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.

M. Infantino (✉)
University of Trieste, Trieste, Italy
e-mail: minfantino@units.it

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arise and the contact with official law materialises, details of the contact remain contained in scattered and largely unpublished arbitral awards.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.

Constitution and legislation,[44] while the power to enact "civil, civil-procedural and arbitration-procedural legislation" lies only with the Federal Government.[45]

As emphasized by the Russian rapporteur, Russian law traditionally belongs to the "continental civil law legal family".[46] At the beginning of the Twentieth century, pre-revolution Russian law's vocabulary, notions, structure and contents were already shaped by continental European traditions, especially the German one, as shown by Book V of the 1913 Draft Civil Code of the Russian Empire. Such influence was still evident (although less clearly, since private property had been abolished in 1917) in the first Civil Code of the Russian Soviet Federated Socialist Republic (SFSR) of 1922 (*Grazhdanskiy Kodeks RSFSR* 1922).[47] From 1928 onwards, however, the introduction of a centralised planned economy devalued the role of civil law in general and of contract law in particular; foreign trade was put under the State's monopoly and disputes arising out of transnational contracts were subject to the exclusive jurisdiction of Soviet arbitral bodies, such as the Maritime Arbitration Commission and the Foreign Trade Arbitration Commission, established, respectively, in 1930 and 1932 before the Chamber of Commerce of the Union of Soviet Socialist Republics (USSR).[48] In 1936, the newly adopted USSR Constitution assigned to the Union the jurisdiction to enact a civil code, but such a code was never approved. In 1957, the Constitution was amended to give the fifteen Union Republics that at that time made up the USSR the power to enact their own civil codes, while preserving the Union's power to lay down 'fundamental principles' for these codes.[49] This resulted in the enactment of the 1961 'Fundamental Principles of Civil Law of USSR and Union Republics' by the Union which was followed by the enactment of the Russian SFSR's new Civil Code in 1964 (*Grazhdanskiy Kodeks RSFSR* 1964). In both the texts, economic relationships between entities (which were almost all state-owned) were conditioned upon compliance with the State's acts of planning, while contracts between individuals to satisfy people's daily needs were admissible insofar as they respected the hyperdetailed requirements and rules set out by the law for each type of contract.[50] It was only in 1991, with the enactment of the Fundamental Principles

[44] Article 5 (2) of the Russian Federation's Constitution. State legislation shall however conform to the Russian Federation's Constitution and laws, according to Articles 15 (1) and 76 of the Russian Federation's Constitution.

[45] Article 71, letter (n), of the Russian Federation's Constitution; see also Article 3 (1) of the Russian Civil Code of 1994.

[46] Komarov, Russian report, no 1.

[47] On Russian law at the beginning of the Twentieth century, see Yefremova et al. (2014), 6–7; Osakwe (2008), 49; Oda (2007), 64–66 (also on the civil law influence on the 1832 Svod Zakonov); Ioffe (1985), 115. It should however be noted that Article 1 of the 1922 Civil Code provided that civil law rights were protected by law except "when they are exercised in contradiction with their socio-economic purpose" and that Article 17 of the same Code restricted foreign commercial transactions allowing only the state to engage in foreign trade.

[48] See Berman (1947), 199–202, 209–213; Kos-Rabcewicz-Zubkowski (1970), 72; Ioffe (1985), 114–116.

[49] On these developments, see Yefremova et al. (2014), 9.

[50] Yefremova et al. (2014), 10.

of Civil Legislation of the USSR and the Union Republics, that equality of participants in the commercial market was officially reinstituted and new forms of contract allowed.[51] The 1991 Fundamental Principles laid the basis for the drafting and enactment of the post-Soviet Russian Civil Code (*Grazhdanskiy kodeks Rossiyskoy Federatsii*), whose Four Parts were adopted between 1994 and 2008 (and later revised on several occasions).

The 1994 Civil Code covers both private and commercial law and is nowadays the main source of contract law, which is regulated in both Part One (on the general law of contracts) and Part Two (which deals with special contracts).[52] As has been noted, the Russian Civil Code's approach to contract law is "in part Soviet and in part Western".[53] While the length, style and level of detail of its provisions and the number of rules regarding state contracts are signs of the Socialist heritage, the Code has a clear civil law imprint, in particular of German law. Evidence of this imprint comes, for instance, from the Code's division into a general and a special part, the inclusion of (both bilateral and unilateral) contracts in the wider notion of obligations and '*Rechtsgeschäfte*',[54] the rejection of the requirement of cause (as well as consideration) for the validity of contracts,[55] the reliance upon the principle of good faith,[56] the admissibility of preliminary contracts[57] and provisions on pre-contractual liability, specific performance and modification or termination of contracts in case of hardship.[58] Remarkably, and notwithstanding the 1991 ratification of the CISG by the USSR (subsequently succeeded by the Russian Federation), the CISG seems to have provided little inspiration for the Code's drafting. The same holds true for the UPICC, the first edition of which was out in 1994.[59] In contrast, the Code, mostly thanks to later amendments, bears traces of some common law-inspired transplants, such as rules on indemnity clauses and liability in case of misrepresentation.[60] Influence from the European legal framework (and in particular by the 1980 Rome Convention on the Law Applicable to Contractual Obligations and by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, subsequently repealed and replaced by the Regulation (EU) No 1215/2012) is clear in Russian private international law rules, which are also contained in the Civil Code. In case of contracts with foreign elements,

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[51] Yefremova et al. (2014), 13; Feldbrugge (1993), 271–282.

[52] See respectively Articles 420–453 (in Part I) and 454–1063 (in Part II).

[53] Osakwe (2008), 27.

[54] See Articles 153–181 (on *Rechtsgeschäfte*) and 307–419 (on obligations) of the Russian Civil Code. See also Article 423 of the Code, devoted to onerous and gratuitous contracts. See also Oda (2007), 85–86.

[55] Komarov, Russian report, no 3.1.1.

[56] Cf., for instance, Articles 1 (3), 307 (3), 434.1 (2) of the Russian Civil Code.

[57] See Article 429 of the Russian Civil Code.

[58] See, respectively, Articles 434.1, 308.3 and 451 of the Russian Civil Code.

[59] Maggs (2009), 200; Komarov (1996).

[60] See respectively Articles 406.1 and 431.2 of the Russian Civil Code; see also Maggs (2009), 197–203.

Article 1210 (1) of the Code provides for parties' freedom to choose the applicable law (choice of non-state law, though, is thought not to be admissible[61]). Absent the indication of choice by the parties, Article 1211 (1) identifies the applicable law with the law of the country where the party providing the most significant performance resides or has its seat at the time when the contract was made.[62] Foreign law is applicable except if it conflicts with mandatory provisions or Russian public order.[63] Obviously, there are many other laws outside the Civil Code that might affect the life of contracts, such as the 1992 law on consumer protection,[64] the 2006 antitrust law,[65] and the UN-inspired 2011 law on electronic signatures.[66] It is however important to keep in mind that, in case of discrepancy, the Civil Code enjoys priority over any other rule, as emphatically stated by Article 3 (2) of the Russian Civil Code itself.

A similar blending of civil law traits and Socialist heritage is visible in the organization of civil justice. The current system is two-tiered, consisting of civil and commercial (called *arbitrazh*) courts. Commercial courts have inherited the function of Tsarist German-inspired commercial courts and of the Soviet *arbitrazh*, which were quasi-judicial bodies that settled economic disputes between enterprises during the socialist period.[67] They are organized at three levels (circuit, appellate and cassation courts) and deal with litigation between corporations and/or merchants, enjoying exclusive jurisdiction over corporate, intellectual property and bankruptcy matters.[68] Civil courts are structured in two instances: district and regional courts—some minor disputes are, however, handled by Justices of the Peace. These courts have residual jurisdiction, treating all cases concerning individuals that do not fall within the competence of commercial courts (that is, in the contract field, disputes arising out of B2C and C2C transactions).[69] Both the systems are headed by the Supreme Court of the Russian Federation, which serves as the appellate and cassational review court for decisions by lower courts.[70] Despite the fact that precedents

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[61] Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation, No 158, 9 July 2013.

