattei (2003).

[23] At Cornell, Schlesinger launched in 1957 his collective comparative research project on the 'Formation of Contracts', which resulted, in 1968, in the publication under his general editorship of two monumental volumes: Schlesinger (1968). See also Schlesinger (1957), Farnsworth (1969), Ehrenzweig (1968), Braucher (1970). For a discussion of Schlesinger's (as well as Rodolfo Sacco's) fundamental contributions to comparative law research, see Mattei (2001).

to this volume agreed to draft the questionnaire using the UNIDROIT Principles of International Commercial Contracts (PICC) as a stating reference[24]—reserving to the second stage of the project (and to the volume to be published thereupon) the opportunity of scrutinizing the suitability of the PICC, or of part of them, to our actual purposes.

The answers to the questionnaire have a double function: on the one hand, they provide the reader with the relevant data on each concerned jurisdiction, on the other hand, the same data become a starting point for the comparative analysis. This methodology allows a further advantage: it enables the reader to look at the answers provided by each rapporteur not only through the lens of the black-letter rules but also taking into account the implementation of the same rule in practice.

The goal is to identify the real differences and similarities in the five legal systems. Comparative law scholarship has already demonstrated how similar (or even identical) rules can lead to different operational results and—on the contrary—how different rules can take to the same operational result, due to the action of different legal formants.[25] The comparative analysis of the contract law in the five BRICS countries takes into proper account what these legal formants are, how they operate in each legal system and how they determine the operational rules in the living law of commercial contracts.

A final thought concerns the actual usefulness of a research on the common principles in the area of commercial contracts for the BRICS' legal systems. It could be argued, as has in fact been done, that even if the research led to the drafting of those principles they would be unlikely to find an actual implementation by and in the BRICS countries.[26] The degree of probability that a research be used in practice has never stopped scientific endeavours, though. It may be that in view of the path these countries have trodden since the beginning of their cooperation and of the efforts and collaborations made in large areas of common interests, the possibility that those principles might be shared and applied in practice is not so remote. Maybe it is. Yet, we thought our research project worth the effort like any other comparative law

[24] UNIDROIT has worked extensively in the area of contract law and adopted a variety of instruments intended to offer harmonised and effective rules to respond to the evolving needs of modern transactions. The UNIDROIT Principles of International Commercial Contracts (whose first edition dates back to 1994) constitute a non-binding codification or "restatement" of the general part of international commercial contracts law, providing a comprehensive set of rules dealing with all the most important topics in that matter. The latest edition of the UNIDROIT Principles was published in 2016 (full text available at https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf). See *ex multis,* Bonell (2009, 2018).

[25] Indeed, another fundamental approach followed by the project is the dynamic comparative law methodology principally developed by Rodolfo Sacco during the last forty years. Sacco's theory is based on the assumption that a list, albeit exhaustive, of all the reasons given for the decisions made by the courts is not the entire law and that the statutes or the definitions of legal doctrines given by scholars are not the entire law. Therefore, it is necessary to analyze the full, complex relationship among what he calls the 'legal formants' of a system, that is, all those elements that make up any given rule of law among statutes, general propositions, particular definitions, reasons, holdings and so on, to know what the law is. The theory is summarized in Sacco (1991).

[26] For a full discussion of this issue see Mancuso (2017) 265 and ff.

initiative that tries to cast light on a blind spot. This kind of study is meant to gather and spread granular knowledge on the commercial contract laws of a series of legal systems that are usually dealt with in isolation, or with a view of grouping them in one or another legal family, or within analysis surfing over their own specific features inside commentaries devoted to this or that international legal instrument. Thinking out of the box sometimes is path-breaking, sometimes it is a naïve and time-wasting delusion. The reader will judge.

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Commercial Contract Law in the BRICS: A Comparative Overview

Marta Infantino

1 Introduction

The aim of this chapter is to provide some background information on the five legal systems analysed in the book, with a particular focus on their institutional infrastructure, organisation of the judicial system and sources of law, traits of contract law, conflict-of-laws rules and arbitration.

One might wonder why the above features matter in a study on international commercial contracts. Merchants, even in domestic settings, are well-known for their tendency to not rely on official law and to avoid litigation.[1] In transnational settings, the move away from national laws and courts is eased by the ability of the parties to choose the law governing their relationship and to select the (most of the time, arbitral) forum that will handle the resolution of the possible disputes between them – a move that often implies a choice of English law or the law of some US states and of an arbitral institution based in Paris, London, Singapore, Hong Kong or Geneva.[2] As a result, commercial transnational contracts most of the times live governed by self-enforced, sectoral rules that have little contact with national legal systems, the contents of which can be properly ascertained only through a sociological inquiry

[1] Among the substantial literature on these issues, see Macaulay (1963), Milgrom et al. (1990), Bussani (2019).