[62] Further criteria for special contracts are dictated in the second paragraph of the same article. On the influence played by European rules on this regard, see Orlov (2017).

[63] See Article 1193 of the Russian Civil Code.

[64] Law on the protection of consumers No. 2300–1 FZ of 1992.

[65] Law on the protection of competition No. 135 FZ of 2006.

[66] Law on electronic signature No. 63 FZ of 2011, amended in 2016, after Russia's ratification in 2014 of the UNCITRAL Convention on the Use of Electronic Communications in International Contracts.

[67] Berman (1947), 204–209. On the Russian judicial system and its historical origins, see Maleshin (2017), Maggs et al. (2015), 61–95; Oda (2007), 23–40.

[68] See Federal Constitutional Law on Commercial Courts in the Russian Federation No 1-FKZ of 1995. Many of the recent reforms affecting Russian judiciary were inspired by the need of improving Russia's scoring on the World Bank's Doing Business Report: see World Bank (2017).

[69] See Federal Constitutional Law on Courts of General Jurisdiction in the Russian Federation No 1-FKZ of 2011.

[70] The Supreme Court is the highest court on non-constitutional matters under Article 126 of the 1993 Constitution. Until 2014 the apex court of commercial courts was the Higher Commercial

are not officially binding, the Supreme Court's judgments are particularly authoritative for lower courts.[71] Further, alongside the judicial function, the Supreme Court has inherited from the socialist period the function of Soviet apex courts to issue 'guiding explanations' unrelated to concrete disputes and binding on lower courts.[72] In full continuity with that practice, the Plenum of the Supreme Court often publishes '*разъяснения*' (explanations), that is, advisory opinions detached from any actual case or controversy, which are meant to clarify how to interpret and apply the law and which are treated as binding by lower courts.[73] The Supreme Court also publishes selections of its important judgments, which work as a guidance for lower courts of the Supreme Court's trends.[74]

As in many other civil law countries, legal scholarship is not formally included in the sources of law, and courts avoid citing doctrinal sources.[75] Nonetheless, opinions of commentators are viewed as authoritative by lawyers and judges, and legal scholars are often involved in drafting new laws.[76]

An overview of Russian contract law would not be complete without mentioning the role played by arbitration. Arbitration has a long history in the country, as it was the preferred means of dispute resolution for foreign (and, after 1959, even domestic) commercial contracts during the socialist period.[77] Several arbitral institutions have existed in the country since the 1930s, and in 1958 the USSR was one of the first states to ratify the NY Convention. With the end of the socialist era, Russia embraced a liberal approach to arbitration, which has spurred an increased demand for arbitration services[78] and has limited the propensity of Russian courts to deny recognition and enforcement of foreign arbitral awards for violation of Russian public order.[79]

Court of the Russian Federation (originally provided by Article 127 of the 1993 Russian Federation's Constitution), but the court was abolished by the Federal Constitutional Law on the amendment to the Russian Federation's Constitution No 2-FKZ of 2014 and its functions were trasferred to the Supreme Court. On the reasons underlying such a choice, see Maggs et al. (2015), 63–68.

[71] Orlov (2019), 131; Oda (2007), 14.

[72] For references, see Maggs et al. (2015), 26–27; Oda (2007), 15–17.

[73] Such power is provided by Article 126 of the Russian Federation's Constitution. On such explanations, see Maggs et al. (2015), 26–27; Oda (2007), 17; Osakwe (2008), 52–53; Zhuikov (2009), 111–114. For a list of the Plenum's opinions (in Russian), see http://www.supcourt.ru/documents/. According to Article 104 (1) of the Constitution, the Supreme Court has also the power of legislative initiative in the matter of its own jurisdiction.

[74] See http://www.supcourt.ru/documents/thematics/.

[75] Maggs et al. (2015), 31.

[76] Ibid.; see also Orlov (2019), 131.

[77] See Orlov and Yarkov (2017).

[78] Oda (2007), 30 (noting that in the past parties in international contracts used to choose arbitration in a third country, while now arbitration in Russia is a more frequent choice).

[79] Russian courts traditionally adopted a broad notion of Russian public policy under Article 1193 of the Civil Code (see above, footnote 62) and Article 36 of the Law on international commercial arbitration No 5338–1 of 1993 (according to which recognition or enforcement of foreign arbitral awards can be refused when the award is contrary "to the basic principles of Russian law"). The trend was partially reserved in 2013, when the Presidium of the Higher Commercial Court issued the Information Letter no 156 of 25 February 2013 on the application of the public policy exception by

Legal treatment of arbitration is currently bifurcated, with international arbitration covered by the International Commercial Arbitration Law of 1993 and domestic arbitration governed by the Domestic Arbitration Law of 2015. The significance of the distinction is however limited by the fact that both laws were inspired by the UNCITRAL Model Law on International Commercial Arbitration, either in its 1985 or 2006 version.[80] Currently, the most important arbitral institution dealing with international commercial disputes is the International Commercial Arbitration Court (ICAC, the successor to the Soviet Foreign Trade Arbitration Commission). In 2017, a new Russian Arbitration Centre (RAC) was established to deal with domestic arbitration under the aegis of the Russian Institute of Modern Arbitration.[81] In 2018, there were 450 cases pending before the ICAC and over 250 cases pending before the RAC.[82] Such statistics demonstrate that Russian arbitral institutions are robust. There is some evidence to suggest the openness of Russian arbitral tribunals to refer to the UPICC to interpret the applicable law, even when the parties are silent on the issue.[83]

4 China

China, one of the most ancient civilizations in the world, has a historically deep tradition of centralization. This is still visible in today's political structure: in spite of the size of its territory and population (which puts China, in the ranking of the world's countries, respectively at the third and at the first place), China is a highly centralized state. According to the 1982 Constitution, the legislative power lies exclusively in the National People's Congress (NPC) and in its Standing Committee.[84] The only exception are the two special administrative regions of Hong-Kong and Macao, which, being former foreign colonies, are allowed by the Constitution and special

commercial courts, inviting them to narrowly interpret the public policy requirement. See Dozhdev (2020), Spiegelberger (2014).

[80] Law on international commercial arbitration No 5338-1 of 1993 and Law on arbitration no 382-FZ of 2015 (replacing the previous Law on arbitration in the Russian Federation no 102-FZ of 2002). The new 2015 law aims in particular at intensifying state supervision over arbitration in order to prevent distortions and abuses of arbitral law; on these developments, see Dozhdev (2020), Kotelnikov et al. (2019), Skvortsov and Kropotov (2018).

[81] See respectively https://mkas.tpprf.ru/en/, https://centerarbitr.ru/en/main-page/.

[82] Cf. https://mkas.tpprf.ru/en/statistics.php and https://centerarbitr.ru/en/2019/03/26/the-first-caseload-report-of-russian-arbitration-center-for-2018/.

[83] Komarov (2011).