[2] On the dominance of English and US law in international contracting, see Roberts (2017), 270–272; on the preference of parties in international commercial contracts in arbitrating before the International Chamber of Commerce (ICC), headquartered in Paris, the London Court of International Arbitration (LCIA), the Singapore International Arbitration Center (SIAC), the Hong Kong International Arbitration Center (HKIAC), and the Swiss Chamber of Commerce (SCC), see Queen Mary University of London (2019), 9.

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of the field and its actors.[3] Even in the exceptional cases in which disputes arise and the contact with official law materialises, details of the contact remain contained in scattered and largely unpublished arbitral awards.

Yet, notwithstanding all of the above, one cannot conclude that national law and culture bear no relevance to international commercial contracts. In some cases, national law might come in through the application of the forum's conflict of law rules; in other cases, some national rules of mandatory application might defy the parties' attempt to eschew domestic law; yet in other cases, parties themselves might be interested in resorting to national courts and having them interfere with the contractual relationship or the arbitral proceedings. Further, it is well known that parties' own legal culture tends to affect national legal actors' negotiating and handling business transactions.[4] It is therefore reasonable to assume (as the UNIDROIT Secretariat did when preparing the Principles of International Commercial Contracts (UPICC)) that national contract law does matter to international commercial contracts and that surveying the former could "be of considerable assistance" in studying and restating the law applicable to the latter.[5] This is why the book collects national reports on the main features of commercial contract law in each BRICS country, and, since each legal system presents its own features that affect how contract law is thought of, made, and applied, the present chapter aims at sketching out a basic outline of what these features are.

One caveat, though. The following provides a condensed snapshot of the official legal framework related to commercial contracts of BRICS countries; no consideration is given to adjoining fields, such as those of investment law, public contracting and company law. The focus is only on the latest developments, that is, developments in official law since the Nineteenth and, especially, the Twentieth century, after the countries' encounter with, or colonization by, the West. As such, the description is not only sketchy; it also does not take into consideration both the history of indigenous law and the current survival, more or less officially, of layers of legal pluralism (think of the law applied to Hindus or Muslims in India or South African customary law[6]). This is not because the historical roots and legal pluralism of BRICS countries have left no imprint on their law; quite the contrary. However, given that such an imprint is least visible on international commercial contracts, constraints of space suggest to leave it out of the analysis.

The limitations of this survey—i.e., it being restricted to contemporary official and largely Westernized contract law—justify why, in the following description, legal systems are reviewed through the lens of their membership in and proximity to either the civil law or the common law tradition. According to the classification by

[3] Such as those carried out by Dezalay and Garth (1996).

[4] See, for all, Bologna (2020), Kozolchyk (2014), Hill and King (2004).

[5] UNIDROIT (1974), 2 ("The Committee […] considered that a general comparative study of the principal legal systems would be of considerable assistance in the preparation of the proposed Code of international trade law").

[6] On the role of these laws, see, respectively, Bhadbhade (2012); 41–42, Lubbe and du Plessis (2004), 243.

University of Ottawa's JuriGlobe, Brazil and Russia fall into the category of 'civil law monosystems', China is a 'mixed system of civil law and customary law', South Africa a 'mixed system of civil law and common law', and India is a 'a mixed system of common law, Muslim law and customary law'.[7] Similar categorization attempts clearly suffer with several shortcomings and are of limited explanatory value. Yet, we will see that, as Western-centric as it might be, the civil law/common law axis provides useful insights in looking at BRICS' contract law in context. The survey therefore departs from the alphabetical order otherwise followed in the book, by starting from legal systems participating in the civil law group (Brazil and Russia: paras 2 and 3) and then moving to mixed jurisdictions, from the least to the most oriented to common law (China, South Africa, India: paras 4, 5 and 6).

2 Brazil

According to the 1988 Federal Constitution, which is the supreme law of the land, the political and administrative organization of the Federal Republic of Brazil comprises twenty-six states and one federal district.[8] While the states have their own constitution and system of state courts,[9] the power of legislating on civil and commercial law, including contract law, lies exclusively with the Union.[10] In other words, Brazilian federalist structure has little impact on contract regulation, which is the same throughout the entire country.