[84] Article 58 of the 1982 Constitution. The Standing Committee of the NPC, besides the power of enacting laws, has also the power to issue mandatory interpretations of existing laws under Article 67 (4) of the Constitution.

laws to maintain their legal systems (which have been influenced, respectively, by British and Portuguese law).[85]

China's recent legal past has followed patterns that are largely comparable to Russian ones. In China too, law is primarily thought of as being a body of rules enacted by the State and manifested in legislation. Similarly to what happened in Russia, the fascination for European codes, and in particular for the BGB, at the beginning of the Twentieth century led to the preparation of a draft civil code (the so-called draft Qing code) in 1911 and, after the revolution, the adoption of the Kuomintang Civil Code in 1929–1930 (still in force in Taiwan).[86] In 1949, after the foundation of the People's Republic of China, the code was repealed and China largely turned to Soviet models (which themselves had roots in the civil law tradition), enacting a large number of contract regulations that provided the types of transactions permitted, parties which were allowed to engage in economic activities, and the rules for enforcing contracts.[87] In 1954 the plan to enact a civil code modelled after the 1922 Civil Code of the Russian Soviet Federated Socialist Republic (itself inspired by the BGB) failed.[88] After the deterioration of Sino-Soviet relationships, there were repeated new attempts to draft a civil code, but they all landed nowhere. This in particular was the case for both the, largely original, 1964 draft civil code (which embodied the typically Soviet conception of contracts as vertical relationships between the State and economic entities)[89] and the 1982 draft civil code (which was influenced by the 1961 Fundamental Principles of Civil Legislation of the USSR, the 1964 Civil Code of the RSFSR and the revised Hungarian Code of 1978).[90] In the meantime, the piecemeal approach to legislation advocated by Deng Xiaoping led to the enactment of special laws concerning civil law matters, such as the Economic Contract Law in 1981 (dealing with domestic contracts, and inspired by Soviet sources), the Foreign Economic Contract Law in 1985 (on international contracts, and inspired by the 1980 CISG, which China signed in 1981 and ratified in 1986), the General Principles of Civil Law in 1986 (providing general rules of civil and commercial law on persons, property and obligations, including contracts, which look like a mixture of European

[85] See Article 31 of the 1982 Constitution, as well as the 1990 Basic Law of the Hong Kong Special Administrative Region and the 1993 Basic Law of the Macao Special Administrative Region. On the Hong Kong and Macau's legal systems, see Castellucci (2012).

[86] Chen (2016) 455 (who, among the sources of the Kuomintang code, cites, besides the BGB, "the Japanese Civil Code of 1896, […] the French Civil Code of 1804, the Swiss Civil Code of 1907 and the Swiss Code of Obligations of 1911, the Brazilian Civil Code of 1916, the Civi lCode of Soviet Russia of 1922, the Siamese Civil Code of 1923–1925, the Turkish Commercial Code of 1926, the draft Italian Commercial Code of 1925 and the never enacted Franco-Italian Code of Obligations and Contracts of 1927"); Fu (2011), 13–15; Zhang (2006), 29–30; Huang and Chen (1999), 38. While the Qing Code distinguished private from commercial law, the Koumintang Code treated them together: Chen (2016), 456.

[87] Huang and Chen (1999), 39.

[88] Chen (2016), 459–460; Fu (2011), 16.

[89] Chen (2016), 460–461.

[90] All these codes were, despite their socialist inspiration, somehow modeled after the BGB: Chen (2016), 461.

continental models and Socialist ideology).[91] Pending accession to the World Trade Organization, which was finalized in 2001, China repealed the Economic Contract Law of 1981 and the Foreign Economic Contract Law of 1985 by adopting a unified regulation, the Contract Law of 1999. The rules of the Contract Law were maintained with minor modifications in the Book III ('Contracts') of the Chinese Civil Code, which was approved in May 2020 and came into force on January 1st, 2021.

A number of concepts and provisions of the (then Contract Law and now) Book III of the Civil Code were borrowed from the German and Japanese Civil Code, as well as from the CISG, the UNIDROIT Principles and the 1996 UNCITRAL Model Law of Electronic Communication of the United Nations Commission on International Trade Law.[92] This is evidenced, for instance, by the presence of general clauses on good faith,[93] the absence of any requirement of cause (or consideration) for contract validity, contract formation being based upon receipt of the acceptance by the offeror,[94] and rules on pre-contractual liability,[95] *laesio enormis*[96] and specific performance.[97] These continental traits are mixed with provisions on the State's control over private autonomy, particularly allowing administrative supervision of contracts[98] and subjecting the validity of contracts to their observance of "public order" and "good morals" (Article 143). There is also some clear influence of US law, for instance on rules on anticipatory breach,[99] although the US imprint is less evident than in other pieces of legislation, such as the 1993 Law on Protection of Consumers' Rights and Interest, the 1994 Company Law and the 2007 Anti-Monopoly Law.[100]

Outside the Code remains the 2010 Law on the Application of Law for Foreign-Related Civil Legal Relationships, which constitutes the main Chinese statute on private international law. Article 41 of the 2010 Law recognizes that parties in a foreign-related contract are free to choose the applicable law (whereby 'law' is

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[91] To the list one should also add the Technology Contract Law of 1987. On all these acts, Chen and DiMatteo (2018), 4–5; Chen (2016), 465–493; Zhang (2006), 48–49; Chen (2001), 155–160; Fu (2011), 16–17; Huang and Chen (1999), 41–43.

[92] On all these sources, see Janssen and Chau (2018), 447–455; DiMatteo and Wang (2018); DiMatteo (2018), 397–400; Fu (2011), 20; Shaohui (2008), Ling (2002), 37–38; Zhang (2000), 239–240. In 2006 China signed the United Nations Convention on the Use of Electronic Communications in International Contracts, although it never ratified it.

[93] See for instance Articles 466, 500, 509 and 558 of the Chinese Civil Code.

[94] Article 483 of the Chinese Civil Code.

[95] Article 500 of the Chinese Civil Code.

[96] Articles 577 and 578–580 of the Chinese Civil Code.

[97] See Article 157 of the Chinese Civil Code.

[98] Article 502 of the Chinese Civil Code; on the great deal of administrative supervision of contracts, including licensing and approvals, see Zhang (2000), 248–252, as well as Zhang & Dong, Chinese report, no 3.2.1.

[99] See Articles 563 and 578 (on anticipatory breach) of the Chinese Civil Code. The influence of US law on the Chinese law of contract is a trait often emphasized—if not exaggerated—by US-trained commentators: cf. Mateson (2006), 340; Zhang (2000), 238.

[100] All these texts are also influenced by EU and European laws: see, respectively, Thomas (2018); Minkang (2010), 5–6, 13–14; Harris et al. (2011), 2–4.

generally understood as State law only[101]). In the absence of the parties' choice, the same article mandates the application of "the law of the habitual residence of the party whose performance of obligation is most characteristic of the contract or the law that is most closely connected with the contract".[102] Special criteria for identifying the applicable law to specific types of contracts are set forth by the Provisions of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Cases Involving Disputes over Foreign-related Civil or Commercial Contracts of 2007, which are still deemed to be in force.[103] Foreign law is however not applicable when it would harm "the social and public interest of the PRC"[104] and is never applicable to Chinese-foreign joint venture contracts and contracts for Chinese-foreign joint exploration and development of natural resources, if performed within the territory of the People's Republic of China, which are mandatorily subject to Chinese law.[105]

As the reference to the Supreme People's Court's Provisions on private international law makes clear, the role of the Chinese judiciary is akin to that of Russian courts, mixing a continental institutional structure with Chinese and socialist characteristics.[106] Contract law disputes are heard by ordinary civil courts, which are structured on four levels: county courts, intermediate courts, high courts and then, at the apex, the Supreme People's Court (SPC)[107]—however no more than two instances, one trial and one appeal, are ordinarily possible.[108] While there is no separate system of commercial courts, the SPC has established in 2018, as its own bodies, two 'international commercial courts—one in Shenzhen and one in Xi'an—, which are meant to work as the court of first (and only) instance for commercial parties who choose to submit their high-value controversy to the jurisdiction of the Court.[109] There is no doctrine of *stare decisis* and judges are required to apply the law, avoiding any interpretative/creative intervention, since the power of making and interpreting the law officially lies in the NPC and in its Standing Committee only. Yet, like in Russia,

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[101] Tu (2016), 74–75.