Of the five countries under examination, Brazilian law is the one most clearly aligned with the civil law tradition.[11] Positive legislation is considered as the primary source of law. As to contract law, the basic source today is the Brazilian Civil Code, which was enacted after almost thirty years of parliamentary debates in 2002 and replaced the previous Commercial Code of 1850 and Civil Code of 1916 (which in their turn had superseded the royal Portuguese legislation that ruled the country before and after its independence from Portugal in 1822). The 2002 Civil Code covers both civil and commercial matters and is said to constitute "the second most important piece of legislation in Brazil, after the Constitution".[12] Like the 1916 Civil Code, the 2002 Code is divided into a General and a Special Part; obligations, including contracts, are dealt with in Book I of the Special Part. But while the Civil Code of 1916 was largely inspired by pre-existing Portuguese legislation, as well as by the French,

[7] See http://www.juriglobe.ca/eng/sys-juri/index-syst.php. Rather than adopting the view that mixed legal systems are mixture of civil law and common law (adopted by Palmer 2010), the University of Ottawa's Juriglobe clearly embraces a broader notion of mixed jurisdictions, such as the one advocated by Örücü (2010). On these debates, see du Plessis (2019).

[8] Article 18 of the Brazilian Constitution.

[9] See Articles 25 and 125 of the Brazilian Constitution.

[10] See Article 22 (1) of the Brazilian Constitution.

[11] On the history of Brazilian private law, see Gomes (1959), Rosenn (1971), Rosenn (1984), Wald (1999), Junqueira de Azevedo (2005), Campilongo (2017).

[12] Antunes Soares de Camargo (2003), 162.

Italian, German and Spanish codifications, and embraced a classical liberal approach to contract law, the 2002 Code relies more heavily on the German and Italian traditions and adopts a more socially-attuned approach to contract law.[13] For instance, the 2002 Civil Code—besides being endowed with a General Part which is reminiscent of the BGB's *allgemeiner Teil* and embracing the idea that party autonomy finds a limitation due to the 'social function' of the contract[14]—looks at contracts through the lens of the German notion of '*Rechtsgeschäft*'[15] and treats donations and unilateral agreements as a species of contract,[16] places extensive reliance on general clauses, including on the principle of good faith,[17] recognizes the validity of preliminary contracts (that is, contracts to make a contract),[18] and allows parties to annul transactions tainted by gross disparity[19] and to terminate long-term contracts in case of hardship.[20] It seems that neither the UPICC (in their 1994 edition) nor the 1980 UNCITRAL Convention on Contracts for the International Sale of Goods (CISG, which Brazil ratified in 2014 with the Decree No 8.327/2014) have exerted any influence on contract law regulation in the Civil Code.[21] Rather than aligning with inter- and trans-national sources, drafters of the Code were more interested in reducing the gap between elitarian and foreign-inspired legislation and the needs of the many communities that make up the highly varied Brazilian society.[22] As a result, it is said that, in the 2002 Code, "the notion of contractual justice superseded legal individualism, formerly the exclusive source of contractual obligations, and now prevails over the absolute application of the ancient principle of the pacta sunt servanda".[23]

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[13] Wald (1999), 817–818; Mancuso (2017), 253.

[14] See Article 421 of the Brazilian Civil Code (on the '*função social*' of the contract), which resounds with the idea developed by Emilio Betti in Italy, according to which every contract has 'social and economic function' of its own: Betti (1943), 119. See also Benetti Timm (2006).

[15] See Articles 104 and ff. of the Brazilian Civil Code, under the General Part.

[16] The Brazilian Civil Code deals with donations under Articles 538–564 in the Book on contracts; similarly, the BGB regulates donations under the title 4 of the division 8 (particular types of obligations) of Book II on the Law of Obligations. By contrast, donations are located in Book II of the Italian Civil Code, devoted to succession law.

[17] See Articles 113 and 422 of the Brazilian Civil Code. Cf. with § 242 BGB and Articles 1175 and 1375 of the Italian Civil Code.

[18] See Articles 462–466 of the Brazilian Civil Code; cf. with Articles 1351 and 2932 of the Italian Civil Code.

[19] See Article 157 of the Brazilian Civil Code and cf. with § 138 (II) BGB (but see also the doctrine of uncoscionability enshrined in § 2–302 of the US Uniform Commercial Code).

[20] See Article 478 of the Brazilian Civil Code; cf. with Article 1467 of the Italian Civil Code.

[21] Grebler (2005); Gama (2011). On the problems and consequences of Brazil's 2014 ratification of the CISG, see Estrella Faria (2015); Espolaor Veronese (2019).

[22] The great social and economic inequality affecting Brazilian society is a feature underlined by many commentators: see, *e multis*, Rosenn (1984), 15–16, 29–30; Wald (1999), 807–808.