[102] Article 41 of the 2010 Law confirms the criteria that were already embraced by Article 126 of the 1999 Contract Law and that are currently enshrined in Article 467 of the Chinese Civil Code.

[103] Tu (2016), 31.

[104] Article 5 of the Law on the Application of Law for Foreign-Related Civil Legal Relationships.

[105] Article 467 of the Chinese Civil Code. The rule has remained unaffected by the Chinese Foreign Investment Law of 2019.

[106] On this point, as well as for a survey of the historical precedents of the actual system, see Yu and Gurgel (2012).

[107] The Supreme People's Court is a constitutional body under Article 127 of the Constitution. Local courts are mentioned by Articles 123–126 of the Constitution, but their concrete structure is set forth by Articles 17 and ff. of the 2011 Organic Law of the People's Courts of the People's Republic of China. On the Chinese judicial system, see Chen (2016), 187–195.

[108] See Article 11 of the Organic Law of the People's Courts of the People's Republic of China ("In the administration of justice, the people's courts adopt the system whereby the second instance is the last instance").

[109] See the China International Commercial Court's website at http://cicc.court.gov.cn/html/1/219/193/195/index.html, as well as Fei (2020) and Sun (2020).

the SPC does not only perform the judicial function; its main role is supervising and providing guidance to lower courts.[110] The guidance of the SPC is given through four types of texts (interpretations, provisions, replies, decisions) which interpret and clarify the law for lower courts and are legally binding on everybody (not only on lower courts).[111] In particular, the SPC's Interpretations and Provisions (which can be cited by lower courts in their judgments) occupy a central position in the Chinese system of legal sources. De facto, the Court is a sort of second legislature. To provide a few illustrations, before and after the enactment of the 2010 Law on the Application of Law for Foreign-Related Civil Legal Relationships, the rules for determining the applicable law to specific contracts were dictated by the SPC's Provisions of 2007. After the enactment of the 1999 Contract Law, which said nothing on hardship, it was the SPC's Judicial Interpretation that, in 2009, officially introduced in the Chinese system the doctrine of change of circumstances and the right of the disadvantaged party to have the contract modified or terminated by courts[112]—a rule which is now enshrined in Article 533 of the 2020 Civil Code. In addition to such texts, the SPC also publishes collections of its own case-law (the so-called 'Gazette' cases), which are considered an important secondary source of law,[113] as well as a selection of 'guiding cases' from the Court itself and other courts, which are cases in which "facts are clearly ascertained, law is correctly applied, and reasoning for the adjudication is sufficient, and which [provide] good legal and social outcomes as well as universal guiding significance for the adjudication of similar cases".[114] Although not officially binding, guiding cases are to be taken into account by courts adjudicating similar issues and can even be quoted by them, although not as a basis for their decisions.[115] According to another set of SPC's Provisions, courts in their judgments should only report the relevant laws and judicial interpretations by the SPC itself.[116]

As stated by the SPC, Chinese judges cannot cite legal scholarship. Similar to what happens in Russia, legal scholarship is not considered among the sources of law.

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[110] Cf. Article 127 of the Constitution and Article 32 of the Organic Law of the People's Courts of the People's Republic of China.

[111] The Court itself declared that these texts are binding: see Article 5 of the 2007 Supreme People's Court's Provisions on the Work Concerning Judicial Interpretation. The power to interpret the law was officially delegated by the NPC's Standing Committee to the Supreme People's Court in 1981: Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law. For a detailed analysis of the types and effects of the Supreme People's Court's interpretations, see Qi (2020).

[112] Article 26, SPC's Second Judicial Interpretation Concerning the Application of the Contract Law of China on 24 April 2009.

[113] Chen and DiMatteo (2018), 7.

[114] Article 2, SPC's Detailed Implementing Rules on the Provisions of the Supreme People's Court Concerning Work on Case Guidance, of 13 May 2015.

[115] Articles 9–10 of the SPC's Detailed Implementing Rules on the Provisions of the Supreme People's Court Concerning Work on Case Guidance. See also Liu (2019).

[116] See Article 4 of the SPC's Provisions on How to Cite Laws, Regulations and Other Normative Documents in Judicial Judgments and Decisions, 26 October 2009, no 14.

However, legal doctrine regularly guides the design and drafting of legislation, and often provides the materials applied by judges when developing their arguments.[117]

Like elsewhere, parties to commercial contracts prefer to submit their disputes for arbitration rather than to ordinary courts. The People's Republic of China has a long history of arbitration: The Foreign Trade Arbitration Commission was established as early as 1954 to deal with foreign-related contracts and investments[118]; the 1985 NY Convention was signed and ratified by China in 1987. Arbitration is currently regulated by a law enacted in 1994, as supplemented by SPC's judicial interpretations, which provide different tracks for domestic and international (called 'foreign-related') arbitral proceedings.[119] Most notably, a SPC's Notice of 1995 has obliged intermediate people's courts, in cases in which they are about to set an (international or foreign) award aside, or to deny recognition/enforcement, to report their intended decision to the high court. If the high court is also in favour of vacating the award or denying recognition/enforcement, it should send the case to the SPC and ask for the latter's advice[120]: it is the so-called Prior Reporting System, the aim of which is to ensure minimal judicial interference with foreign arbitral awards. Overall, the market for arbitration in China seems to be thriving. Ever since the enactment of the Arbitration Law, official statistics report that Chinese arbitral commissions have handled over 2.6 million cases involving more than 70 countries.[121] Since the 1990s, the China International Economic and Trade Arbitration Commission (the successor of the ancient Foreign Trade Arbitration Commission) has had one of the heaviest caseloads among the world's major arbitration institutions, handling, on an average, more than 2,000 cases annually.[122]

5 South Africa

South Africa is a republic made up of a national government, nine provinces and local spheres of government.[123] According to the 1996 Constitution, which is the supreme law of the land,[124] national legislative power is residual, while legislative competence is vested in the provinces, except in a few areas of concurrent national

[117] Ge (2019), 46, 49–50; Tu (2016), 9.

[118] Houzhi (1984), 520.

[119] See Chinese Arbitration Law of 1994; see also Chen and Wang (2020); Mo (2017), 188–191.

[120] Notice of the Supreme People's Court on the Handling by People's Courts of Issues Concerning Foreign-related Arbitration and Foreign Arbitration no 18 of 20 August 1995, at http://cicc.court.gov.cn/html/1/219/199/201/701.html.

[121] See 全国仲裁机构累计处理案件逾260万件 标的额逾4万亿元.仲裁已成为解决民商事纠纷主渠道之一, a media report by the Ministry of Justice available at the official website www.moj.gov.cn/subject/content/2019-03/26/862_231600.html.

[122] See CIETAC, Introduction, at http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en.

[123] See Section 40 of the 1996 Constitution of the Republic of South Africa.