[23] Grebler (2005). Under Article 5 of the Introductory Act to Brazilian Law (Decree Law No 4657 of 1942), judges are required, in interpreting the law, "to pay attention to the social purposes aimed at by the law and the needs of public welfare". It should be stressed, however, that, more recently, with the enactment of Law No 13.874 of 2019, which amended the 2002 Civil Code, this social mindset has been mitigated, especially when it comes to business transactions. Under Article 421,

Such a shift was smoothened by the fact that, during the almost thirty years of parliamentary debates over the drafts of the new Civil Code, Brazilian courts often used the drafts as a source for interpreting existing rules, thus facilitating the transition from two pre-existing codes to the new one.[24] Further, since the enactment of the 2002 Civil Code, to help adjust to the new rules, the *Conselho da Justiça Federal* (Council of Federal Justice), in conjunction with the *Centro de Estudos Judiciários* (Legal Research Institute), have organized meetings called '*Jornadas de Direito Civil*', which resemble the '*Juristentag*' promoted every two years since 1860 by the Association of German Jurists. At these meetings, judges, professors and lawyers work together to draft statements and clarifications of private law rules ('*enunciados*') that work as normative guidelines in practice.[25]

Other important pieces of legislation include—besides the Consumer Protection Code (Law No 8.078 of 1990), which provides several rules for B2C contracts, and antitrust legislation (originally enacted with Law No 8.884 of 1994, now replaced by Law No 12.529 of 2011)—the 1942 Introductory Act to Brazilian Law (Decree Law No 4657 of 1942) and the 1996 Arbitration Act (Law No 9.307 of 1996). The former provides, inter alia, the conflict-of-laws rules applicable to contractual disputes with a foreign element, stating that such disputes should be regulated by the law of the State in which the contract was entered into, which is presumed to be the place where the promisor resides or has his place of business, except when such law offends "national sovereignty, public order or good usages".[26] Most notably, the Introductory Act does not clearly affirm that contractual parties in transnational contracts are free to choose the law applicable to their transaction and has thus given rise to a heated debate as to whether or not choice-of-law clauses are enforceable in Brazilian law.[27] In contrast, when a contractual dispute is submitted to arbitration, the determination of the applicable law is governed by the 1996 Brazilian Arbitration Law. The Law, which was largely inspired by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (NY Convention, ratified by Brazil through Decree No 4.311 of 24 July 2002) and by the UNCITRAL Model Law on International Commercial Arbitration of 1985,[28] sets out the rules for national and international arbitral proceedings. In particular, the 1996 Arbitration Law allows courts to refuse recognition and enforcement of foreign arbitral awards which are contrary to "national public order" (a notion that the Brazilian Superior Tribunal of

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as amended, the principle of *pact sunt servanda* and minimal intervention in private contracts shall prevail.

[24] Antunes Soares de Camargo (2003), 163.

[25] See http://www.jf.gov.br/cjf/corregedoria-da-justica-federal/centro-de-estudos-judiciarios-1/publicacoes-1/jornadas-cej/EnunciadosAprovados-Jornadas-1345.pdf.

[26] See respectively Articles 9 (2) and 17 of the Introductory Act to Brazilian Law.

[27] Whenever a contract has to be executed in Brazil, Brazilian courts still tend to override parties' choice of applicable law and to apply Brazilian law by invoking the 'public order' exception under Article 17 of the Introductory Act: see Slomp Aguiar (2011), 493–495; Stringer (2005).

[28] Costa and Tavares Paes (2019) no 2.3 (according to which the Brazilian 1996 Arbitration Act was also influenced by the Spanish Arbitration Act of 1988 and by the Inter-American Convention on International Commercial Arbitration, ratified with Decree No 1.902 of 1996).

Justice interprets as meaning 'international public policy'[29]) and clearly states that parties are free to choose the applicable law, unless the latter violates good usages or public order, even allowing parties to select "general principles of law, customs, usages and the rules of international trade".[30] Arbitration therefore represents an important means to overcome the resistance of Brazilian courts to recognise the autonomy of parties in their choice of law.[31]