[124] Section 2 of the 1996 Constitution.

and provincial competence.[125] Such a division of power, however, leaves the area of private law almost unaffected, since, in South Africa's mixed legal system, the basic principles and rules of private law, in particular in the area of obligations, are to be found in the country's uncodified common law. The power "to develop the common law" is inherent in courts (and, in particular, in the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa).[126]

This mix of laws in South Africa is the result of the country's long and varied history of colonization, which started with the Dutch East India Company's settlement in the Cape of Good Hope in 1652 and then continued under British rule from 1806 until the country's independence (first, as an independent dominion of the British empire and then as the Republic of South Africa).[127] South African common law consists of "an amalgam of rules drawn primarily from Roman-Dutch and, to a lesser extent, English law, which have been combined and adapted by the Courts so as to meet what they perceived as the country's own evolving needs".[128]

This is particularly evident in the law of contracts, which has been forged from Seventeenth century Roman-Dutch civil law and Nineteenth century English common law. In particular, South African contract law derives from Roman-Dutch law the Latin-based vocabulary, a number of core concepts, the systematization of the law of contract as a branch of the law of obligations, and a distinctive inclination to work with abstract legal concepts. But, in terms of the underlying policies and values that they promote, South African contract principles and rules are at times closer to those of Nineteenth century English common law, and are strongly centred on freedom of contract, individual autonomy and legal certainty, as opposed to using values like good faith and Ubuntu to promote greater contractual fairness.[129] South African contract law therefore traditionally recognizes a limited role for the principle of good faith, only imposes precontractual liability in limited situations, provides no relief based on *laesio enormis* and hardship, and enshrines a variety of English-derived rules, such as the doctrines of estoppel and undue influence, and the notion that anticipatory breach or repudiation is a ground for cancellation.[130] Furthermore, like the United Kingdom, South Africa has not ratified the CISG (in spite of academic

[125] For instance, consumer protection law falls into the areas of concurrent national and provincial competence: see Schedule 4 of the 1996 Constitution.

[126] See Section 173 of the 1996 Constitution ("The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice"). Also see Section 39(2) of the 1996 Constitution, which the courts often refer to when developing the common law to ensure that it conforms to constitutional demands.

[127] On the history of South African law and on the variety of official and customary laws applying to the country's heterogenous population, see, among the many, Van der Merwe et al. (2012), du Bois (2004), Bennett (1996).

[128] du Bois (2004).

[129] The emphasis on freedom of contract is evidenced, *inter alia*, by the little relevance that inequality of bargaining power plays under South African contract law, and by parties' freedom in limiting their liability through exclusionary clauses: see du Plessis, South African report, nos 3.1.2, 5.1.2, 6.1.2, 7.2.1.

[130] du Bois (2004), 42; Lubbe and du Plessis (2004), 243–274.

views suggesting this should be done[131]) and there is no evidence of the UPICC's influence on the development of domestic contract law.[132]

Needless to say, in many cases the South African common law of contract is integrated and supplanted by legislation, which is mostly drafted in the style of detailed rules intended to minimise judicial gap-filling. This is, for instance, the case of antitrust law and consumer contract laws, regulated by the Competition Act 89 of 1998 and Consumer Protection Act 68 of 2008 respectively,[133] of contracts formed through electronic means, regulated by the Electronic Communications and Transactions Act 25 of 2002 (following the 1996 UNCITRAL Model Law on Electronic Commerce), and of arbitration law, regulated by the Arbitration Act 42 of 1965 and the International Arbitration Act 15 of 2017, devoted to domestic and international arbitration respectively. Company law too is subject to a separate act, the Company Law Act 71 of 2008.

Private international law rules applicable to contracts, by contrast, are dictated by common law principles. Under such principles, parties are free to choose the applicable law (which, according to South African scholarship, might include non-state law[134]). In the absence of the parties' choice of law, courts determine the proper law applicable to the contract by interpreting the intention of the parties or by looking for the legal system with which the transaction has its closest and most real connection.[135] Common law also governs recognition and enforcement of foreign judgments, which is possible only if certain requirements (such as the foreign courts having jurisdiction and the decision respecting South African public policy) are met.[136] Yet, according to the Protection of Businesses Act 99 of 1978, foreign judgments arising from transactions "connected with the mining, production, importation, exportation, refinement, possession, use, or sale of, or ownership of any matter or material, of whatever nature, whether within, outside, into or from the Republic"[137] are not enforceable in the Republic, except with the permission of the Minister of Economic Affairs. The provision (which was meant to shield South African companies from the effect of US antitrust laws) is unfortunately worded in very wide terms and has been repeatedly criticized by commentators.[138] However, courts have substantially limited the scope

[131] See for instance Wethmar-Lemmer (2016), 59.

[132] See Naudé and Lubbe (2001).

[133] On the influence of EU law on South African competition and consumer law, see Bradford et al. (2019), Barnard (2017).

[134] Neels and Fredericks (2006), 122–125.

[135] Oppong (2013), 133. The same author notes that South Africa has been one of the first African countries to have shown interest in private international law issues, since the first volumes of the Cape Law Journal (1884–1900—now South African Law Journal) already contained several articles on private international law issues: see Oppong (2007), 694.

[136] The leading case in this regard is South Africa's Supreme Court of Appeal, *Jones v Krok* 1995 (1) SA 677 (A) 685.

[137] Section 1(3) of the Protection of Businesses Act 99 of 1978. Until the Schedule 4 of the Arbitration Act 15 of 2017 repealed from Section 1 the word 'arbitral awards', the same provision was applicable to foreign arbitral awards.

[138] See for instance Oppong (2007), 708–709.

of the Act by interpreting it strictly, for example by holding that the above-mentioned rule only applies to transactions involving raw materials rather than manufactured goods.[139]

As all of the above makes clear, the main architects of South African contract law are the courts. Courts competent in private law matters are organized in a three-tier system of courts of general jurisdiction: magistrates' courts, the High Court of South Africa, and the Supreme Court of Appeal (plus, as far as constitutional issues are concerned, the Constitutional Court).[140] The High Court operates both as a court of first instance and as an appellate court for reviewing decisions from the magistrates' courts; the Supreme Court of Appeal is the highest court for non-constitutional matters, and hears only cases for which a leave to appeal is obtained from either the Court itself or the High Court.[141] South African courts follow the doctrine of *stare decisis*: precedents established by earlier courts in principle must be followed, unless they are considered to be clearly wrong, while decisions of higher courts are binding on all lower ones.[142] The style of South African decisions is very close to the open, discursive style of English judgments. Yet, South African courts display a remarkable tendency to consider not only material relating to other common law systems (especially Canada and the United States, less often India, Australia, New Zealand) and to contemporary civil law systems (particularly German and the Netherlands), but also Eighteenth and Nineteenth century legal authorities of European *jus commune*.[143]

It follows that legal scholarship enjoys a peculiar position in the South African system. Civil law scholarship predating the age of codification in Europe is considered a source of law.[144] This is not the case for contemporary legal doctrine, which enjoys no formal authority and yet is highly respected by courts.[145] Further, law professors play a key role in promoting legal reforms, for instance by participating in the work of the South African Law Reform Commission, the body that, similar to the English one, oversees the development of the law and puts forward proposals for law reform.[146]

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[139] High Court, *Tradex Ocean Transportation SA v MV Silvergate (or Astyanax) and Others*, 1994 (4) SA 119 (D); High Court, *Chinatex Oriental Trading Co. v Erskine*, 1998 (4) SA 1087 (C); Supreme Court of Appeal, *Richman v Ben-Tovim*, 2007 (2) SA 283 (SCA).

[140] See Section 166 of the Constitution.

[141] See Sections 168–170 of the South African Constitution, as well as rules 49 and 51 of the 2009 Uniform Rules of Court; see also du Bois (2004), 25–27; Erasmus (2004), 443–444.

[142] du Bois (2004), 43–44; van Huyssteen and Maxwell (2019), 34.

[143] van Huyssteen and Maxwell (2019), 34–35; Van der Merwe et al. (2012); du Bois (2004), 51–52; O'Regan (1999). South African courts' openness to foreign legal sources is further strenghened by the constitutional provision authorizing courts to "consider foreign law" when interpreting the Bill of Rights (Section 39 (1) (c) of the 1996 Constitution).