In the absence of a valid arbitration agreement or choice-of-forum clause,[32] disputes arising out of commercial contracts are normally within the competence of Brazilian states courts, which are structured in two tiers (trial and appeal courts). Decisions from the Appellate Courts may be appealed before the Superior Tribunal of Justice, Brazil's highest federal court for all non-constitutional matters, which is also exclusively competent to decide issues regarding the recognition and enforcement of foreign arbitral awards.[33] Traditionally, Brazilian courts are deemed not to be formally endowed with the power to make the law.[34] Yet, as in all civil law countries, such statement should be taken with caution. First of all, Brazilian legislation, and the Civil Code in particular, is filled with general clauses that give room to judges "to create, develop or complete legal norms".[35] Second, it is statutorily recognized that in cases not regulated by the law, judges should solve disputes according to "analogy, usage and general principles of law".[36] Third, following a practice developed since the Sixties, the Brazil's constitutional court (the Supreme Federal Tribunal) and the Superior Tribunal of Justice have started to regularly publish '*súmulas*', that is, summaries of their judgments which, for a long period, provided guidelines to all appellate and lower courts across the country (although it was debated whether or not they were binding). The binding character of the Supreme Federal Tribunal's '*súmulas*' was established in 2004 by a constitutional amendment which inserted Article 103-A in the 1988 Constitution, while Articles 926–927 of the 2015 Civil Procedure Code made it clear that rulings issued in some specific situations by the

[29] See Article 39 (2) of the 1996 Arbitration Act, as well as de Albuquerque Cavalcanti Abbud (2009), 289–292.

[30] See, respectively, Articles 39 (2) and 2 (1)–(2) of the 1996 Arbitration Act. By contrast, designation of non-State law as the applicable law is not possible before ordinary courts: Gama (2011), 641.

[31] Slomp Aguiar (2011), 496.

[32] For quite a long time, Brazilian courts have deemed forum-selection clauses invalid, because of the alleged mandatory nature of procedural rules on judicial competence. In 2010, however, the Superior Tribunal of Justice (RESP 1.177.915/RJ, Terceira Turma, STJ, 13 April 2010) ruled that forum-selection clauses are generally valid. The rule is now enshrined in Article 63 of the 2015 Civil Procedure Code (enacted with Law No 13.105 of 2015).

[33] See Article 105 (1) (i) of the Brazilian Constitution and Article 35 of the 1996 Brazilian Arbitration Act. Before 2004 such competence was exclusively endowed to the Brazialian Supreme Federal Tribunal. See Celli & Espolaor Veronese, Brazilian report, no 1.

[34] Rosenn (1986), 513.

[35] Estrella Faria (2015), 220.

[36] Article 4 of the Introductory Act to Brazilian Law.

Superior Tribunal of Justice as '*súmulas*' are binding for all appellate and lower courts.[37]

Understanding contract law in Brazil would not be possible without considering the position of legal scholarship, on the one hand, and of arbitral tribunals, on the other hand.

Fully in line with the civil law tradition, scholarly doctrine and opinions of distinguished jurists are held, in Brazil, in the highest regard. Brazilian judges are allowed to refer, and often do refer, to the writings of law professors when they confront legal questions that cannot be solved by a plain reading of statutory provisions, often considering them more influential than judicial decisions.[38]

As for arbitration, as the Brazilian national reporters note, "currently, the majority of disputes arising from international contracts concluded by Brazilian parties are subject to arbitration"[39] often before European arbitral centres, and especially the International Chamber of Commerce. Yet, one should keep in mind that, especially in recent years, the Brazilian legal system has embraced a distinctively pro-arbitration attitude—as shown by, inter alia, the rules in the 1996 Arbitration Law opening to the parties' freedom to choose the law applicable to the contract[40]—and multiplied the arbitral fora available to commercial parties. For instance, in 1979 the Arbitration and Mediation Centre of the Brazil-Canada Chamber of Commerce (CAM-CCBC) was established in São Paulo to provide dispute resolution services under its own arbitration and mediation rules.[41] In the same city, the International Chamber of Commerce opened a hearing office in 2018.[42]

3 Russia

The largest country in the world, Russia, is a federation of eighty-five states, regions, territories and cities. According to the 1993 Constitution of the Russian Federation, which has "supreme legal force",[43] each of the states has the power to enact its own

[37] Even before the statutory reforms mentioned in the text, *súmulas* created a "de facto stare decisis because taking a contrary position [to a *súmula* of the STJ] practically guarantees a reversal" (Rosenn 1986, 514). On the current situation, see Marinoni (2019), 309.

[38] Slomp Aguiar (2011), 508; Stringer (2005), 965.

[39] Celli & Espolaor Veronese, Brazilian report, no 1.

[40] See above in the text. There is also some evidence of Brazilian arbitral tribunals applying the UPICC: Gama (2011), 648–653.

[41] See www.ccbc.org.br.

[42] See https://iccwbo.org/contact-us/contact-sciab-ltda/.

[43] Article 15 (1) of the Russian Federation's Constitution of 1993.