[144] See Supreme Court of Appeal, *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*, 1992 (4) SA 202 (A) (per Hefer JA) at 219I-J; Supreme Court of Appeal, *Tjollo Ateljees (Edms) Bpk v Small* 1949 1 SA 856 (A) (Van den Heever JA), at 874.

[145] du Plessis (2012), 818; Guadagni (1989), 19–28.

[146] See https://www.justice.gov.za/salrc/about.html.

In the field of arbitration, South African law seems to be more aligned with civil law approaches rather than with common law ones. Arbitration is governed by legislation, i.e., the Arbitration Act 42 of 1965 (on domestic arbitration) and the International Arbitration Act 15 of 2017 (which transplants the 2006 UNCITRAL Model Law on International Commercial Arbitration[147]). The latter Act also deals with the recognition and enforcement of foreign arbitral awards, essentially incorporating the criteria set forth in the 1958 NY Convention, ratified by South Africa in 1976.[148] In recent years, many institutions have been established to support the development of arbitration: the Association of Arbitrators of Southern Africa was formed in 1979[149] and the Arbitration Foundation of Southern Africa was created in 1996.[150] The latter was given the responsibility, in partnership with the Shanghai International Arbitration Centre (SHIAC), to establish the China-Africa Joint Arbitration Centre (CAJAC), with two seats launched in Johannesburg and Shanghai in 2015.[151]

6 India

India is a Union of twenty-eight states.[152] According to the 1950 Constitution, the Union and the states each have exclusive power to legislate on matters that are enumerated in the Seventh Schedule's lists for the Union and states respectively; the Union and the states enjoy concurrent legislative powers in matters mentioned in the Schedule's 'concurrent' list.[153] The Union also has residual power on any issue not mentioned in the latter Schedule.[154] For instance, the regulation of foreign and inter-State trade falls exclusively within the jurisdiction of the Union, intra-State trade within the exclusive competence of the states, while regulation of 'contracts' and 'civil procedure' is a matter for concurrent jurisdiction.[155] In practice, however, the concurrent jurisdiction gives the central government considerable power over the

[147] See Section 6 of the International Arbitration Act 15 of 2017.

[148] As to the criteria for denying recognition/enforcement, see Section 18 of the International Arbitration Act 15 of 2017.

[149] https://www.arbitrators.co.za/about-us/.

[150] https://arbitration.co.za/a-brief-history/.

[151] Cf. http://www.cajacjhb.com and http://www.shiac.org/CAJAC/index.aspx. See also du Plessis, South African report, n 1.2.

[152] See Article 1 (1) of the Indian Constitution of 1950.

[153] See Article 246 (1)–(3) of the Constitution.

[154] Article 248 of the Constitution.

[155] Cf. the Schedule Seven of the Constitution, 'Union list', nos 41–42; 'State list', no 26; 'Concurrent list', nos 7 and 13. Similarly, the power to provide for stamp duties on written instruments, including contracts, is shared between the Union and the States: see the Schedule Seven of the Constitution, 'Union list', no 91; 'State list', no 63. Although lack of the stamp does not affect the validity of a contract, written contracts cannot be presented as evidence in court unless they are duly stamped: Bhadbhade (2012), 105–106.

substance and procedure of private law. Moreover, the central legislature has used its power under Article 249 (1) of the Constitution to enact laws in matters falling within the exclusive jurisdiction of states when this is "necessary or expedient in the national interest".[156] The significance of India's centralized legislative power in our field, in its turn, is tempered by the fact that much of private law regulation pre-dates the country's independence from the United Kingdom in 1947, and is actually a legacy of the British rule. It is the Constitution itself that expressly affords all pre-independence legislation continuing validity under the new constitutional system.[157]

In the context of an extensive project to codify the common law for all of British India, the colonial government of India enacted the Indian Contract Act in 1872. The codifiers aimed to provide a clear, ordered and written systematization, enriched with illustrations, of the basic rules of English common law, as adapted to the needs of Indian society. Among the objectives underlying such an effort, was the desire of helping local courts and of minimising the risk of unpredictable legal change.[158] The Indian Contract Act (which, with amendments, is still in force today) embodies the distinctive traits of Nineteenth-century English contract law – such as offer and acceptance being effective upon communication, the requirement of consideration for contract validity, doctrines of undue influence and misrepresentation,[159] absence of rules not only on good faith, but also on pre-contractual liability and hardship, although with some important modifications (for instance, past consideration is a valid consideration and all agreements in restraint of trade are void).[160] But the most significant deviation from the common law effected by the Indian Contract Act, 1872 concerns the system of legal sources and the role of courts. Although the Act is far from being a complete codification of contract law and leaves substantial areas to judicial law-making (which Indian courts often fill by looking at English cases[161]), the codification has effectively distanced Indian contract law from the intrinsic generativity of English common law, putting at centre stage legislative directives as applied and interpreted by courts.[162] A good illustration comes from rules on

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[156] Article 249 (1) of the Constitution. On such use of central legislative power, see Niranjan (2016), Halberstam and Reimann (2014), 11; Parikh (2014), 256–258; Bhadbhade (2012), 32.

[157] See Article 372 (1) of the Indian Constitution.

[158] Balganesh (2016), 680–682. Localised versions of the same Act are in force in several other countries, such as Pakistan, Bangladesh, Malaysia and Tanzania: Briggs and Burrows (2018), 479.

[159] See respectively Sections 3, 25, 16, 18 of the Indian Contract Act.

[160] See Sections 25 (1), letter (b) and 27 of the Indian Contract Act. Under English law, past consideration is not good (*Eastwood v Kenyon* [1840] 11 Ad & E 438) and agreements in restraint of trade are valid if they are reasonably justified (*Shearson Lehman Hutton Inc v MacLaine Watson & Co. Ltd* [1989] 2 Lloyd's Rep. 570, 615).

[161] For instance, in the silence of the Indian Contract Act and in line with the English common law, Indian courts have held that both perpetual agreements and exclusionary clauses are valid and enforceable (although there is a presumption against perpetual bonds and exclusionary clauses are restrictively interpreted): see Bhadbhade, Indian report, nos 5.12 and 7.1.2. See also, more in general, Bhadbhade (2012), 68.

[162] Balganesh (2016), 680–682; see also Bhadbhade, Indian report, no 1.

penalty/liquidated damages. English law traditionally distinguishes between liquidated damages clauses (where the parties genuinely attempt to pre-estimate their losses in case of breach) and penalty clauses (where the amount exceeds that that can be reasonably pre-estimated), and allows enforcement of the former in the absence of any proof of actual loss.[163] Section 74 of the Indian Contract Act, 1872 speaks of both the sum due and the penalty and allows the party complaining of the breach, "whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named". Yet, in 1929, in an appeal from India, the Privy Council held that "the effect of s. 74 of the Contracts Act 1872 is to disentitle the plaintiffs to recover the sum [provided in the contract] whether as penalty or liquidated damages. The plaintiffs must prove the damages they had suffered".[164] Subsequent rulings by the Indian Supreme Court confirmed the Privy Council's approach, holding that s.74 departs from English law in that it does not distinguish between penalties and liquidated damages clauses and requires that all sums stipulated as payable for a breach must be proved to have been suffered.[165] As the example shows, Indian contract law shares the mindset and vocabulary of English common law, but differs from it in terms of sources, interpretive approach and contents.

Apart from general contract law, legislation also covers specific areas of contract law. Worth mentioning are the Sale of Goods Act, 1930 (heavily borrowed from the English Sale of Goods Act, 1893; India followed the English lead in deciding not to ratify the CISG[166]), the Specific Relief Act, 1963,[167] the Arbitration and Conciliation Act, 1996 (based on the 1985 UNCITRAL Model Law on International Commercial Arbitration for regulating both domestic and international arbitration),[168] the Information Technology Act, 2000 (based on the 1996 UNCITRAL Model Law on Electronic Commerce), the Competition Act, 2002, and the Consumer Protection Act, 2019.[169] Company law, too, is subject to a separate act, the Companies Act, 2013. Conflicts of law rules, in contrast, are common law-based. As in England, such rules allow the parties in transnational contracts to freely choose the law applicable to their contract, and, in the absence of parties' choice, point to the 'proper

[163] See *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co. Ltd* [1915] AC 847 (establishing a four pronged test to distinguish penalties from liquidated damages clauses); *Cavendish Square Holding BV v Talal El Makdessi (El Makdessi) and ParkingEye Ltd v Beavis* [2015] UKSC 67 (replacing the Dunlop criteria with a proportionality test).

[164] *Bhai Panna Singh v Bhai Arjun Singh*, AIR 1929 PC 179 (per Lord Atkin).

[165] *Fateh Chand v Balkishen Das* [1964] 1 SCR 515; AIR 1963 SC 1405; *Maula Bux v Union of India* [1970] 1 SCR 928. See Bhadbhade, Indian report, no 7.2.3, as well as Swaminathan (2018).

[166] Indian academic scholars, by contrast, support the ratification of the CISG: see for instance Nain and Manish (2011). As to the UPICC, there is no evidence of their influence in either Indian legislation or case-law: Khanderia (2018a).

[167] See also the Special Relief (Amendment) Act, 2018, whose Section 3 introduced specific performance as a general remedy.

[168] The Act was amended in 2015 and in 2019.

[169] The Act repealed the preexisting Consumer Protection Act 1986.

law' of the contract, to be inferred from parties' tacit or presumed intention.[170] It is doubtful whether Indian courts would enforce parties' choice to have their contract governed by a non-state law.[171]

While "legislation is the primary source of law"[172] in India, judicial precedents are an important source as well. The Indian judicial system is structured in three levels. States' civil and district courts are at the lower level and are subordinate to states' High Courts; a reform of 2015, carried out to improve India's score in the World Bank's Doing Business Reports, established lower level commercial courts for hearing high-value commercial disputes and a special commercial division in every High Court.[173] The apex court, and the only federal judicial body, is the Supreme Court.[174] Besides receiving requests for the enforcement of constitutional rights,[175] the Supreme Court hears cases certified for appeal by High Courts and has discretionary appellate jurisdiction over any order passed by any court or tribunal across the country.[176] The doctrine of *stare decisis* applies in India: the law declared by the Supreme Court is binding on all courts within the Indian territory,[177] and only the Supreme Court itself is free to depart from it. Further, judgments of the High Court are binding on all the courts subordinate to them (although not on other High Courts).[178] In their decisions, Indian courts rely upon legislative provisions and judicial opinions, as well as on case-law from other common law jurisdictions, the most prominent among which are England, the United States, Canada and Australia.[179] Articles in journals and academic works are rarely mentioned in decisions, while reference to books and treatises is more common.[180]

Coherent with India's membership in the common law tradition, legal scholarship is not per se regarded authoritative. Yet, legal doctrine is (occasionally quoted by courts and) regularly used by judges to scrutinize the precedents on which their

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[170] Noronha (2010), 4–6, 71–74.

[171] Choice of non-state law, by contrast, is explicitly allowed in international arbitration by Section 28 (1) (b) of the Arbitration and Conciliation Act, 1996: Khanderia (2018b).

[172] Bhadbhade (2012), 63.

[173] See Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015, as well as Ramani Garimella and Ashraful (2019).

[174] See Articles 124–147 (on the Supreme Court), 214–232 (on High Courts), 233–237 (on subordinate courts) of the Indian Constitution, as well as Bhadbhade (2012), 32, 36–37.

[175] See Article 32 of the Indian Constitution.

[176] See, respectively, Articles 132–134 and 136 of the Indian Constitution. On the competence, power and approach of the Indian Supreme Court, see Chandra et al. (2017); Robinson (2013), 175–193.

[177] See Article 141 of the Indian Constitution. Even the obiter dicta of the Indian Supreme Court are considered to be binding: *Commissioner of Income-Tax v Vazir Sultan and Sons* AIR 1959 SC 814.

[178] Bhadbhade (2012), 66 (also for the specification that the precedent value of High Courts' judgments does not derive from any enactment).

[179] Balakrishnan (2008).

[180] Bhadbhade (2012), 70.

decisions should be based.[181] Further, legal scholars are involved in the drafting of statutes and often sit as members of the Indian Law Commission.[182]

It is, for instance, following the suggestions of the 246th Report of the Indian Law Commission of 2014[183] that the Arbitration and Conciliation Act, 1996 (which governs both domestic and international arbitration on the basis of the 1985 UNCITRAL Model Law) was amended in 2015 to give the High Courts and the Supreme Court exclusive jurisdiction in deciding issues related to international commercial arbitration.[184] In an attempt to improve India's score in the Doing Business Reports, a further legal reform was enacted in 2019 to establish a new independent governmental body, the Arbitration Council of India, charged with the task of supervising Indian arbitral institutions.[185] These reforms are part of a general trend in the country towards strengthening arbitration. Part of the same trend is visible in the judicial position on the recognition and enforcement of foreign arbitral awards. The issue is regulated along the lines of the NY Convention, which India ratified in 1960.[186] Until recently, the Indian Supreme Court allowed foreign arbitral awards to be set aside by lower courts and adopted an expanded notion of the 'public policy' reasons justifying the denial of recognition and enforcement of awards.[187] In the 2010s, however, the Court reversed its position and embraced a restrictive view of both the jurisdiction of Indian courts and reasons to deny recognition/enforcement of foreign arbitral awards.[188] This move towards favouring arbitration is also visible in the multiplication of arbitral institutions. Besides the newly created Indian Council of Arbitration,[189] the International Centre for Alternative Dispute Resolution (ICADR)

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[181] Bhadbhade (2012), 70 ("One reaches the appropriate report or case from its citation given in books. More often, general digests and manuals or those compiled for particular subjects are useful in locating cases").

[182] Halberstam and Reimann (2014), 14; Bhadbhade (2012), 45, 66. See also http://lawcommissionofindia.nic.in. It must be noted that, among the law commissions existing in former British colonies, the Indian one is the one whose proposals are least incorporated in the law: see the comparative analysis carried out by Hammond (2016), 178.

[183] Indian Law Commission, Report no. 246. Amendments to the Arbitration and Conciliation Act 1996, August 2014, at http://lawcommissionofindia.nic.in/reports/Report246.pdf.

[184] See Section 2 (1) letter (e) and Section 6 of the Arbitration and Conciliation (Amendment) Act, 2015.

[185] See Arbitration and Conciliation (Amendment) Act, 2019 and Narang (2020).

[186] See Section 48 of the Arbitration and Conciliation Act, 1996 (the Section, however, applies only to awards from states which ratified the NY Convention; other Sections deal with the enforcement of awards stemming from countries that are not parties to the NY Convention).

[187] See, respectively, *Bathia International v Bulk Trading SA & Anr* AIR 2002 SC 1432; *Venture Global Engineering v Satyam Computer Services Ltd & Anr* AIR 2008 SC 1061 (allowing vacating foreign arbitral awards as if they were domestic ones); *Phulchand Exports Ltd v OOO Patriot* (2011) 10 SCC 300, para. 16 (equating 'public policy' with the notion of 'patent illegality').

[188] *Videocon Industries Ltd. v Union of India* (2011) 6 SCC 161 (holding that parties' choice of arbitration under English law excludes the application of the Indian Arbitration and Conciliation Act 1996 and jurisdiction over the dispute by Indian courts); *Shri Lal Mahal Ltd v Progetto Grano SpA* (2014) 2 SCC 433, paras. 27–30 (overruling the equation between 'public policy' and 'patent illegality'). On all these developments, see Kumar et al. (2017).

[189] See http://www.icaindia.co.in.

was set up in 1995,[190] the Delhi International Arbitration Centre (DIAC) in 2009,[191] and the Mumbai Centre for International Arbitration (MCIA) in 2016.[192] Further, in the past few years, many foreign arbitral institutions, including the Singapore International Arbitration Centre and the International Chamber of Commerce, have opened representative offices or national committees in India,[193] even though arbitration remains administered in their Singapore and Paris seats.[194]

7 Comparative Conclusions

As the above survey shows, the countries under review differ not only in the contractual rules and principles they embrace, but also in the legal traditions they are more consonant with, the international models which inspired them, their systems of legal sources, judicial structures, approaches to conflict-of-laws rules, and attitudes towards arbitration.

Four systems (Brazil, Russia, South Africa, India) have a federal structure; China does not. In all the five systems, private law is mainly determined by the central government (rather than by local governments). In South Africa, contract law is mainly dictated by common law, which in turn is based on principles based on Roman-Dutch law, supplemented by English law, while in the other four countries contract law is codified, either in the civil code (Brazil, Russia, China from 2020) or in special acts (China before 2020, India). The sources of inspiration, style and contents of these codifications and statutes are however far from being uniform; Brazil's Civil Code has a German-Italian flavour, Russia's Civil Code mixes legacies of socialist law with German- and US-derived norms, China's Civil Code is largely influenced by international principles and rules (including the UPICC) and the Indian Contract Act is firmly grounded in English common law.

A similar lack of uniformity exists as to private international law rules. Conflict-of-law rules applicable to contracts are dictated by the Civil Code in Russia, by special statutes in Brazil and China and by common law in South Africa and India. Only in Brazil it is unclear whether parties are always free to choose the law applicable to their contracts, while in the other countries parties' freedom of choice is a settled principle. Nonetheless, the criteria embraced by BRICS countries to determine the applicable law in the absence of the parties' choice are different, pointing to the 'proper law' (South Africa, India), to the law of the place where the promisor resides

[190] See http://icadr.nic.in.

[191] See http://www.dacdelhi.org.

[192] See https://mcia.org.in.

[193] Seehttps://www.siac.org.sg/2014-11-03-13-33-43/about-us/siac-india-representative-offices and http://www.iccindiaonline.org. In 2009 the London Court of International Arbitration established a subsidiary in India called LCIA-India, but shut it down in 2016: http://www.lcia-india.org.

[194] Chandru and Kumar (2019).

(Brazil), to the law of the place where the party charged with the characteristic performance resides (Russia), to either the law of the place where the party charged with the characteristic performance resides or the law most closely connected with the contract (China).

Further, South Africa and India did not ratify the CISG; Brazil, Russia and China are signatories of the CISG, but only in China such ratification seems to have exerted an influence on national law.[195] All five countries are members of the World Trade Organization, but the effect of such membership on contract law seems to be limited.[196] As to the impact of other international hard and soft sources, China, India and South Africa drafted special statutes on electronic contracts relying on the 1996 UNCITRAL Model Law of Electronic Communication of the United Nations Commission on International Trade Law,[197] while Russia ratified and implemented the 2005 UNCITRAL Convention on the Use of Electronic Communications in International Contracts in a special law (China signed the Convention in 2006 but never ratified it).[198]

Diverse also are the legal sources that each country relies upon in the field of contract law. While legislation has a role to play in all the five countries examined, it ranges from announcing general principles held to be the primary source of civil law to providing detailed regulations aiming at stating deviations and exceptions to the common law. As to case law, South African and Indian law abide by the doctrine of *stare decisis*, which is not followed in civil law countries. In the absence of any doctrine of binding judicial precedents, however, Brazilian apex courts have developed the practice of the *súmulas*, while the supreme courts of Russia and China have inherited from their Soviet and socialist predecessors the power to issue guidelines and instructions akin to legislation and of general applicability. Brazil and South Africa have a unified organization of courts for civil and commercial matters; until recently, this was also the case in China and India. Yet, in 2015 India created commercial courts at the lower and appellate level and in 2018 the Chinese Supreme Court established two international commercial courts as its own bodies. Russia, by contrast, has a long history of a dual track of civil and commercial courts. Except for the so-called 'old authorities' of the *jus commune,* South African law does regard legal scholarship as an official source of law. Nonetheless, the works of jurists plays an important role in all the jurisdictions surveyed, although the prestige and authority associated with it change considerably from one place to the other. In Brazil, South Africa and India, judges and professors work together to either interpret existing laws (with, for instance, the Brazilian '*enunciados*' produced at the '*Jornadas de Direito*

[195] China ratified the CISG in 1986, Russia in 1990, Brazil in 2013: see https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.

[196] While three countries—Brazil, India and South Africa—were members of the GATT since 1948 and then became members of the WTO in 1995, China adhered to the WTO only in 2001 and Russia in 2012: see https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[197] Cf. Chinese Contract Law Act of 1999) and India Information Technology Act, 2000.

[198] See https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications/status.

Civil') or to evaluate them and put forward proposals for reform (through the South African Law Reform Commission and the Indian Law Commission).

Commonalities are more visible in the regulation and practice of arbitration. All five countries are signatories of the 1958 NY Convention[199] and four out of five (Brazil, Russia, South Africa, India) modelled their arbitration rules on the UNCITRAL Model Law on International Commercial Arbitration, in either its 1985 or 2006 version.[200] Yet, under the veil of legal harmonization through hard and soft international legal instruments, the interpretation given to the uniform rules such as the notion of 'public order' preventing recognition and enforcement of international arbitral awards and the criteria for setting aside arbitral awards are subject to considerable variety among countries.

Are all the above differences significant for international commercial contracting and for the project of restating rules of international commercial contracts in the BRICS countries? As we noticed at the beginning of the chapter, there are occasions in which domestic law might have a say in international commercial contracts. Domestic law might frame the expectations of parties and their behaviour during the contractual negotiations and drafting, require stamps, licences and permits, intervene in the adjudication of disputes alongside or in the middle of arbitral proceedings, and govern the enforcement of arbitral awards. It is therefore important to keep in mind and be aware of the diversity of BRICS' domestic law. Yet, one should also take into account that the overall interaction between the self-contained and largely autonomous field of international commercial contract law and national laws remains often limited. Most of the times, international commercial contracts are made, live and end having no relationship whatsoever with domestic official laws. The divergence of the latter might thus be assumed to pose little obstacle to the restatement and development of a BRICS' *lex mercatoria.*

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[199] India and Russia ratified the Convention in 1960, South Africa in 1976, China in 1987, and Brazil in 2002: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

[200] Cf. the Brazilian Arbitration Act 1996, the Russian International Commercial Arbitration Law of 1993 and Domestic Arbitration Law of 2015, the South African International Arbitration Act 15 of 2017, and the Indian Arbitration and Conciliation Act, 1996.

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Marta Infantino is Ph.D. (Palermo), LL.M. (NYU School of Law), is Associate Professor of Comparative Law at the University of Trieste, Italy. She is Associate Member of the International Academy of Comparative Law and Chair the 'Tort Law Group' of the 'Common Core of European Private Law' project. She has hold visiting professorship in Canada, Colombia, and France, and she has published extensively in Italian, English and French on comparative contract law, comparative tort law, and global indicators. Some of her works have been translated into Chinese, Greek and Spanish. Her first monograph ('La causalità nella responsabilità extracontrattuale', Staempfli-ESI, 2012) was awarded the Italian Lynx Academy's prize for emerging authors in 2013.